Dealing with Difficult Clients

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Cincinnati Bar Association, 5th Floor

POTTER STEWART AMERICAN INN OF COURT

APRIL 16, 2019 SESSION

Dealing with Difficult Clients

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Hypo: Client is not Paying Bills

You represent Cherry, Inc. and Megan Cherry, who started and controlled Cherry, Inc. Orange Co. has brought breach of contract and fraud claims against your clients, and your clients have lodged counterclaims for the same. From the very first meeting, Ms. Cherry has maintained that she is not interested in litigating the matter and desires to reach a business solution that allows Cherry, Inc. and Orange Co. to continue working together. She has indicated that Cherry, Inc. is low on funds and wants to keep costs as low as possible. When you were retained, you explained to Ms. Cherry that depositions and experts can be very costly but that, based on her explanation of the background and dispute, you did not expect to need an expert or to conduct more than one or two depositions.

Both sides have now served discovery requests and have begun a rolling document production. After reviewing the documents received to date, you realize that not only are your claims weaker than Ms. Cherry had initially indicated, you will need to take at least ten depositions and retain an expert for trial. To complicate matters, your clients have not paid their invoices for the previous four months. You reach out to opposing counsel to discuss a potential mediation, but the opposing party has no interest in settling. You meet with Ms. Cherry and advise her of the changed circumstances. She tells you to do whatever it takes to win – take all the depositions you need and to hire both experts. When you address the issue of unpaid invoices, she explains that the company has been low on cash but will get the invoices paid in the next week or so.

After another month passes and an additional unpaid invoice, you have taken several depositions and realize you need an additional expert to succeed at trial. You meet with Ms. Cherry and again the upcoming costs of litigation. She again tells you to do whatever it takes to win and hire the second expert. You again discuss your invoices and discuss the cost of upcoming litigation. Ms. Cherry admits that the company has no money and will not be able to pay at this time. You advise her that she should seek a different counsel, but she insists that she wants to you remain her attorney. She offers to pay you an additional sum or to pay interest. Discovery is ongoing and your dispositive motions deadline and trial date are approaching.

Hypo: Client Communications / Client Authority / Client Requests Their File

Attorney is approached by Joe Billingsly to represent him in a personal injury case. Joe was rear-ended by a school bus 16 months ago while Joe was on his way to work. Joe is no stranger to Attorney. Attorney has helped Joe with numerous matters in the past – Attorney drafted Joe's Will, helped Joe file the necessary paperwork to open a small business, and helped defend Joe's business in an employment discrimination case. Joe pays his bills, but on repeated occasions has disappeared for months without notice, leaving Attorney in difficult positions. For example, in the employment case, Joe missed several discovery deadlines, because he would not return Attorney's calls, emails, or mailed correspondence in a timely manner.

Attorney wants to help Joe with his personal injury case, but he also wants to avoid the problems of Joe disappearing at critical points in the case. Accordingly, Attorney tells Joe that he will represent Joe on a contingency fee basis, but that Joe must sign a power of attorney allowing Attorney to take any action and execute all documents that Attorney deems necessary in the matter. Joe assures Attorney that he has learned from his past mistakes and will respond to Attorney in a timely manner in this case. Based on these assurances, Attorney agrees to represent Joe without a power of attorney.

Joe does not change his ways. Attorney cannot get Joe's medical records, because Joe will not respond to requests to sign a HIPAA authorization. Attorney nonetheless, spends considerable time investigating and researching the legal and factual issues in the case. Attorney attempts to reach Joe again regarding the need for an authorization and to discuss Attorney's recommendations on how to proceed with the case. Joe still does not respond. After two months without any contact, Attorney writes Joe to withdraw his representation. Joe responds immediately to this letter and after a heated call, demands a copy of his file. Attorney reviews the file and sees that his memos to the file are peppered with stray remarks about Attorney's frustration with Joe.

Hypo: Difficult Clients and Document Production

You represent the small, closely-held corporation Re-Toro. Re-Toro specializes in the re-manufacture of commercial lawn mowers used in the landscaping business. Six months ago, Re-Toro received a commercial mower for re-manufacture from Weed Man Landscaping, LLC. This particular mower included a specialized blade that required a machine tool for sharpening that Re-Toro did not have. Re-Toro therefore sent the blade to The Sharper Edge for sharpening and refurbishment. After the blade was returned and the re-manufacture of the mower was complete, Re-Toro returned it to Weed Man. On the first day of operation, the blade broke off the mower and severely injured two employees of Weed Man. The injured employees are now suing The Sharper Edge and your client Re-Toro to recover for their personal injuries.

Counsel for plaintiffs has served Re-Toro with requests for production of all electronic documents regarding several topics relevant to the litigation, including copies of all electronic communications between Re-Toro and The Sharper Edge and all internal communications at Re-Toro regarding the re-manufacture of the mower at issue. You are working with IT guy at Re-Toro (who also happens to double as a salesman) to identify and collect the responsive electronic documents. IT guy advises you that all communications with The Sharper Edge were conducted via email and there are also internal communications about the mower at issue via email and text message. You explain the concept of electronic discovery to IT guy and your proposed plan to have a reliable e-discovery vendor access their systems and cull out and collect the potentially responsive electronic records for review. IT guy responds that The President of Re-Toro does not want to pay for the services of an e-discovery vendor. Rather, IT guy advises that he will print out the emails with The Sharper Edge and provide you with copies for review and production. IT guy will not provide any copies of text messages about the mower because The President says those texts are on his and another employee's personal cell phone and "those greedy lawyers are not allowed to look at what's on my personal phone." At The President's direction, IT guy refuses to provide you with the name of the other employee who also texted internally about the mower at issue.

Hypo: The Contract King

A prospective client believes he has a breach of contract claim, and researches local lawyers, finding one who markets himself as the Contract King ("CK"). On CK's website, nearly three dozen case outcomes are listed, all of which involve recoveries in excess of $1 million and top out at $10 million. The prospective client is seeking lost profits, and expects he should recover about $1 million in damages. Prospective client retains CK.

CK prepares the complaint, and sends it to the client for review. The limitations period specified in the contract expires at the end of the day, so time is of the essence to file. Client sees that the complaint merely states that damages are "in excess of $25,000" and the client hits the roof. Client demands that CK changes the complaint to allege that damages are $1 million. Client says, "If you're really the contract king, you need to act like it; a $1 million recovery is nearly guaranteed." Client adds that he is not in a position to send additional information or documentation at this time regarding the amount of damages at this point, but client insists that CK must specify the $1 million amount of damages to send a message to the other party and properly set expectations with the opposing party about the value of the case. CK adds the updated damages figure to the complaint and files it. Thereafter, the client repeatedly insists that he will not entertain resolving the case for anything less than $1 million.

Hypo: Attorney-Approved Ponzi Scheme?

You represent a corporate client criminally indicted for fraud in both the criminal case and related civil litigation. Over the course of your representation, the company has employed the services of many different law firms for advice on how to handle certain issues in the highly regulated field that the company does business in. The company and certain indicted employees have not been very good at following advice. They often do things without asking and worry about legal repercussions later. They also often get advice from dubious people in their industry that is not correct. In short, despite many attempts to fix the relationship, you remain on a need to know basis.

At one point, the company has an idea for a new avenue for revenue. Because this is a highly regulated field, they enlist a specialized law firm to advise on how to legally set up the new venture. You are directly involved in the discussions with the specialty firm because you want to make sure the company does not get into any more trouble before the upcoming trial date.

The company gets the advice, promptly ignores it, and starts a new venture that you believe is a new fraud. In effect, they have now set up a Ponzi scheme. You are also concerned the new Ponzi scheme will be exposed in open court at the upcoming criminal trial. The company disagrees and insists that you and the specialty firm approved of their new venture (you decidedly did not). In fact, you defended Client in a deposition where Client recently and unexpectedly testified that the specialty firm approved of Client's new venture.

Client is very good at paying their legal fees as your fees are being paid by a friend of the company whose finances are unrelated to the company. Clients' Criminal Trial starts in 3 weeks.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2010-2
Issued April 9, 2010

SYLLABUS: Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer.

OPINION: This opinion addresses a question regarding whether a lawyer's notes must be relinquished to a client upon the client's request.

> Are a lawyer's notes of an interview with a current or former client considered client papers to which the current or former client is entitled upon request?

This opinion offers advice as to ethical duties of a lawyer responding to a client's request for his or her file or an item in a file. This opinion does not offer advice as to a client's legal entitlement to the file or an item in file. This opinion does not provide advice as to laws or rules governing discovery of work product or a lawyer's response to a discovery

request in a civil or criminal proceeding. The advisory authority of the Board of Commissioners on Grievances and Discipline is limited under Gov. Bar R. V(2)(C) to advising lawyers on the application of the ethical rules.

Introduction

A file request might be made by a client upon completion of a representation, or it might be made during a representation either upon discharge by a client or upon withdrawal by a lawyer. A client's file request might arise after a legal fee is paid in full or in part, or before any legal fee is paid.

The age old question a lawyer faces is how to respond when a client asks for the client file or an item in the file. The answer is that a lawyer must respond to a file request by a current or former client within appropriate ethical standards, no matter what the context of the request.

Ohio Rules of Professional Conduct

A lawyer's ethical duties in response to a client's request for the file or an item in the file are guided by several rules within the Ohio Rules of Professional Conduct. Prof. Cond. Rule 1.4 applies to ethical duties regarding communication during a representation. Prof. Cond. Rule 1.16 applies to ethical duties as part of termination of representation. Prof. Cond. Rule 1.8(i) addresses assertion of a lien authorized by law to secure a lawyer's fee or expenses. Prof. Cond. Rule 1.15 applies to ethical duties as to safekeeping of funds and property.

Keeping a client informed

During a representation a lawyer is required by Prof. Cond. Rule 1.4(a)(3) and (a)(4) to keep a client reasonably informed and to comply with reasonable requests for information.

> Rule 1.4(a) A lawyer shall do all of the following:
>
> > (3) keep the client *reasonably* informed about the status of the matter;
> >
> > (4) comply as soon as practicable with *reasonable* requests for information from the client.

A common way for a lawyer to keep a client informed during a representation is by providing the client with copies of correspondence, pleadings, deposition transcripts, and expert reports as the representation proceeds; but the rule does not expressly require this way of keeping a client informed. The manner in which a client is kept informed is a

determination left to the professional judgment of the lawyer based upon the client's needs and preferences. For example, in some unusual circumstances it may be that a client prefers not to receive copies of correspondence, pleadings, deposition transcripts, and expert reports during the representation. Or, it may be that the lawyer does not believe the release of certain information is warranted in some instances. For example, Comment [7] to Prof. Cond. Rule 1.4 explains that "[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders."

Taking steps to protect a client's interest

Upon termination of a representation, a lawyer is required by Prof. Cond. Rule 1.16(d) to take steps, to the extent reasonably practicable, to protect a client's interest.

> Rule 1.16(d) As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* 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. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

A lawyer's duty to take reasonable steps to protect a client's interest applies regardless of the reason for the termination of the representation. As explained in Comment [9] to Prof. Cond. Rule 1.16(d), "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client." Pursuant to Prof. Cond. Rule 1.0, " '[r]easonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."

As described in the rule, one of the steps a lawyer must take to protect a client's interest is the prompt delivery of all papers and property to which the client is entitled.

The conundrum for a lawyer is determining what are the papers and property to which the client is entitled. The rule helpfully explains that papers and property may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation; but, the word

"entitled" is not explained. A lawyer must look to other applicable law and rules to determine to what papers and property the client is entitled.

In Ohio, the law is settled that upon discharging a lawyer in a contingent fee case, a client is entitled to the file and that the lawyer is entitled to quantum meruit compensation but not until the successful occurrence of the contingency. See *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 68 Ohio St.3d 570, 574-75 (1994). In *Reid*, a law firm refused to give a file to a client who discharged the law firm in a contingent fee case and conditioned the release of the file upon the client executing a guarantee modifying the prior contingent fee agreement. Id. at 575. The court noted that for all practical purposes the client was made to execute the guaranty to obtain the file. The court found the guaranty not enforceable because the law firm should not have imposed the condition of the release of the file upon the client's execution of a warranty modifying the contingent fee agreement. Id. at 575. The court stated that "[a]long with the mandatory obligation to withdraw from a case when discharged, an attorney who is discharged must yield the case file. At the time the appellant [client] discharged the law firm, the firm was *required* to return his case file to him, and to cease any and all involvement in the case." Id. at 574.

Asserting a lien over a client's file

Lawyers sometimes attempt to rely on the language of Prof. Cond. Rule 1.8(i)(1) as justification for asserting a lien over a client's file.

> Rule 1.8(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may do either of the following:
>
> (1) acquire a lien authorized by law to secure the lawyer's fee or expenses;
>
> (2) contract with a client for a *reasonable* contingent fee in a civil case.

But, in Ohio such reliance by lawyers may be misguided. Prof. Cond. Rule 1.8(i) applies only to acquiring "a lien authorized by law."

In Ohio, there is no common law lien on a client's files in a contingent fee case. See *Reid*, 68 Ohio St.3d at 574-75. And, in Ohio, there is no statutory lien on client files. The legality of a lien is a question of law outside this Board's advisory authority.

Thus, upon termination of a representation a lawyer's ethical duties as to the client file are guided by Rule 1.16(d): "As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* 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."

Safekeeping funds and property

Prof. Cond. Rule 1.15 is a rule that primarily addresses a lawyer's duties as to funds (of a client or third person) that are in the possession of the lawyer. But the rule also requires that property (of a client or third person) be safeguarded. Thus, in several cases cited below a violation of the rule was invoked when a lawyer was unable to locate clients' files when requested.

Ethical violations for refusing to turnover files

In Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover client files to the client.

In *Lake Cty. Bar Assn. v. Kubyn*, a lawyer received a public reprimand for violations of Rule 1.16(d) and (e). 121 Ohio St.3d 321, 2009-Ohio-1154. The lawyer was hired to represent a client in divorce and other matters and was paid $5,000. Upon the client's dissatisfaction and discharge of the lawyer, the lawyer did not comply with requests for an itemized bill, the return of any unearned fees, or the client file. The successor attorney had to recreate the file. The lawyer claimed to have no duty to produce the file because he had sent the client copies of all the paperwork as generated or received. The lawyer never did return the file, but did send an itemized bill and a refund of unearned fees. Id. at 322.

In *Disciplinary Counsel v. Bursey*, a lawyer received a permanent disbarment for misappropriating money held in trust for clients, forging clients' signatures, commingling client funds with the lawyer's funds, and committing numerous other acts of professional misconduct, including not returning a client's file as requested. 124 Ohio St.3d 85, 2009-Ohio-6180. The request for the file was made by a client who had hired the attorney for representation on a contingent fee basis in personal injury lawsuit. The lawyer failed to keep her apprised of development and rarely returned her calls. After the client filed a grievance, the lawyer promised to complete the work for a reduced contingent fee and to call the client weekly until the claim was resolved. The lawyer did not honor his promise. The client discharged him. The lawyer never returned the file as requested. The client was forced to retain another attorney with less than six weeks left on the statute of limitations. By this conduct the lawyer violated Prof. Cond. Rules 1.3, 1.4(a)(3) and 1.16(d). Id. at 88-89. In another client's personal injury matter, the lawyer violated Prof. Cond. Rules 1.4(a)(3), 8.4(c), and 8.4(h), for his misconduct which included not responding to the client's requests for his file and by the client not being able to locate the lawyer. Id. at 91.

In *Cincinnati Bar Assn. v. Lawson*, a lawyer received an indefinite suspension for engaging in a pervasive pattern of professional misconduct involving 13 client matters and failing to cooperate with the investigation. 119 Ohio St.3d 58, 2008-Ohio-3340. Four of the client matters included the lawyer's failure to respond to requests by the clients for the files after being discharged by the clients. In one matter, the lawyer, after being discharged by a client who had retained him to file a wrongful-death action on a contingent fee basis, kept the client's file until it was too late to file a claim. The lawyer's associate sent a letter to the client refusing to return the files unless paid an unspecified amount in legal fees and threatened legal action if the client did not pay. The lawyer violated among other rules DR 2-110(A)(2), DR 7-101(A)(3), and DR 9-102(B)(4). Id. at 62. In a second matter, the lawyer, after being discharged by a couple who were never able to speak to the lawyer after paying him $750 to counsel them on the viability of an action to obtain their son's early release from prison, did not respond to the couple's request for the return of their file and a refund, violating DR 7-101(A)(3), DR 9-102(B)(4), and other rules. Id. at 63. In a third matter, the lawyer, after receiving an interim suspension, failed to give up the file until the filing of a grievance. The lawyer had been hired by a woman to represent her son after arrest and was paid $3,000 for which he did some work but not enough to justify the fee. Among violating DR 7-101(A)(3), DR 9-102(B)(4), and other rules, the lawyer was found to have violated Prof. Cond. Rule 1.15(d) by not producing the file promptly, Prof. Cond. Rule 1.16(d) by withdrawing from the case without contemporaneously locating or returning the file, and Prof. Cond. Rule 1.16(e) by failing to repay the unearned portion of the fee. Id. at 65-66. In a fourth matter, the lawyer had to withdraw from a client's case because the lawyer received an interim suspension. The client had hired the lawyer to defend him in a criminal case. The client paid a $4,000 fee for which the lawyer did nothing except file an appearance, move for continuances, and meet twice with a prosecutor. After withdrawing from the case, the lawyer was unable to locate the file. The lawyer violated Prof. Cond. R. 1.15(d) because he was unable to locate the file upon the client's request and Prof. Cond. Rules 1.16(d) and (e) because he withdrew without providing the new attorney the case file and failed to promptly refund the unearned portions of the fee. Id. at 66.

In *Akron Bar Assn. v. Maher*, the lawyer received an indefinite suspension for professional misconduct, including multiple acts of dishonesty and failing to provide competent representation. 121 Ohio St.3d 45, 2009-Ohio-356. The lawyer failed to return the file in two of the three client matters involved in the disciplinary complaint. In one matter, he was discharged by a couple who had hired him to pursue damages after their disabled son died in a nursing home incident, but he did not honor the request of the client and their new attorney for the files and he did not produce the file until after a grievance was filed. Id. at 48. Among other rule violations in the matter, he violated DR 2-110(A)(2) and Prof. Cond. Rule 1.16(d) by failing without justification to promptly deliver the clients' papers on demand. Id. at 48. In a second matter, he was discharged by a client who had hired him to enforce a civil protection order. He had failed to take action and falsely advised the client that he was attending to the case. Upon discharge he did not return the files for over six months and did not refund unearned fees until the

panel hearing. Id. at 49. In addition to the other misconduct and rule violations, including DR 1-102(A)(6) and Prof. Cond. R. 8.4(h), he violated DR 2-110(A)(2) and 9-102(B)(4) and Prof. Cond. Rules 1.15 and 1.16(d) by failing to promptly return property to which the client was entitled upon discharge. Id. at 49.

Lawyer's notes

None of the above cited disciplinary cases provide guidance as to whether under the ethical rules a lawyer's notes are part of the file to which a client is entitled upon request. Nor, has this Board advised upon the issue of turning over a lawyer's notes to a client upon request.

A past opinion of the Board advised as to a lawyer's duty to deliver a former client's case file to a former client upon request, but did not discuss a lawyer's notes. In Op. 92-8, the Board, applying DR 2-110(A)(2) [the predecessor rule to Prof. Cond. Rule 1.16(d)] and DR 9-102(B)(4) [the predecessor rule Prof. Cond. Rule 1.15(d)] advised that "[a]n attorney has an ethical duty to promptly deliver a former client's case files to the former client upon request. Materials acquired or prepared for the purposes of representing the client and other materials that might prove beneficial to the client should be returned. These materials include, but are not limited to, all significant correspondence, investigatory documents and reports the client has paid for, filed or unfiled pleadings and briefs, and all materials supplied by the client." Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 92-8 (1998).

Part of the difficulty in addressing "lawyer's notes" is that the category is broad and not precisely defined. A lawyer's notes might comprise a range of information from thoughts, ideas, impression, or questions of an attorney, to internal office management memoranda such as personnel assignments or conflicts of interest checks, to facts about a case.

The American Bar Association and various state ethics committees have weighed in on the ethics of turning over a lawyer's notes to a client. The advice is not uniform.

The ABA Committee on Ethics and Professional Responsibility expressed the view that "the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem." ABA, Informal Op. 1376 (1977).

In Arizona, a lawyer's notes fall within the documents to which a client is ordinarily entitled. Comment [9] to Arizona's Ethical Rule 1.16 states in pertinent part that "[o]rdinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda." Thus, an Arizona ethics committee opinion advised: "An attorney may not assert a retaining lien against any items in a

client's file that would prejudice the client's rights. While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file [such as notes] which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests if withheld from the client." State Bar of Arizona, 04-01 (2004).

In California, an ethics committee stated in summary that "[u]pon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessive lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney. However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitutes or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy." San Diego County Bar Assn., Op. 1984-3.

In Colorado, an ethics committee addressed the general obligations of lawyers to surrender the file upon demand after termination and discussed what does, or does not constitute papers and property to which the client is entitled. For purposes of the opinion the committee assumed the lawyer had not asserted a retaining lien. As to notes, the committees view was that "[c]ertain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled." Colorado Bar Assn., Op. 104 (1999).

In the District of Columbia, an ethics committee advised that "[u]pon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the view, thoughts, and strategies of the lawyer." District of Columbia Bar, Op. 333 (2005).

In Illinois, an ethics committee advised that a client is not entitled to internal administrative materials under Rule 1.4(a) or Rule 1.15(b) because those materials are not relevant to the status of the client's matter, are usually prepared for internal use, and are not property of the client that a lawyer must deliver upon request. The committee concluded that the better rule is that a lawyer's notes and factual or legal research

material, including certain types of investigative material are the property of the lawyer and generally need not be delivered to the client. Illinois State Bar Assn. Op. 94-13 (1995).

In Kansas, an ethics committee advised that "[w]hen counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand and interpret documents highlighted above, Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense to the client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule." Kansas Bar Assn. Op. 92-5 (1992).

In Mississippi, an ethics committee advised that "[t]he right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's clause. The ownership of specific items in a client's file is a matter of law. However, ethically the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client." Mississippi State Bar, Op. 144 (1988).

In Pennsylvania, an advisory committee responded to an inquiry from a lawyer who had represented a client in a personal injury action and approximately $6,000 in outstanding costs had not been paid. The former client requested the entire file be surrendered to new counsel to investigate a possible malpractice action against the lawyer who referred the matter to the inquiring lawyer. The lawyer inquired whether he was required to deliver the entire file, including the lawyer's work product such as handwritten notes and outlines of testimony, legal memos and research, and the notes and the work product of the referring counsel. The ethics committee noted that the validity of a retaining lien is recognized in the state, but advised that "[t]here is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you [the lawyer] would be required to surrender the file to your client." As to internal memos and notes the committee stated "the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem. However, again, in the interest of complying with Rule 1.16(d), any doubt about whether materials in your file are of the type to which the client is entitled should be resolved in favor of relinquishment." Pennsylvania Bar Assn., Op. 96-157 (1996). An earlier Pennsylvania advisory opinion identifies factors lawyers should consider in

evaluating whether retaining file materials would be prejudicial to a client and whether such prejudice would be substantial. See Pennsylvania Bar Assn., Op. 94-35 (1994).

In Utah, an ethics committee was asked whether an unexecuted trust or will or an unfiled extraordinary writ, prepared by a lawyer is, for purposes of Rule 1.16, part of the client's file that must be delivered to the client at the termination of the representation. The committee noted that Comment 9 of Utah's Rule 1.16 states: "It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings." The committee's view was that under Comment 9, the unfiled petition for extraordinary writ is an unfiled pleading that is excluded from the client file within the meaning of Rule 1.16(d). The committee interpreted Comment 9 to also exclude from the file unsigned legal instruments such as agreements, trusts, and wills. Thus, the committee advised that "[a]n unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation." Utah State Bar, Op. 06-02 (2006).

In Virginia, an ethics committee, interpreting DR 2-108(D) and assuming that no fees are owing to the firm as a result of its representation of former clients, advised that the client is entitled to the entire contents of the file. The committee expressed the view that "any legal definition of 'work product,' as applied in the Rules of Evidence or elsewhere in a legal context is inapposite to the question of delivery of a client's files since a file may contain additional materials which were not prepared in anticipation of litigation or for trial. Rather, the committee opines that the term's plain meaning is applicable and refers to all materials prepared or collected by the attorney, or at the attorney's direction, in relation to any legal services for which the client engaged the attorney or the law firm over the entire period of the provision of such services. Thus, the committee is of the opinion that, with relation to the ownership of a client's file, where no fees are outstanding, 'work product' includes, as you have enumerated, attorney notes, internal memoranda and multiple drafts and other documents which lead to final documents or resulted in advice given as to a particular matter." Virginia State Bar, Legal Ethics Op. 1366 (1990).

In addition, to these advisory opinions it is also of note that in Montana, the following language is included in Rule 1.16(d): "A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i)." In New York, the state's highest court ruled that "[b]arring a substantial showing by the Proskauer firm of good cause to refuse client access,

petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 37, 666 N.Y.S.2d 985, 989, 689 N.E.2d 879, 883.

Lawyer's notes under Ohio's Rule of Professional Conduct

In considering whether under the ethical rules a lawyer's notes are papers to which a client is entitled upon request, the Board considers the language of Prof. Cond. Rule 1.16(d) to be instructive. Prof. Cond. Rule 1.16(d) states that "[c]lient papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation."

In Prof. Cond. R. 1.16(d), a lawyer's notes are not specifically identified in the list of examples of what client papers may include. This omission is considered significant. The drafters of Ohio rules could have easily included a lawyer's notes in the list, but did not. Yet, the list does include a category "items reasonably necessary to the client's representation" and this is the category where a lawyer's notes may or may not fall depending upon the nature and content of the notes.

When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation and if so should be turned over to the client.

Any expense incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer. As explained in Comment [8A] to Prof. Cond. Rule 1.16 "[c]lients receive no benefit from a lawyer keeping a copy of the file and therefore can not [sic] be charged for any copying costs."

Conclusion

In conclusion, the Board advises as follows. Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client

makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2010-6
Issued October 8, 2010

SYLLABUS: A lawyer representing a client in a civil matter may not enter into a contingent fee agreement whereby the client grants the lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including but not limited to signing on the client's behalf a settlement agreement and release, a settlement check, or a closing statement. Such use of a broad power of attorney in a contingent fee agreement contravenes Prof. Cond. Rule 1.2(a) by improperly allocating all of the authority regarding the representation from the client to the lawyer and disregards Prof. Cond. Rule 1.4(a) by eliminating required communication by the lawyer to the client. Such practice is improper unless a lawyer is able to demonstrate that there is an extraordinary circumstance in which there is an exigent reason for a client to grant such authority to the lawyer. For example, an extraordinary circumstance might arise when there is an urgent surgery or travel to a remote location.

OPINION: This opinion addresses a question regarding a lawyer's use of a contingent fee agreement in which a client grants a power of attorney to the lawyer as to all aspects of a legal matter.

> May a lawyer representing a client in a civil matter, enter into a contingent fee agreement whereby the client grants the lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including but not limited to signing on the client's behalf a settlement agreement and release, a settlement check, or a closing statement?

Introduction

A lawyer's contingent fee representation of a client in a civil matter requires skillful communication. A lawyer must communicate effectively to understand the client's objectives of representation, explain settlement offers, reach agreement to settlement terms, obtain necessary client signatures, and disburse settlement proceeds. Such communication is a time honored legal skill, but is a time laden process.

In an effort to streamline a contingent fee representation, a busy lawyer might be tempted to obtain a client's power of attorney, granting the lawyer authority to make decisions and sign necessary documents on the client's behalf in the matter. The lawyer might rationalize that such authority would benefit a client, for example, by eliminating the need for a client to travel to the attorney's office to sign documents or to sign a settlement disbursement. But such benefit, if any, does not outweigh the ethical risks that arise when a lawyer requires a client to sign a contingent fee agreement granting such broad authority to the lawyer.

As explained in this opinion, a power of attorney granting a lawyer authority to make all decisions and execute all documents that the lawyer deems necessary in a client's contingent fee matter might streamline a lawyer's representation and provide some convenience for a client, but, in the absence of extraordinary circumstances, the practice is unethical for the lawyer and shortchanges the client's role in the legal representation. The proposed use of a broad power of attorney in a contingent fee agreement contravenes Prof. Cond. Rule 1.2(a) by improperly allocating all of the authority regarding the representation from the client to the lawyer, and disregards Prof. Cond. Rule 1.4(a) by improperly eliminating required communication.

Allocating authority and communicating with a client as required by Prof. Cond. Rules 1.2(a) and 1.4(a)

The proper allocation of authority between a lawyer and client is addressed in Prof. Cond. Rule 1.2. Prof. Cond. Rule 1.2(a) requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Further, Prof. Cond. Rule 1.2(a) unequivocally requires that "[a] lawyer shall abide by a client's decision whether to settle a matter."

As explained in Comment [1] to Prof. Cond. Rule 1.2: "Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as to whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation."

The duty to communicate information regarding a representation is addressed in Prof. Cond. Rule 1.4. Prof. Cond. Rule 1.4(a) requires that "[a] lawyer shall do all of the following: (1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules; (2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client *reasonably* informed about the status of the matter; (4) comply as soon

as practicable with *reasonable* requests for information from the client; (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law." Prof. Cond. Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation."

Comment [5] to Prof. Cond. Rule 1.4 provides guidance as to a lawyer's role in explaining matters to a client: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects for success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation."

Use of a contingent fee agreement to grant a lawyer a power of attorney to agree to settle a matter and to sign a settlement agreement and release on behalf of a client

As required by Prof. Cond. Rule 1.2(a) and as explained in Comment [1], a decision to settle must be made by the client, not the lawyer. Further, as required by Prof. Cond. Rule 1.4(b), there is a duty for a lawyer to explain a matter so that a client is able to make an informed decision.

Neither of these rules is fulfilled when a client signs a contingent fee agreement at the onset of representation granting the attorney authority to take action and execute the documents the attorney deems necessary in the matter, including the settlement of a matter.

At a client's signing of a contingent fee agreement with a lawyer, there is no crystal ball. The facts and circumstances of a matter will not be fully developed and the terms and conditions of a settlement and release will not be fully explored or determined. Therefore, it is highly unlikely in the initial stage of a representation at the signing of a contingent fee agreement that a lawyer would be able to fulfill the duty to explain and inform a client so that the client is able to make an informed decision as to a settlement.

Thus, the proposed use of a contingent fee agreement to obtain a power of attorney to settle a matter and to sign a settlement agreement and release on behalf of a client is

improper, unless there is an extraordinary circumstance where the details of a particular settlement might be available at the signing of the contingent fee agreement so that the client could make an informed decision as to specific settlement terms and conditions based upon fully developed facts and circumstances.

Use of a contingent fee agreement to grant a lawyer a power of attorney to sign a settlement check and a closing statement on a client's behalf

Upon receipt of a settlement check, a lawyer has several ethical duties. First, there is an ethical duty to promptly notify the client. Prof. Cond. Rule 1.15(d) states: "Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person." Second, there is an ethical duty to hold client funds in a separate interest-bearing account. Prof. Cond. Rule 1.15(a) states: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a 'client trust account,' 'IOLTA account,' or with a clearly identifiable fiduciary title."

When a settlement check is made payable to both the lawyer and the client, obtaining the client's signature takes time and effort. For example, the client might need to come to the lawyer's office or elsewhere to endorse the check, or the check might need to be sent to the client for signature and then returned to the lawyer. If, as proposed, a lawyer uses a client's power of attorney that was obtained through a contingent fee agreement, the lawyer could avoid meeting with a client to endorse the check. For this reason, the expediency of a lawyer using a power of attorney obtained in the contingent fee agreement to endorse the client's name on a settlement check may have appeal, but it is not advisable. When a client personally signs a settlement check it is clear that the client is notified of the lawyer's receipt of the settlement funds and is aware of the amount of the settlement check. In the absence of extraordinary circumstances, these are ethical safeguards that a lawyer should not ask a client to relinquish.

Use of a contingent fee agreement to grant a lawyer a power of attorney to sign a closing statement on a client's behalf

Before a lawyer receives compensation under a contingent fee agreement, a signed closing statement is required. A signed statement is required by both ethical rule and Ohio law.

Prof. Cond. Rule 1.5(c)(2) states that "[i]f the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the

agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and the lawyer."

This ethical provision applies to all contingent fee agreements; whereas the statutory requirements of R.C. 4705.15(C) apply to contingent fee agreements in tort actions. R.C. 4705.15(C) requires that if an attorney represents a client in connection with a claim that is or may become the basis of a tort action and "if their contract for the provision of legal services includes a contingent fee agreement, and if the attorney becomes entitled to compensation under that agreement, the attorney shall prepare a signed closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under that agreement. The closing statement shall specify the manner in which the compensation of the attorney was determined under that agreement, any costs and expenses deducted by the attorney from the judgment or settlement involved, any proposed division of the attorney's fees, costs, and expenses with referring or associated counsel, and any other information that the attorney considers appropriate."

While it may be expedient for a lawyer to use a power of attorney obtained in a contingent fee agreement to sign a closing statement on a client's behalf, it is not advisable. The signing of the closing statement provides an additional opportunity for a lawyer to fulfill the required ethical duties of communication with a client about the representation. It is the lawyer's time to bring closure to the representation, to explain to the client the disbursement of funds, and to respond to the client's final questions regarding the representation and the disbursement of settlement funds. In the absence of extraordinary circumstances, a lawyer should not ask a client to relinquish this opportunity to receive information and a thorough explanation about the disbursement of the actual settlement.

It can be argued that language in Comment [3] to Prof. Cond. Rule 1.2 and Comment [2] to Prof. Cond. Rule 1.4 permits such advance authorization as the inquiry presented. Comment [3] to Prof. Cond. Rule 1.2 states: "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time." Comment [2] to Prof. Cond. Rule 1.4 states: "If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a)."

These Comments are not to be interpreted as permission for a client to give blanket authority to a lawyer over all aspects of a case, settlement, and the signing of necessary documents. Prof. Cond. Rule 1.2(a) is clear that it is a client's decision whether to settle. Prof. Cond. Rule 1.4(a) is clear that clients must be consulted and kept reasonably informed. Prof. Cond Rule 1.5(c)(2) is clear that a client shall be provided with a closing statement and the statement shall be signed by the client and the lawyer.

Views of other states

In Arizona, the Committee on the Rules of Professional Conduct advised upon a fee agreement that provided: "[Client] . . . does make, constitute and appoint, [Attorney], true and lawful attorney of HIS/HERS and in HIS/HER name, place, and stead, to settle, adjust, file and prosecute by suit in the proper courts, or otherwise dispose of, claims." The Arizona committee advised that "[a] client may not be asked to agree to representation so limited in scope that the client surrenders the right to settle his or her own matter" and that the attorney "would have an obligation under ER 1.4 to inform the client adequately so that the client could make the decision whether to accept or reject the offer." Arizona State Bar Op. 94-02 (1994).

Later, a different but related question was presented to the State Bar of Arizona. "May an attorney ask a client for authority to allow the attorney, if the client disappears or otherwise cannot be contacted, to settle the client's case and then to sign any drafts or releases necessary to finalize the settlement?" The Committee on the Rules of Professional Conduct concluded "that an attorney may not ethically obtain such advance blanket authorization because doing so would conflict with an attorney's obligations under ERs 1.2 and 1.4, and also would result in an impermissible conflict of interest under ER 1.8." State Bar of Arizona, Op. 06-07 (2006). The committee stated that "[d]espite the changes to ER 1.2(a), we conclude that the result and reasoning of Ariz. Ethics Op. 94-02 are still valid, and preclude a lawyer's ability to obtain a blanket authorization from a client allowing the lawyer to decide whether to settle the client's claim. As ER 1.2(a) provides, only the client may make that decision." Id.

A New Jersey ethics committee, appointed by the Supreme Court of New Jersey, addressed the granting of such power of attorney, not in the retainer agreement, but at the time of the signing of a closing statement. The Advisory Committee on Professional Ethics, in a now superseded opinion, did not find improper a law firm's proposed use of an Authorization to Endorse form to be signed when the client comes to the law office to execute release and disbursement statement. The committee advised that "[t]he requirements with respect to fee agreements and closing or written statements showing the remittance to the client and the method of its determination make the client aware of the amount of the recovery which the client is entitled to receive. If after that has been done, the client for his own convenience executes a written authorization permitting his attorney to endorse the settlement draft or check received in settlement of the matter or in satisfaction of a judgment and to deposit same in the attorney's trust account for the sole purpose of disbursing the funds in accordance with the closing statements, we see nothing improper in such a procedure." New Jersey Sup.Ct, Op. 635.

But, the New Jersey Advisory Opinion 635 was appealed to the New Jersey Supreme Court and was modified by the court. *In the Matter of Advisory Committee on Professional Ethics Opinion* 635, 125 N.J. 181, 592 A.2d 1210 (1991). The Supreme Court of New Jersey stated: "We should make clear exactly what it is that we are disapproving: the routine use of a form that extends power of attorney to the lawyer in endorsing the client's name to a settlement draft. We will not permit the form to become a part of the package of a lawyer's ordinary closing papers. We acknowledge that there may be extraordinary circumstances-the client on the eve of departure for an extended stay in a foreign land, a client about to undergo surgery with a doubtful prognosis and an extended hospital stay to follow-that might justify use of such a power of attorney. Those, however, are not the situations contemplated by the inquiry nor does Opinion 635 purport to be so limited." Id. at 187. In 1994, there was a Notice to the Bar that the opinion is superseded. 136 N.J.L.J. 1638, 3 N.J.L. 852 (1994).

In an earlier case, the New Jersey Supreme Court disapproved of an attorney's practice in negligence cases of using a form of retainer containing a power of attorney to endorse the client's name on the settlement check, deposit the check and make disbursements. *In the Matter of John S. Conroy, III*, 56 N.J. 279, 281-82, 266 A.2d 279 (1970). The court stated: "We . . . make clear that we consider employment by members of the bar of the type of retainer and power of attorney described above to be highly improper. The practice of insurance carriers or other settlors in drafting settlement checks in the joint names of the attorney and claimants is to protect and preserve the interest of all three parties to the transaction. The form of retainer in question facilitates the subversion of that purpose and is unqualifiedly disapproved." Id. at 282. This 1970 case was addressed in both New Jersey Advisory Opinion 635 and in the court's decision to modify the advisory opinion in *In the Matter of Advisory Committee on Professional Ethics Opinion* 635, 125 N.J. 181, 183-187, 592 A.2d 1210 (1991).

For other authority finding it improper for a lawyer to add a provision to a fee agreement allocating to the lawyer all settlement authority on the client's behalf, see *In re Grievance Proceeding*, 171 F. Supp.2d 81, 85 (D. Conn. 2001); *In re Lansky*, 678 N.E.2d 1114, 1115 (Ind. 1997); *Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n*, 789 P.2d 52, 55 (Utah Ct. App. 1990).

Conclusion

In conclusion, the Board advises as follows. A lawyer representing a client in a civil matter may not enter into a contingent fee agreement whereby the client grants the lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including but not limited to signing on the client's behalf a settlement agreement and release, a settlement check, or a closing statement. Such use of a broad power of attorney in a contingent fee agreement contravenes Prof. Cond. Rule 1.2(a) by improperly allocating all of the authority regarding the representation from the client to the lawyer and disregards Prof. Cond. Rule 1.4(a) by eliminating required communication by the lawyer to the client. Such practice is improper unless a lawyer is

able to demonstrate that there is an extraordinary circumstance in which there is an exigent reason for a client to grant such authority to the lawyer. For example, an extraordinary circumstance might arise when there is an urgent surgery or travel to a remote location.

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PRACTICE POINTS

BY CHUCK STRAIN

Professionalism When A Criminal Client Changes Lawyers

All you really need to know: Take the high road, communicate, read the rules, and be nice!

Lawyer-Hopping Clients

Beware the lawyer-hopping client. His desire to switch horses may be for all the wrong reasons. A desperate client will employ wishful thinking to grasp at any straw of good news. A lawyer who makes optimistic predictions to entice the client to hire her is dishonest, despicable, and is not engaging in good client-service.

Poisoning the Well

The new lawyer (successor counsel) should not bad-mouth the original lawyer, whether public defender or not. Nothing could be less collegial or less professional. The new lawyer should not even do it in subtle ways, such as by rolling the eyes or by asking, "Did she *really* tell you that?"

Aspirational good behavior in these situations is promulgated by state and local bar associations across the country. Many of these professionalism, civility, and courtesy creeds and codes are collected in an online American Bar Association index.[1]

None of these formulations hits the nail any more squarely than the Golden Rule mothers teach their children. And that rule has been codified by the Ohio Supreme Court in *A Lawyer's Creed,* issued February 3, 1997: "To my colleagues in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor, and dignity that I expect to be extended to me."

Do lawyers sometimes rationalize an exception to that Golden Rule when they do not personally like the current lawyer or when they are just trying to pay their bills?

Every time a lawyer violates that rule, she poisons the well from which all lawyers drink. That poison affects the well-being of lawyers in general, contributing to their extremely high rates of career dissatisfaction, depression, substance abuse, and suicide. Beyond lawyers' personal well-being, the toxin contaminates the whole judicial system, eroding public confidence. It also trickles down to a diminution of client welfare.

Client-Stealing

Client-stealing? Hiring and firing is always the client's call, of course (with the court's approval). But even the least vulnerable client's decisions can be manipulated. Going anywhere close to client-stealing is very low. It is hard for a lawyer to choose dignity over fattening his bank account or massaging his ego by winning over a client who had previously chosen his competitor. A lawyer should not let the shaky economy and glut of lawyers compromise his good values.

When he loses a client, a public defender may be happy to cross one more noble duty off his long list. But a private lawyer may see the new lawyer as a client-stealer. A lawyer may psychologically rationalize such stealing more easily in a large metropolitan bar association because of the feeling of relative anonymity. So big-city lawyers need to be especially vigilant in resisting the urge to pilfer.

Quick and Friendly Communication

Of course, a lawyer should not be a client stealer, and a lawyer should not skulk around like one either. When a client hires successor counsel, there might be a temptation to avoid facing the current lawyer. Is it better to wait for the client's retainer check to clear? Should successor counsel consider delaying the contact to give the current lawyer less time to react? Should successor counsel tell the client not to talk to the current lawyer? Is it better to send a letter, or, better yet, a certified letter? Can successor counsel just ignore the current lawyer? Successor counsel can make do without the documents in the current lawyer's file, right?

No. Successor counsel should phone the current lawyer immediately — even before signing on with the client. It should be a friendly, deferential discussion. If successor counsel is even slightly embarrassed to make that call, maybe it is because he is not really proud of what he is doing. The call should not be limited to these few words: "You're out and I'm in. Send the file." Counsel should be sensitive to the

Succedaneous County Municipal Court
Traffic Division
State of Transition

State of Transition,	:	Case No. 2012 TRC 111111 A - C
Plaintiff	:	Judge Al Waysrite
vs.	:	
Ben Fickel, Defendant	:	**Motion to Substitute Counsel**

At defendant's request, the undersigned moves the Court to permit him to substitute as counsel of record in place of Sally Forth.

Johnny Komlaytly
Attorney for Defendant
600 New Street
Urbane, Transition 22202
513-000-0001

Ben Fickel, Defendant

Certificate of Service

I certify that a copy of the foregoing motion has been served on the prosecutor by hand-delivery on July 1, 2012.

Johnny Komlaytly
Attorney for Defendant

current lawyer's feelings. No one likes to be fired; it can be a significant matter of pride and/or loss of income.

Asking for current counsel's insight about the case and client is a way at least to show respect. Successor counsel may even learn that the client is better off with the current counsel. If so, successor counsel should urge the client to stay put. *In fact, that should be the default position.* If nothing else, successor counsel may learn from the current lawyer how better to handle the client. And the client may benefit from successor counsel's acquiring the current lawyer's case knowledge and/or strategic ideas.

Be Nice

The new lawyer should make it as easy as possible on the original lawyer. For example, the new lawyer can offer to come by to pick up or copy useful parts of the file and do all the legwork of the transition. Moreover, the new lawyer can return the original lawyer's calls promptly, listen to what she has to say, and ask if the defendant still owes attorney fees.

Current Counsel's Money

Some scofflaw tenants stay until evicted and use the money owed to the current landlord to pay the next landlord. The new lawyer should not be an enabler of that kind of behavior. It would be even worse if the new lawyer sent the original lawyer a letter demanding a refund for the client or an accounting of hours. In addition, the new lawyer should not tell the client to stop payment on the check to the original lawyer or to threaten a grievance in order to extort a refund.

Instead, the new lawyer should not sign on until the original lawyer is paid and happy. If all lawyers were that courteous to each other, the legal profession — and the whole world — would be much better. The new lawyer should insist that the client do the right thing.

A Notice of Substitution Is Not Enough

Successor counsel should not merely file a "notice of substitution" or (worse) a bare designation of counsel form. The widespread use of such a notice or designation when substituting is actually a disrespectful usurpation of the judge's authority. Counsel would not think of filing a notice of continuance, a notice of suppression, or a notice of acquittal! Whether counsel may substitute or withdraw is the court's decision, and counsel should show respect to the court by letting the court speak, even if counsel envisions a rubber stamp.

The court's discretion on this issue is explicit in many courts' local rules. Sometimes those rules actually require a motion and entry. Here's a typical example, the local Hamilton County (Ohio) Municipal Court Rule 2.03:

> Once trial counsel has been designated, such designation shall remain until termination of the case. Change of trial counsel may be permitted by the judge assigned to the case upon the filing of an entry containing the designation of new trial counsel and the agreement of prior trial counsel and provided such change will not delay the trial of the case.

This rule requires that the judge sign something proclaiming the court's approval of the change, with current counsel's agreement on the same page! Such agreement is probably best displayed in a signature line on the entry. (Maybe successor counsel can sign current counsel's name, with friendly permission.) Skipping this step may not only be a violation of the court's rule; it is a professional discourtesy and a foul-smelling short-cut. The best practice is to have the client endorse the substitution motion, showing that *everyone* is on the same page.

Model Rule of Professional Conduct 1.16(c) is in accord:

> A lawyer must comply with applicable law requiring notice

to or permission of a tribunal when terminating a representation.

Ohio's Rule of Professional Conduct 1.16(c) states with even more strength the requirement to get explicit court permission to withdraw:

> 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.

The Motion and Entry High Road

Successor counsel should courteously do the legwork to get the entry endorsed by current counsel without delay. Then successor counsel should immediately walk the motion and entry to the judge, if permitted. Once signed by the judge, the motion and entry should be filed and a copy sent posthaste to prior counsel, who needs to know when he or she is officially off the hook.

Current Counsel's Continuing Duties

Current counsel remains counsel of record — with all attendant duties to the client and the court undiminished — until the substitution entry is signed. (Successor counsel should explain that to the client.) A lawyer may not abandon his or her client's interests, even when clearly fired by the defendant, until properly relieved as counsel by the court. Such abandonment may constitute ineffective assistance of counsel.[2]

Between being fired and being officially relieved as counsel of record by the judge's signature, current counsel may have the inclination to be less vigilant. But that could theoretically subject her to disciplinary action. Even in the interim, the lack of preparation or diligence may be violations of Model Rules of Professional Conduct 1.1 and 1.3. Failure to seek the lawful objectives of the client may be a violation of Model Rule of Professional Conduct 1.2(a). Further, current counsel must take reasonable steps to protect the client's interests under Model Rule of Professional Conduct 1.16(d).

Succedaneous County Municipal Court
Traffic Division
State of Transition

State of Transition,	:	Case No. 2012 TRC 111111 A - C
Plaintiff	:	Judge Al Waysrite
vs.	:	
Ben Fickel, Defendant	:	**Entry Substituting Counsel**

At defendant's request, Johnny Komlaytly is permitted to substitute for Sally Forth as trial counsel.

_____
Judge Al Waysrite

_____
Sally Forth
Attorney for Defendant
500 Old Avenue
Urbane, Transition 22202
513-000-0000

_____
Johnny Komlaytly
Attorney for Defendant
600 New Street
Urbane, Transition 22202
513-000-0001

Suggested Reading

There is not a lot written about client transition ethics and professionalism in criminal cases. The publications below are available for lawyers who want to learn more:

John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice,* Thomson Reuters Westlaw, 2005-2011.

ABA/BNA Lawyers' Manual on Professional Conduct, American Bar Association, Bureau of National Affairs, 1984-2012.

Notes

1. http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html.

2. See *Appel v. Horn, et al.*, 250 F.3d 203 (3d Cir. 2001). ■

About the Author

Chuck Strain exclusively practices DUI defense. He is a frequent speaker and writer on traffic law, ethics, and professionalism. He has attended every Summer Session of the National College for DUI Defense since 2001. A member of many committees and associations, he is president of the Lawyers' Club of Cincinnati.

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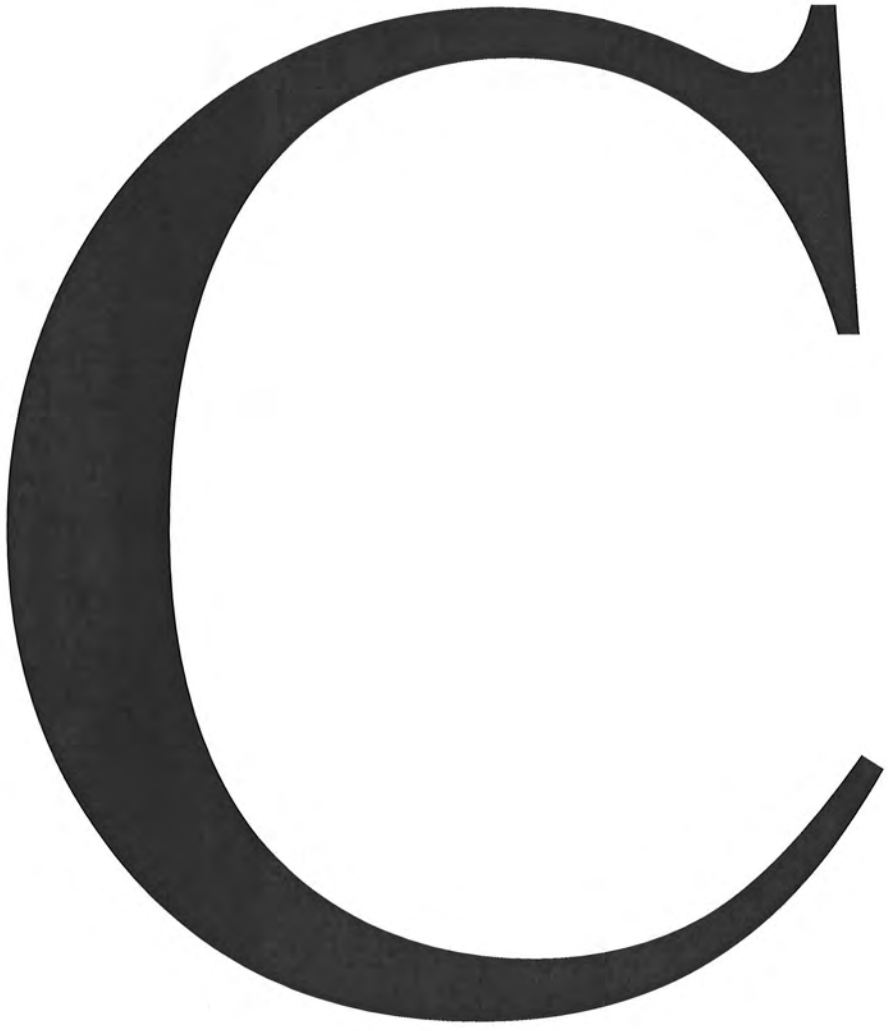

What to Do When Your Criminal Client Intends to Commit Perjury

by Lee Metzger

What should you do when you know that your criminally accused client intends to testify in his own defense and commit perjury? The Bill of Rights and the Kentucky Rules of Professional Conduct present a number of important (and competing) considerations to keep in mind. For starters, under the Fifth Amendment, your client has the right to testify in his own defense.[1]

You cannot preclude him from testifying. That is a right (and a choice) that belongs to him.[2] And under the Sixth Amendment, he also has the right to assistance of counsel.[3]

Further, Rule 1.6 of the Kentucky Rules of Professional Conduct requires you to keep confidential all information relating to the representation of your client, unless the client consents to disclosure.[4] At first blush, this would seem to preclude you from advising the court of the client's intent to commit perjury... but read on.

Despite Rule 1.6's confidentiality provisions, Rule 3.3(a) prohibits you from offering evidence to the court that you know to be false.[5] It also prohibits you from failing to disclose a material fact to the court when that disclosure is necessary to avoid a fraud being perpetuated upon the court.[6] Under Rule 3.3(c), these duties apply even if the information is otherwise protected by Rule 1.6. Our Commonwealth's Supreme Court has recognized that, "[d]espite the tension between Rules 1.6 and 3.3 and the rights to testify and to counsel, when the false testimony involves the client, Rule 3.3(b) [now 3.3(c)] requires disclosure, even if protected by Rule 1.6."[7]

So, practically speaking, what actions should you take when you know your client intends to testify falsely? The first is perhaps the most obvious: be a counselor, and "seek to persuade the client that such evidence should not be offered."[8] In other words: ADVISE YOUR CLIENT TO TELL THE TRUTH![9]

If that is ineffective, and you know reasonably in advance of trial that the client will commit perjury, your next option is to file a motion to withdraw. Before doing so, inform your client that you are ethically bound to withdraw if he intends to commit perjury. This warning may be enough to convince him to testify truthfully. If it is not, file the motion. Typically, you will "be allowed to withdraw without revealing the specifics of the conflict."[10]

But if the trial is imminent, or already in progress, when the lawyer learns that the client intends to commit perjury, "failure to inform the court may lead the lawyer to at least passively assist in deception of the tribunal, which could subsequently lead to disciplinary charges or criminal complicity charges against the lawyer."[11] So how can you ethically (and legally) maneuver this sticky situation?

There are generally three schools of thought. The first approach – rejected in Kentucky – is that "the lawyer should be entirely excused from revealing potential perjury when the witness is her client, giving more weight to the attorney-client relationship of confidentiality than candor to the court."[12] But the problem with this approach, as our Supreme Court has recognized, "is that the lawyer thus becomes a knowing instrument of perjury."[13]

The second approach—also rejected in Kentucky—is to permit the accused "to testify by narrative statement without the benefit of the attorney's questioning and without informing the court of the specific reasons for the departure from regular examination. This solution, however, "'compromises both contending principles' (the duty of candor and duty of confidentiality) by simultaneously 'exempting the lawyer from the duty to disclose false evidence but subjecting the client to an implicit disclosure of information imparted to counsel.'"[14] Moreover, under this approach, the lawyer would participate, in a merely passive way, in deception of the court.[15]

The third approach, adopted by our Supreme Court in *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007), is for "the lawyer [to] reveal [to the court] that her client is about to commit perjury, and the substance of what she believes the perjury to be, because no client has the right to assistance of counsel in committing perjury."[16] Our Supreme Court concluded in *Brown* that this solution is what is contemplated by Kentucky's version of Rule 3.3.[17]

Under this third approach, the following steps must be taken when you learn during trial that your client intends to commit perjury:

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STEP ONE: Confirm that you have in good faith a firm basis in objective fact for your belief, beyond conjecture and speculation, that the client will commit perjury. You must rely on facts made known to you by your client, not on a subjective belief that your client *might* be lying or that your client's consistent version of events differs from other evidence.[18]

STEP TWO: Emphasize to your client the importance of telling the truth and attempt to persuade him to testify truthfully. If he is unmoved, advise him that the law and the Rules of Professional Conduct prohibit you from offering testimony that you know to be false, and that you will seek to withdraw from the case if he intends to perjure himself.

STEP THREE: If your client still insists on testifying falsely, comply with Rule 3.3 by bringing the existence of a potential conflict to the court's attention. Tell the court that your client intends to present false testimony to the jury, that you have attempted to persuade him not to testify falsely, and that you need instruction from the judge on how to proceed before the jury.[19] Your duty is to advise the court of all material facts necessary to establish the adversity between you and your client, but this does not require a detailed evidentiary statement of the disagreement. A clear statement of the nature of the problem is sufficient.[20]

STEP FOUR: Comply with any instructions from the court. "Once the trial court is made aware of the potential for perjury, the court must evaluate the situation and instruct counsel on how to proceed."[21,22] The court should discuss with the defendant the importance of truthful testimony and the attorney's ethical obligations, and generally educate the defendant about the nature of the situation. This will give the defendant a chance to further consider any possible course of action.[23]

STEP FIVE: If the defendant nevertheless insists on testifying, it is appropriate to have the defendant present the contested testimony in narrative form, in your presence, and with you continuing to represent him on cross-examination regarding portions of the testimony you do not believe to be perjured.[24] Practically speaking, this means that you can put the defendant on the stand, ask him his name, and let him tell his story to the jury.[25] After asking his name, your sole question should be, "What do you wish to tell these jurors?" You may then allow his testimony to proceed in a narrative fashion.[26] You should not ask any additional questions on direct or redirect. You should remain standing during the entirety of your client's narrative.[27]

STEP SIX: You may not argue your client's testimony during closing argument. The perjured testimony is off limits, so you may not rely upon it at any point.

In summary, when you know that your client intends to commit perjury, your first reaction should be to attempt to talk him out of it. If that fails, withdraw. If it is too late to withdraw, then advise the court during trial of the conflict without delving into specifics, and follow any instructions the court gives. After you advise the court of the issue, the judge should advise the client of the importance of testifying truthfully. If the client still insists on testifying falsely, you should put him on the stand, ask him his name, and ask him what he wishes to tell the jurors. Do not ask any additional questions. Continue to stand during his narrative, and object during cross-examination (as appropriate) to questions regarding any portion of testimony you do not believe to be perjured. During closing arguments, omit any reference to your client's testimony.

By following this basic protocol, you can preserve your client's constitutional right to the assistance of counsel and constitutional right to testify in his own defense, while simultaneously fulfilling your ethical duties under the Rules of Professional Conduct.

References: **1.** *Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"); *see also Faretta v. California*, 422 U.S. 806, 820 n. 15 (1975) (recognizing the right to testify based on the due process clause). **2.** The defendant does not, however, have a constitutional right to commit perjury. *Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense... But that privilege cannot be construed to include the right to commit perjury"); *Nix v. Whiteside*, 475 U.S. 157, 173 (1985) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely") (emphasis in original)). **3.** U.S. Constitution, amend. VI ("In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence"); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent criminal defendant's right to have the assistance of counsel is a fundamental right essential to a fair trial).

4. Rule 1.6, titled "Confidentiality of Information," provides in pertinent part as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (1.6)(b).

5. Rule 3.3, titled "Candor toward the tribunal," provides in pertinent part as follows:

(a) A lawyer shall not knowingly:

a. Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

b. Fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

c. Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage... in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

6. *Id.* **7.** *Brown v. Commonwealth*, 226 S.W.3d 74, 79 (Ky. 2007). **8.** *Id.* **9.** Document your file. Put this advice in a signed letter to the client. The last thing you want is a disgruntled former client wrongfully accusing you of being a willing accomplice in his perjured testimony. **10.** *Id.* **11.** *Id.* at 80. **12.** *Id.* **13.** *Id.* (internal quotations omitted). **14.** *Brown*, 226 S.W.3d at 80 (citing Rule 3.3, cmt. 9). **15.** *Id.* **16.** *Id.* **17.** *Id.* **18.** *Id.* at 84. **19.** *Id.* at 81 (citing with approval *Commonwealth v. Mitchell*, 781 N.E. 2d 1237 (Mass. 2003)). **20.** *Id.* at 84. **21.** *Brown*, 226 S.W.3d at 84. **22.** The Court should not conduct an evidentiary hearing during the trial. It is more appropriate "to reserve specific disclosure of the basis of the attorney's belief until a motion for a new trial is made by the defendant." *Id.* **23.** *Id.* **24.** *Id.* **25.** *Id.* at 81. **26.** *Id.* (citing with approval *Mitchell*, *supra*). **27.** *Id.*

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Sprawling Chicago Condo Court Fight Leads To $1M Sanction

By **Celeste Bott**

Law360 (April 4, 2019, 9:24 PM EDT) -- A "serial litigator" and his lawyer have to pay more than $1 million in sanctions to residents of a Chicago-area condominium complex and their attorneys, after engaging in a "pattern of abuse" in litigation that included nearly 400 court filings and multiple frivolous complaints, an Illinois state court held.

Over the course of three consolidated cases, Marshall Spiegel and his attorney John S. Xydakis filed duplicative claims in different venues and hundreds of "voluminous, irrelevant and overly burdensome" motions, Cook County Circuit Judge Margaret Ann Brennan said in a March 29 order. The judge granted bids for sanctions brought by a team of firms — Hinshaw & Culbertson LLP, Duane Morris LLP and Murphy Law Group — that say it could be the biggest such sanction in Cook County.

She also issued an injunction barring Spiegel from filing any more actions against the parties concerning the underlying claims.

"Not only have they continued to pursue an unfounded lawsuit in this court, but attempted to pursue identical lawsuits in numerous other courts. Not only does this waste the parties' time and resources, but also the courts' time and resources," Judge Brennan said. "The actions of Spiegel and Xydakis are simple obscene and clear violations of Rule 137."

Rule 137 is an Illinois Supreme Court rule allowing the court to sanction attorneys or parties if they aren't acting in good faith, or aren't making claims grounded in fact or warranted by existing law.

In total, Spiegel and Brennan are on the hook for $1,061,672.97. The sanction breaks down to: more than $500,000 in attorney fees and increased insurance costs to 1618 Sheridan Road Condominium Association Inc., nearly $361,000 to condo owner Valerie Hall, and $25,000 to Duane Morris, which represented Hall. Spiegel also has to pay roughly $174,000 to Michael C. Kim, the condo association's attorney.

In an email to Law360 on Thursday, Xydakis said the sanctions were retaliation for seeking Judge Brennan's disqualification for ex-parte conversations, which he says he can prove took place with phone records obtained through Freedom of Information Act requests.

"Judge Brennan will be reported to the Judicial Inquiry Board and will likely be disciplined for this and her outrageous sanctions retaliation. Judge Brennan's sanctions decision lacks any factual or legal basis and will certainly be appealed, and overturned," Xydakis said in a statement.

Judge Brennan could not be immediately reached on Thursday.

What began as a condominium governance matter "needlessly mushroomed" into multifaceted litigation that eventually swept up multiple condo owners and Kim, according to Kim's attorney, Hinshaw & Culbertson partner Thomas McGarry.
The dispute stems from Spiegel's October 2015 lawsuit seeking to remove Hall from the condominium association's three-member board of directors, accusing her of defamation and breach of contract and arguing she couldn't serve on the board because she didn't own a unit.

Judge Brennan said both Spiegel and Xydakis have been on notice since November 2015 that their initial arguments about Hall weren't grounded in fact, but instead they "doubled down," filing more complaints and adding more parties.

The consolidated cases include claims addressing water bottles left outside Spiegel's doorway, lawn furniture purchased for common areas, neighbors hiding in bushes, voicemails left on his answering machine, and rules prohibiting him from having shirtless massages next to the pool, according to the order.

After other judges dismissed similar complaints, Judge Brennan denied Spiegel's request to file a 99-count, 223-page fifth amended complaint in June 2017.

Kim is represented by Thomas McGarry and Michael Ruff of Hinshaw & Culbertson LLP.

The condo association is represented by Michael C. Kim of Michael C. Kim & Associates, and Eugene Murphy and David Hyde of Murphy Law Group.

Hall is represented by John Schriver of Duane Morris LLP.

Spiegel is represented by John S. Xydakis.

The case is 1618 Sheridan Rd. Condominium Association v. Marshall Spiegel et al., case number 15 L 10817, consolidated with 16 L 3564 and 15 CH 18825, in Cook County Circuit Court.

--Editing by Breda Lund.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1618 SHERIDAN ROAD CONDOMINIUM ASSOCIATION,	)	
	)	**No. 15 L 10817**
Plaintiff,	)	
	)	**Commercial Calendar N**
v.	)	
	)	**Honorable Margaret Ann Brennan**
MARSHALL SPIEGEL, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter coming before the Court on 1618 Sheridan Road Condominium Association ("Sheridan"), James Waite ("James"), Marie Franscoise Waite ("Marie"), William McClintic ("William"), and Corinne McClintic's ("Corinne") (together "Movants") Petition for Sanctions against Defendant Marshall Spiegel ("Spiegel") and his counsel John Xydakis ("Xydakis") pursuant to Illinois Supreme Court Rule 137; the Court having considered the written submissions and being advised of the premises, finds:

This petition arises from the consolidated cases of 15 L 10817, 15 CH 18825, and 16 L 3564. Xydakis, on behalf of Spiegel, has filed seven amended complaints and a number of motions. Movants request the entry of sanctions against Spiegel and Xydakis pursuant to Illinois Supreme Court Rule 137. The Movants request the Court award the Movants attorneys' fees incurred and an amount equal to the increase in the cost of Sheridan's insurance, which is due to this litigation.

Arguments of Parties

Movants argue that Spiegel and Xydakis have repeatedly engaged in sanctionable litigation tactics under Rule 137. First, Xydakis mischaracterized the law in each of the pleadings filed on Spiegel's behalf. For example, in Spiegel's May 24, 2016, Emergency Verified Motion for TRO or Preliminary Injunctions, Xydakis paraphrased and incorrectly cited the law on preliminary injunctions and restoring litigants to status quo. In Spiegel's complaints and responses in 15 L 10817 and 16 L 3564, Xydakis miscites, cites to Texas law[1], and mischaracterizes law.[2] In Spiegel's Response to Motion to Dismiss Affirmative Defenses,

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[1] For the proposition that the Declarations of the Association are a covenant and covenants can be enforced without any showing of irreparable injury.

[2] Xydakis uses *Lopin v. Cullerton*, 46 Ill. App. 3d 378, 380 (1977) for the proposition that the Court has eliminated the element of absence of adequate remedy at law in considering a claim for injunctive relief. The Court in *Lopin* actually stated that the absence of adequate remedy at law is irrelevant only in determining whether the court has jurisdiction.

Xydakis claimed the heightened pleading standards for fraud did not apply to his affirmative defense. Further, Spiegel filed his Motion to disqualify Murphy and Hourihane as Counsel for Sheridan without a reasonable inquiry into the facts. Xydakis reasonably should have known that there were no derivative claims pending in 15 L 10817 and 16 L 3564.[3]

Second, Spiegel and Xydakis repeatedly filed pleadings with unfounded and/or irrelevant allegations. Xydakis filed claims against nearly every resident at Sheridan and their attorneys. Without any factual basis, Spiegel and Xydakis alleged serious offenses, including theft, slander, harassment, and stalking. For example, Spiegel and Xydakis alleged that the Halls' and Waites' united were owned by their trusts to shield their assets from creditors and avoid the consequences. They also accused Michael Kim, an attorney representing a party, of committing fraud and drafting false affidavits. Xydakis claimed the TRO was *ex parte*, but he was present in court and spoke on the record the day it was entered. They also accused Murphy and Hourihane of improperly attempting to consolidate the cases to subsidize the legal fees. In addition, Spiegel and Xydakis mispresented the facts to the Court. For example, they stated Trust No. 4179 was not the proper trust that owned Spiegel's unit. However, they named that trust themselves in earlier complaints. They also claimed no open meeting was held for editing and reviewing the new rules adopted by Sheridan, even though Spiegel was present at the meeting. These allegations and falsities caused the consistent need to fact check, resulting in elevated attorneys' fees for each of the parties, and an unbearable living environment for the residents of Sheridan.

Third, Spiegel and Xydakis repeatedly displayed complete disregard for the importance of judicial economy by (1) recycling the same allegations from pleading to pleading; (2) pursuing litigation on functionally identical claims in multiple jurisdictions; and (3) filing countless and irrelevant written motions. In each of the complaints filed in the consolidated cases, they used the same unfounded and irrelevant allegations. Further, the numbers of allegations in each complaint only grew. The Second Amended Complaint contained 139 paragraphs and thirteen counts, while the Fifth Amended Complaint contained 1,436 paragraphs and ninety-nine counts. Spiegel also made essentially identical claims in the Circuit Court of Cook County (15 CH 18825, 15 L 10817, and 16 L 3564), the Northern District of Illinois (16-cv-10935 and 16-cv-9357), the U.S. Court of Appeals for the Seventh Circuit (No. 18-1070), and the Illinois Department of Human Rights. Thus, Spiegel and Xydakis engaged in forum shopping. Further, Xydakis filed countless irrelevant and unsupported motions.[4] The countless motions caused the parties to incur unnecessary and costly attorneys' fees.

In response, Spiegel and Xydakis argue that Rule 137 only applies to false facts. Namely, Rule 137 motions must relate to false allegations, and not false conclusions of law. Thus, parties do not need to be correct in their view or application of the law. Parties need only have an objectively reasonable argument. Here, Movants identify no false facts and only argue about

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[3] Spiegel's Motion was based off *Cannon v. US Acoustics Corp.*, which targeted the unique nature of a derivative action for qualification.

[4] Among these motions are (1) motions for entry of an order, (1) motions to set briefing schedules, (3) a motion to "stay, strike, or to allow discovery," (4) a motion for "custodian, dissolution, or receiver, a preliminary injunction & for other relief; (5) an emergency motion to allow a court reporter; (6) a motion to compel the board to "repair common elements causing water damage and mold inside Spiegel's unit," and (7) a motion for status.

legal theories. Further, Movants claim Spiegel's litigation approach is what Rule 137 protects against. However, Rule 137 does not authorize a trial court to impose sanctions for all acts of misconduct. Rule 137 only authorizes sanctions for false allegations made without reasonable cause within a signed filing. Regardless of the subject intent of the attorney or litigant, a document well-grounded in fact and warranted by law cannot be sanctioned. Litigants cannot be punished for bringing lawsuits for an improper purpose, as it conflicts with a litigant's right of access to courts.

Further, Movants claim Spiegel's allegations were frivolous from the beginning, but waited nearly two and a half years before petitioning for sanctions. Movants offer no explanation for the delay. Thus, Movants have a duty to mitigate the costs incurred after waiting so long. Any award of attorney fees, though, needs to be related to and the result of the specific misconduct. The court does not have the discretion to impose sanctions in one lump sum for a myriad of conduct spanning two and a half years. Movants expect this Court to revisit every filing. Movants fail to identify the offending filings, which statements were false, and the fees and costs that directly results from the untrue allegations. These identifications are necessary to allow Spiegel to respond and defend himself. The Petition for Sanctions is also thus statutorily untimely. Rule 137 motions must be brought within thirty days after the trial court denied Spiegel leave to file an amended complaint, or a motion attacking a pleading must be filed within 21 days of the pleading.

Lastly, Movants rely on three cases[5] to claim this Court may impose sanctions in one lump sum based on the cornerstone theory. As the one exception to lump-sum awards, the cornerstone theory is premised on the idea that false allegations made without reasonable cause is the cornerstone of the entire baseless lawsuit. However, these cases are inapplicable because the cornerstone theory requires a trial, evidentiary hearing, or discovery first. None of which has taken place here. Movants also point to "false cornerstones" of Spiegel's claims. Denial of Movants' request is appropriate because it is excessive, an abuse of the courts, and is primarily sought for punishment. The Court may not impose sanctions purely for punishment, as federal courts require sanctions to be compensatory in nature.

In reply, Movants argue this litigation has been harassing and wasteful from the beginning. Spiegel's response, filed by Xydakis, contends, with no real support, that Rule 137 does not cover his wasteful and improper litigation tactics because he was not caught in any direct lie. Contrary to their contention, Rule 137 is not limited to false pleadings, but more broadly is meant to penalize litigation brought for an improper purpose. Movants give numerous examples of how Spiegel and Xydakis mischaracterized the law, mislead the court, plead frivolous claims and motion on unfounded and irrelevant facts, and disregarded judicial economy. Xydakis cannot disguise his deliberate tactics as mistakes or misunderstandings. Spiegel and Xydakis have failed to explain why nearly every pleading in the consolidated matters have contained the same violations. Lastly, Spiegel's response to the cornerstone theory

[5] The cases are (1) *Riverdale Bank v. Papastratakos*, 266 Ill. App. 3d 31 (1st Dist. 1994); (2) *Robertson v. Calcagno*, 333 Ill. App. 3d 1022 (1st Dist. 2002); and (3) *Father & Sons v. Stuart*; 2016 IL App (1st) 143555.

is also irrelevant as to whether or not sanctions should be entered. It goes to the scope of inquiry on fees, which is within this Court's discretion.

OPINION OF THE COURT

Illinois Supreme Court Rule 137 states:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

Rule 137 is designed to prevent and discourage the filing of frivolous and false lawsuits. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110 ¶ 15. Rule 137 is meant to prevent abuse of the judicial process by punishing those who bring "vexatious and harassing actions based upon unsupported allegations of fact or law." *Father & Son Home Imp. II, Inc. v. Stuart*, 2016 IL App (1st) 143666 ¶ 56. Since Rule 137 is penal in nature, it is narrowly construed by the courts. *Arnold*, 2015 IL 118110 ¶ 12. Further, the Illinois Supreme Court concluded that within Rule 137 is the requirement that an "attorney promptly dismiss a lawsuit once it becomes evidence that it is unfounded." *Id.* at ¶ 13. It is within the trial court's sound discretion whether or not to impose sanctions. *Stuart*, 2016 IL App (1st) 143666 ¶ 58.

What sanction is appropriate is determined in light of the misconduct. *Stiffle v. Baker Epstein Marz*, 2016 IL App (1st) 150180 ¶ 56. Pursuant to Rule 137, an appropriate sanction may include an order to pay the other party's reasonable expenses, including a reasonable attorney fee. *McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust*, 2018 IL App (1st) 163478 ¶ 20. However, dismissal of a cause of action may be an appropriate sanction in the most egregious of cases. *Koppel v. Michael*, 347 Ill. App. 3d 998, 1004 (1st Dist. 2007). Dismissal is appropriate when (1) the party has shown a "deliberate and contumacious disregard for the court's authority," and (2) a lesser sanction would not serve to deter such conduct. *Id.*

In one Illinois case, the trial court not only found sanctions warranted, but required to "punish the plaintiffs' egregious behavior." *Stiffle*, 2016 IL App (1st) 150180 ¶ 23. In finding the conduct egregious, the trial court named these four considerations: (1) the violations went to the heart of the claim; (2) the violations were contained in briefs, complaints and affidavits signed by the plaintiffs and their attorney; (3) the repetitive nature of the falsehoods increased the cost of litigations and caused excessive delay; and (4) the time for other pending cases was reduced. *Id.*

Spiegel and Xydakis misconstrue Rule 137 and the surrounding law in an attempt to defend their actions. They also respond to the Petition for Sanctions as if their misconduct did not occur. However, Spiegel and Xydakis have shown complete disregard for the judicial process

through their egregious conduct. The pleadings, some which were verified by Spiegel, and motions filed and signed by Xydakis are frivolous and unfounded. Xydakis, on behalf of Spiegel, filed several amended complaints, evidently none of which sought to correct the errors of its predecessors. Instead, the complaints became lengthier and more cumbersome. Sheridan also named a number of the unnecessary motions filed, which has only succeeded in delaying the proceedings. The unnecessariness and resulting delay are caused by the sheer number of motions filed by Xydakis.

The claims brought forward by Spiegel and Xydakis also have no basis in law or fact. There was simply a lack of case law to support their claims. They actually twisted existing case law to fit their claims. Spiegel and Xydakis provided this Court with non-Illinois case law, but represented it as binding authority. They also misrepresented Illinois case law by reversing or altering holdings, so that their claims remained viable. The facts also do not support Spiegel's claims. Extreme accusations are made against the residents of Sheridan and their attorneys, without any evidence to support the allegations. Further, they make claims that are blatant lies, such as alleging an attorney engaged in *ex parte* communications. These claims have been unproven through the record of this litigation and the records provided by Sheridan's Board. All of the baseless allegations meant the parties had to expel needless effort to check the facts and defend against them. Further, these violations occurred within all of Spiegel's complaints and briefs, which were signed by Xydakis on behalf of Spiegel.

Even though the claims are clearly unfounded, Spiegel and Xydakis have not dismissed their claims as Rule 137 requires. Not only have they continued to pursue an unfounded lawsuit in this Court, but attempted to pursue identical lawsuits in numerous other courts. Not only does this waste the parties' time and resources, but also the courts' time and resources. The actions of Spiegel and Xydakis throughout this litigation and the consolidated cases are simply obscene and clear violations of Rule 137. Accordingly, Movants' Petition for Sanctions is granted.

As this Court has found that sanctions are to be awarded in this matter, the remaining issue is in what form. In support their motion, Movants provided this Court with affidavits of and copies of the bills for the attorneys' services to the Association and the represented members, Waite and McClintic. As of July of 2018, those bills totaled $387,404.70 for Murphy Law Group, LLC. and $105,027.38 for Michael C. Kim & Associates. Additionally, the Movants provided this Court with an affidavit establishing the increased insurance costs. The increased costs directly relate to Hanover American Insurance Company's decision to cancel the policy due to the numerous claims submitted to pay for litigation initiated by Spiegel. From the period of September 3, 2016 to July of 2018, the increased insurance cost for the Association and Board was $27,878.

Regarding the attorneys' fees, this Court has reviewed the billing and finds a total of $5,425.00 is unrecoverable as both the associate and partner billed for attendance at court hearings. Specifically, this Court has disallowed as recoverable the associate's attendance at hearings on 1/4/16, 1/22/16, 2/20/16, 4/27,16, 7/20/16, 8/16/16, 9/28/16, 12/14,16, 2/10/17, 6/8/17, 8/2/17, 8/31/17, 9/8/17, 11/14/17, and 5/16/18. In addition this court has determined that many of the internal meetings involved each attorney billing for the meetings and as such has reduced the recoverable amount by an additional $6,250.00. This Court finds the total amount of recoverable fees and costs attributable to the Murphy Law Group's representation of the Association to be $375,729.70.

Michael C. Kim and Associates also provided this Court with an affidavit and detailed billing. The Court has reviewed the bills and finds unrecoverable those amounts attributable to Board actions, such as Board meetings, resolutions, proxies and the like. Additionally, where several attorneys have met to discuss matters, those fees are unrecoverable as well. As such, the Court finds the recoverable fees for the services of Michael C. Kim to the Association and its members is $97,712.38.

Finally, the Association has provided clear evidence that it has incurred increased insurance costs due to this harassing litigation. As such, this Court also awards as a sanction the amount of $27,878.00.

Wherefore, it is hereby

ORDERED:

1. Movants' Petition for Sanctions is GRANTED.

2. Sanctions are awarded in favor of Movants and against Spiegel and Xydakis in the amount of $473,442.08 for the reasonable attorneys' fees expended due to this harassing litigation and $27,878.00 for the increased insurance costs.

3. Sanctions are to be paid no later than May 1, 2019.

Judge Margaret Ann Brennan

Entered: MAR 29 2019

Circuit Court - 1846

Judge Margaret Ann Brennan 1846
Circuit Court of Cook County, Illinois
County Department, Law Division

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1618 Sheridan Rd. Condominium Association,	)	
	)	**No. 15 L 10817**
Plaintiff,	)	**Consolidated with:**
	)	**16 L 3564 and 15 CH 18825**
v.	)	
	)	**Commercial Calendar N**
Marshall Spiegel. et al.	)	
	)	**Honorable Margaret Ann Brennan**
Defendant.	)	
	)	

ORDER

This cause coming to be heard on Valerie Hall and Duane Morris LLP's Petitions for Sanctions pursuant to Illinois Supreme Court Rule 137 against John Xydakis ("Xydakis") and Marshall Spiegel ("Spiegel"), the matter having been fully briefed, and the Court being advised of the premises, the Court finds:

Background

While these consolidated cases have a convoluted and torturous history, the Court will attempt to summarize some of the pertinent facts that have given rise to these current motions for sanctions. These lawsuits began on October 22, 2015 when Spiegel and his lawyer Xydakis filed the Complaint in 15 CH 15594 seeking to remove Valerie Hall from the condominium association board of directors. Judge Garcia denied the TRO and Spiegel dismissed that action and then filed a second lawsuit 15 L 10817 which added a new defendant. Spiegel again moved for a TRO seeking to remove Valerie Hall from the board and Judge Johnson denied the TRO. Mrs. Hall's counsel sent a letter advising Spiegel and Xydakis that the filed complaints lacked a basis in law and fact and should be dismissed. Xydakis and Spiegel filed an amended complaint adding another unit owner. Valerie Hall answered the complaint denying all material allegations and provided a copy of the warranty deed naming her as the owner of the trust. From November 2, 2015 on Spiegel and Xydakis have been on notice that the claim that Valerie Hall cannot be a board member as she is not a unit owner is not well grounded in fact. Spiegel and Xydakis continued to pursue their claims. Spiegel and Xydakis continued to double down and filed additional pleadings and naming additional parties, including William Hall, the Hall's attorneys, Mark Belongia, John Shriver, their law firm, Duane Morris, LLP. In the consolidated cases, Spiegel brought, among others, claims concerning the placement of empty water bottles in front of his doorway, voicemails left on his answering machine, lawn furniture purchased for common areas, neighbors hiding in bushes, the D & O carrier's failure to fund Spiegel's litigation, and Association bylaws that prohibit Spiegel from having shirtless massages next to the pool. On June 14, 2017, Judge Johnson dismissed all 25 counts in Spiegel's Fourth Amended Complaint

in the 15 L 10817 case on the basis that Spiegel failed to properly plead any claim. Judge Johnson also struck all 33 counts of Spiegel's First Amended Complaint in the 16 L 3564 case. Pursuant to Judge Johnson's rulings, Spiegel would need to petition the court for leave to file an amended pleading. On February 8, 2018, this Court denied Spiegel's request to file his 99 Count, 223 page, 1,436 paragraph Fifth Amended Complaint. On July 11, 2018, this Court denied Spiegel's motion to reconsider the ruling of February 8, 2018.

In prosecuting his claims, Spiegel has sought to amend pleading after pleading before the Court even had an opportunity to decide the motions on the merits; filed numerous motions to reconsider and appeal numerous rulings, issued voluminous, irrelevant and overly burdensome subpoenas and discovery requests; brought numerous petitions for substitution of judge; and sought disqualification of judges and attorneys. At the time of the filing of Valerie Hall's petition, the pleadings, motion, orders, and other filings number 214.

Arguments of Parties

Hall and Duane Morris bring to this Court's attention that Spiegel has previously been sanctioned by both the Circuit Court of Cook County and by the Seventh Circuit Court of Appeals. In *Spiegel v. Continental Illinois Nation Bank,* 790 F.2d 638 (1986) the Seventh Circuit awarded the defendant-appellees double costs and attorneys' fees. In *Spiegel v. Hollywood Towers Condominium Association,* 283 Ill. App.3d 992, the Circuit Courts award of fees as a sanction against Spiegel and his attorney was affirmed, despite Spiegel's claim that only his attorney should be sanctioned for the frivolous filings. Hall and Duane Morris argue that SCR 137 is designed to discourage frivolous filings. A further purpose is to prevent parties from abusing the judicial process. As this Court has already stated that the proposed amended complaint was frivolous and that it was an abuse of the system, the standard for the award of sanctions has been met. Therefore, Hall asserts that she is entitled to be reimbursed for the legal fees and costs incurred as a direct result of the numerous pleadings and motions brought in this matter.

Duane Morris, LLP, Belongia and Shriver petition this Court for sanctions based upon Spiegel and Xydakis pleading intentional interference against the firm and the Hall's attorneys. As the Hall attorneys had advised Xydakis that Illinois authority confirms that the claims against the attorney defendants lacked any merit, sanctions should be awarded.

In response, Spiegel claims that he should not be sanctioned for the acts of his counsel, John Xydakis. Additionally, Spiegel argues that the petitions lack the specificity required under Rule 137. Additionally, Spiegel asserts that Duane Morris and the Hall attorneys are proceeding *pro se* and therefore not entitled to fees.

In reply, Hall argues that as Spiegel has harassed and bludgeoned his neighbors with this senseless litigation for three years. As for the claimed lack of specificity, this Court has already addressed that when she denied the motion to strike Valerie Hall's petition for sanctions. Lastly, although Rule 137 sanctions are not intended to punish unsuccessful litigants, they are available in this case as the pleading was frivolous and purposefully plead to harass. Spiegel's five

complaints, numerous motions to disqualify judges and opposing counsels, routine motions to reconsider nearly every adverse ruling has now generated 385 separate court filings in this case.

Xydakis and Chicago Title Trust filed a combined response to all the sanctions petitions. Xydakis argues that sanctions are not intended to punish unsuccessful litigants. Additionally, Xydakis argues that the Movants have failed to (1)identify the offending pleading, motion or other paper, (2) identify which statements were false; and (3) identify that the fees and costs directly resulted from the untrue allegations. Xydakis also asserts that the Court must conduct an evidentiary hearing allowing the parties an opportunity to present evidence to substantiate or rebut the claim for sanctions, and an opportunity to argue their positions.

In reply, Hall and Duane Morris argue that the correct standard is that all filings with the court are to be well grounded in fact and warranted by law and not interposed for an improper purpose. Xydakis signed five complaints and a motion for leave to file yet another amended complaint. Each succeeding complaint added new parties and eventually mushroomed to 1,436 paragraphs and a 99 count complaint. Additionally, Duane Morris argues that it is not seeking fees, but a rather a non-monetary sanction on Spiegel and his attorney such as an injunction prohibiting him from further litigating against his neighbors and their attorneys. Duane Morris also notes that Xydakis' tactics of judge baiting, his constant misuse of motions to reconsider and motions to strike and his number attempts to change judges is cause for concern about Xydakis' fitness to practice.

Opinion

Supreme Court Rule 137 provides

"...The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. ...If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including reasonable attorney fee."

This Court finds that the litigation tactics of Spiegel and Xydakis warrant an award of monetary sanctions in this matter. Spiegel has engaged in a pattern of abuse, committed for an improper purpose to harass, delay and increase the cost of litigation. Additionally, the Court finds the Complaints filed were frivolous.

Specifically, the following actions of Spiegel and Xydakis require an award of attorney fees and costs under Rule 137.

1. Persisting in his argument that Valerie Hall was not an owner and therefore lacked capacity to service on the condominium association's board even after having been provided clear proof in a Warranty Deed.
2. In response to Hall's counsel advising that the various complaints violate Rule 137, Spiegel doubled down and filed a fourth amended complaint that asserted 25 claims against 10 defendants.
3. The filing of the duplicative lawsuit in 16 L 3564, filed entirely to harass, increase costs and delay.
4. Despite being admonished by Judge Johnson, Judge Novak, and Judge Flynn, Spiegel filed a 99 Count, 223 page and 1,436 paragraph fifth amended complaint which had been mislabeled as a first amended complaint. That iteration repleaded previously dismissed claims without substantive modification.
5. The numerous motions to remove judges for cause, seeking SOJ as a claim of right, when those rights were already exhausted as well as the attendant requests for discovery on the "for cause" matters that were unsupported by fact and law.
6. The repeated misstatements of the law and evidence.
7. The nearly 400 separate court filings.

The mess that has typified Spiegel's pleadings, motions and briefs across the multiple lawsuits has been used to create confusion, evade decision, deceive the court and ultimately harass the litigants, including Kim. The actions of Spiegel amount to an improper purpose as enunciated in *Larocque. In re Marriage of Larocque,* 2018 Il. App. (2d) 160973 at ¶¶ 108, 109.

Spiegel's response that *Larocque* is distinguishable is unavailing. While in *Larocque,* the attorney, rather than the client, was sanctioned, Rule 137 permits the sanctioning of a party as well as the attorney. Spiegel's characterization that his attorney was the sole driver of this abusive litigation is not borne out by the pleadings, motions, appearance of Spiegel personally in this Court's courtroom as well as others. Additionally, Spiegel signed numerous verified pleadings, including verified complaint for injunctive relief, verified motion for TRO, verified motion to disqualify. Spiegel, enabled by his counsel, determinedly chose the tactic of abusive litigation.

In support of his petition for sanctions under Rule 137, Hall has provided this Court with copies of the invoices for legal fees and costs incurred for her defense. Additionally, she has provided supplements to those bills for legal fees and costs incurred since the filing of her petition. Fees and costs at the time of filing the petition totaled $279,015.90. Since then additional fees and costs have been incurred. As of December 31, 2018, Hall has incurred fees and costs in the amount of $378,310.00. After reviewing the bills, this court will remove the items for costs associated with legal research, postage, printing and duplicating. Those disallowed costs total $5,245.00. This Court finds that the attorney fees were overall reasonable, but disallows recovery of the fees associated with more than one attorney billing for internal meetings and for those fees billed for attending to Board meetings and activities. As such, this Court will finds the amount of $12,101.00 as unrecoverable.

Lastly, Duane Morris seeks an appropriate sanction. While *pro se* attorneys are not entitled to an award of attorney fees as a 137 sanction under *McCarthy v. Reynolds,* 2018 IL App (1st) 162478, a flat amount and an injunction would not be unwarranted. Therefore, this Court finds as a sanction and amount of $25,000.00 to the law firm of Duane Morris and additionally, that Spiegel is enjoined from filing any additional actions against these parties concerning the underlying claims of these consolidated cases.

Wherefore it is hereby

ORDERED:

1. Valerie Hall's Petition for Sanctions under Rule 137 is granted. Duane Morris, LLp's Petition for Sanctions is granted.
2. Spiegel and his attorney John Xydakis are to pay, on or before May1, 2019, as sanctions the amount of $360,964.00 for the reasonable attorneys fees and costs incurred by Valerie Hall as a result of this improper litigation.
3. Spiegel and Xydakis are to pay to Duane Morris, LLP as a sanction the amount of $25,000.00. Amount to be paid on or before May 1, 2019.
4. Spiegel is enjoined from filing any additional actions against these parties concerning the underlying claims of these consolidated cases.

Judge Margaret Ann Brennan

Entered: MAR 29 2019

Circuit Court - 1846

Judge Margaret Ann Brennan 1846
Circuit Court of Cook County, Illinois
County Department, Law Division

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1618 Sheridan Rd. Condominium Association,	)	
	)	**No. 15 L 10817**
Plaintiff,	)	**Consolidated with:**
	)	**16 L 3564 and 15 CH 18825**
v.	)	
	)	**Commercial Calendar N**
Marshall Spiegel. et al.	)	
	)	**Honorable Margaret Ann Brennan**
Defendant.	)	
	)	

ORDER

This cause coming to be heard on dismissed defendant, Michael C. Kim's Amended Motion for Sanctions pursuant to Illinois Supreme Court Rule 137 and other relief under Section 25 of the Illinois Citizen Participation Act ("CPA") against Marshall Spiegel ("Spiegel"), the matter having been fully briefed, and the Court being advised of the premises, the Court finds:

Background

While these consolidated cases have a convoluted and torturous history, the Court will attempt to summarize some of the pertinent facts that have given rise to the current motions for sanctions. In the consolidated cases, Spiegel brought, among others, claims concerning the placement of empty water bottles in front of his doorway, voicemails left on his answering machine, lawn furniture purchased for common areas, neighbors hiding in bushes, the D & O carrier's failure to fund Spiegel's litigation, and Association bylaws that prohibit Spiegel from having shirtless massages next to the pool. On June 14, 2017, Judge Johnson dismissed all 25 counts in Spiegel's Fourth Amended Complaint in the 15 L 10817 case on the basis that Spiegel failed to properly plead any claim. Judge Johnson also struck all 33 counts of Spiegel's First Amended Complaint in the 16 L 3564 case. Pursuant to Judge Johnson's rulings, Spiegel would need to petition the court for leave to file an amended pleading. On February 8, 2018, this Court denied Spiegel's request to file his 99 Count, 223 page, 1,436 paragraph Fifth Amended Complaint. On July 11, 2018, this Court denied Spiegel's motion to reconsider the ruling of February 8, 2018.

In addition to the frivolous nature of the Spiegel's claims, he also names as defendants in several lawsuits Michael Kim and Michael C. Kim & Assoc. ("Kim firm") as they had represented the Association. Kim had to defend himself from Spiegel's claims in at least five different forums – as a defendant in the 15 L 10817 case (dismissed), as a defendant in the 16 L

3564 case (dismissed), as a respondent to two disqualification motions in the 15 CH 18825 suit (both denied), as a defendant to a federal court FDCPA claim (judgment entered on the pleadings), as a respondent to a motion to enjoin filed in the 15 L 10817 case (denied), and as a respondent to a request for investigation to the ARDC (investigation closed without action).

In prosecuting his claims, Spiegel has sought to amend pleading after pleading before the Court even had an opportunity to decide the motions on the merits; filed numerous motions to reconsider and appealed numerous rulings, issued voluminous, irrelevant and overly burdensome subpoenas and discovery requests; brought numerous petitions for substitution of judge; and sought disqualification of judges and attorneys.

Arguments of Parties

Kim argues two bases for the entry of a monetary award consisting of attorneys' fees and costs incurred by Kim in defending against Spiegel's complaints, motions and other filings. Kim argues that the Court can make this award pursuant to either Illinois Supreme Court Rule 137 and/or Section 25 of the Citizen Participation Act. Kim argues that Spiegel has brought the actions against Kim for an improper purpose. The filings made by Spiegel are frivolous and consist of misstatements of law and the evidence; baseless or contain false factual claims; and specious and irresponsible accusations of wrongdoing. All the frivolity of his claims and the improper purposes including harassment, unnecessary delay, and other acts needlessly increased the cost of litigation. Kim also asserts that Spiegel is a SLAPP plaintiff. Spiegel's attacks on Kim in five different forums over the last 32 months are in retaliation for Kim's counsel to the Association. Spiegel is a serial litigator with over 60 lawsuits in Cook County and the Northern District of Illinois alone and yet he still sought relief in his complaints that Kim could never provide.

In response, Spiegel claims that he should not be sanctioned for the acts of his counsel, John Xydakis. Additionally, Spiegel had an objectively reasonable purpose when he filed against Kim and in asserting that Kim had a conflict of interest. Spiegel also states that Kim does not have "absolute litigation privilege". Additionally, Spiegel argues that Kim lacks standing to pursue anti-SLAPP damages and even if there were standing, the dismissal under Section 2-615 prevents the awarding of attorneys fees.

In reply, Kim argues that since the filing of the petition, Spiegel continued the harassment by issuing abusive subpoenas for documents and depositions to Hinshaw (Kim's attorneys), filed a meritless motion to strike Kim's petition, and filed a retaliatory Rule 137 motion against Kim and Hinshaw. Additionally, Spiegel's claim that Xydakis was the mastermind of this litigation lacks merit. Spiegel, after *personally* 'firing" Kim directed Xydakis to bring the claim in 15 L 10817. Spiegel hired different counsel to bring other lawsuits that contained detailed minutia that only a person in the Condo could provide. Spiegel continued *ad hominem* attacks against Kim, with Xydakis an ever willful enabler. Additionally, Kim does have absolute privilege, as there is absolutely no evidence of malice. Finally, Kim concedes that remedies under the CPA are unavailable when a final dismissal order is entered under Section 2-615, but Kim argues that

the final order was entered well after Kim filed his petition and therefore this Court can consider an award for him in this instance.

Opinion

Supreme Court Rule 137 provides

"...The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. ...If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including reasonable attorney fee."

This Court finds that the litigation tactics of Spiegel warrant an award of monetary sanctions in this matter. Spiegel has engaged in a pattern of abuse, committed for an improper purpose to harass, delay and increase the cost of litigation. Additionally, the Court finds the Complaints filed were frivolous.

Specifically, the following actions of Spiegel require an award of attorney fees and costs under Rule 137.

1. The December 2, 2015 Counter and Third-Party Complaint asserting the claims of Aiding and Abetting Intentional Interference with Business Expectancy, Conspiracy for Intentional Interference with Business Expectancy and In Concert with Intentional Interference with Business Expectancy. All three counts were filed because the D & O carrier would not pay for or permit Spiegel to retain personal counsel. In response to Kim's counsel advising that the Complaint violates Rule 137, Spiegel doubled down and filed a fourth amended complaint that asserted 25 claims against 10 defendants. This fourth amended complaint led Kim to file his first dismissal and anti-SLAPP motion under the CPA.
2. Spiegel's two efforts to disqualify Kim and the Kim firm were not objectively reasonable. Both motions were denied by Judge Flynn.
3. The filing of the duplicative lawsuit in 16 L 3564, filed entirely to harass, increase costs and delay.
4. The filing of the FHA claim that mimicked the frivolous pleadings filed in the Northern District of Illinois wherein Judge Thomas Durkin admonished Spiegel and his counsel for filing duplicative claims.
5. In the face of being admonished by Judge Durkin, Judge Johnson, Judge Novak, and Judge Flynn, Spiegel filed a 99 Count, 223 page and 1,436 paragraph fifth amended

complaint which had been mislabeled as a first amended complaint. That iteration repleaded previously dismissed claims without substantive modification.

6. The numerous motions to remove judges for cause, seeking SOJ as a claim of right, when those rights were already exhausted as well as the attendant requests for discovery on the "for cause" matters that were unsupported by fact and law.
7. The repeated misstatements of the law and evidence.

The mess that has typified Spiegel's pleadings, motions and briefs across the multiple lawsuits has been used to create confusion, evade decision, deceive the court and ultimately harass the litigants, including Kim. The actions of Spiegel amount to an improper purpose as enunciated in *Larocque. In re Marriage of Larocque,* 2018 Il. App. (2d) 160973 at ¶¶ 108, 109.

Spiegel's response that *Larocque* is distinguishable is unavailing. While in *Larocque,* the attorney, rather than the client, was sanctioned, Rule 137 permits the sanctioning of a party as well as the attorney. Spiegel's characterization that his attorney was the sole driver of this abusive litigation is not borne out by the pleadings, motions, appearance of Spiegel personally in this Court's courtroom as well as others. Additionally, Spiegel signed numerous verified pleadings, including verified complaint for injunctive relief, verified motion for TRO, verified motion to disqualify. Indeed many of the allegations contain such particular detail that there can be no doubt of Spiegel's involvement. Spiegel, enabled by his counsel, determinedly chose the tactic of abusive litigation.

In support of his petition for sanctions under Rule 137, Kim has provided this Court with a summary of the total legal fees, costs and WIP (work in progress) for Kim's defense. Additionally, the Court has been provided with billing invoices from Hinshaw and Culbertson. The bills have been redacted and therefore do not include any claims for legal fees for the work in defending Kim from the related FDCPA case. Additionally, no claim is being made for any costs associated with defending any claims before the ARDC. The requested fees are for the three consolidated cases, 15 L 10817, 15 CH 18825 and 16 L 3564 only. The total amount of fees and costs, including WIP, incurred by Kim is $194,595.65.

After reviewing the summary, bills and related costs. The Court awards costs in the amount of $1850.39 for transcripts and court reporters. Additionally, the Court finds unrecoverable the amount of $795.00 for attorney fees. The Court also does not award WIP amounts as a sanction at this time. Total monetary award of sanctions in favor of Kim and against Spiegel is $174,388.89.

Wherefore it is hereby

ORDERED:

1. Michael Kim's Petition for Sanctions under Rule 137 is granted. Marshall Spiegel is to pay sanctions in the amount of $174,388.89 to Kim no later than May 1, 2019.

Judge Margaret Ann Brennan

Entered: MAR 29 2019

Circuit Court - 1846

Judge Margaret Ann Brennan 1846
Circuit Court of Cook County, Illinois
County Department, Law Division

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1618 SHERIDAN ROAD CONDOMINIUM ASSOCIATION,	)	
	)	**No. 15 L 10817**
Plaintiff,	)	
	)	**Commercial Calendar N**
v.	)	
	)	**Honorable Margaret Ann Brennan**
MARSHALL SPIEGEL, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter coming before the Court on three Petitions for Sanctions filed by Marshall Spiegel and Chicago Title Trust ("Spiegel") for Rule 137 Sanctions against Valerie Hall, John Shriver, Duane Morris, LLP ("Shriver") as respondents in the Amended Petition, 1618 Sheridan Road Condominium Association ("Sheridan"), James Waite ("James"), Marie Franscoise Waite ("Marie"), William McClintic ("William"), and Corinne McClintic's ("Corinne"), David Hyde, Eugene Murphy, and Murphy & Hourihane, and Murphy Law Group (together "Association") as respondents and Michael C. Kim and Hinshaw & Culbertson LLP ("Kim") as respondent. The Court having considered the written submissions and being advised of the premises, finds:

These petitions arise from the consolidated cases of 15 L 10817, 15 CH 18825, and 16 L 3564. Xydakis, on behalf of Spiegel, has filed seven amended complaints and a number of motions. The Respondents to these Petitions have brought their own petitions for Rule 137 Sanctions. By orders dated this same date this Court has already addressed the Respondents' Petitions.

OPINION OF THE COURT

Illinois Supreme Court Rule 137 states:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or

both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

This Court has already found that the claims asserted by Spiegel and Xydakis have no basis in law or fact. There was simply a lack of case law to support their claims. They actually twisted existing case law to fit their claims. Spiegel and Xydakis provided this Court with non-Illinois case law, but represented it as binding authority. They also misrepresented Illinois case law by reversing or altering holdings, so that their claims remained viable. The facts also do not support Spiegel's claims. Extreme accusations are made against the residents of Sheridan and their attorneys, without any evidence to support the allegations. Even though the claims are clearly unfounded, Spiegel and Xydakis have not dismissed their claims as Rule 137 requires. Instead, Spiegel has pursued not only unfounded lawsuits, but now offensive Rule 137 sanction petitions as a defensive ploy. Not only does this waste the parties' time and resources, but also the court's time and resources. The actions of Spiegel and Xydakis throughout this litigation are simply obscene. Accordingly, Spiegel's Petition for Sanctions is denied.

Rule 137 is designed to prevent and discourage the filing of frivolous and false lawsuits. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110 ¶ 15. Rule 137 is meant to prevent abuse of the judicial process by punishing those who bring "vexatious and harassing actions based upon unsupported allegations of fact or law." *Father & Son Home Imp. II, Inc. v. Stuart*, 2016 IL App (1st) 143666 ¶ 56. Since Rule 137 is penal in nature, it is narrowly construed by the courts. *Arnold*, 2015 IL 118110 ¶ 12. Further, the Illinois Supreme Court concluded that within Rule 137 is the requirement that an "attorney promptly dismiss a lawsuit once it becomes evidence that it is unfounded." *Id.* at ¶ 13. It is within the trial court's sound discretion whether or not to impose sanctions. *Stuart*, 2016 IL App (1st) 143666 ¶ 58.

What sanction is appropriate is determined in light of the misconduct. *Stiffle v. Baker Epstein Marz*, 2016 IL App (1st) 150180 ¶ 56. Pursuant to Rule 137, an appropriate sanction may include an order to pay the other party's reasonable expenses, including a reasonable attorney fee. *McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust*, 2018 IL App (1st) 163478 ¶ 20. However, dismissal of a cause of action may be an appropriate sanction in the most egregious of cases. *Koppel v. Michael*, 347 Ill. App. 3d 998, 1004 (1st Dist. 2007). Dismissal is appropriate when (1) the party has shown a "deliberate and contumacious disregard for the court's authority," and (2) a lesser sanction would not serve to deter such conduct. *Id.*

Wherefore, it is hereby

ORDERED:

1. Petitioner's Petition for Sanctions against all Respondents is DENIED.

Judge Margaret Ann Brennan

MAR 29 2019

Entered: Circuit Court - 1846

Judge Margaret Ann Brennan 1846
Circuit Court of Cook County, Illinois
County Department, Law Division

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United States v. Kaczynski: Representing the Unabomber

Michael Mello*

A. The Unabomber's Pen Pal

The first letter from the Unabomber arrived out of the blue. One morning in July, 1998, the letter just showed up in my Vermont Law School mailbox. It was in a white, legal-sized envelope, addressed to me, with Kaczynski's name, prisoner number, and return address in the upper left-hand corner. My initial instinct was that the letter was a gag engineered by one of my friends from my days as a Florida capital public defender. Still, the envelope, and the letter it contained, seemed authentic. I recognized his cramped, painfully precise handwriting, and the envelope contained all the appropriate prison stamps, such as the prison mail room's date stamp.

Theodore Kaczynski wrote to me because, several months previously, I had written a couple of newspaper op-ed pieces questioning whether his lawyers and judge were about to deny him his day in court. How Kaczynski learned about these op-ed pieces, and how he got my address, I have no idea. But there it was, in blue ink, very legibly printed: Kaczynski's request for copies of the two op-ed pieces.

I replied that I was willing to correspond with him, but that he needed to understand two things up front. The first was that I was writing a book about his case; this meant I couldn't be his lawyer. The second was that nine winters previously, a man I loved like a father—federal appellate judge Robert S. Vance—was murdered by a mail bomb. I worked as Judge Vance's law clerk for the year following my graduation from law school in 1982. He was far more than a boss, however; in the years following my clerkship I came to rely upon his wisdom, guidance, and experience. He became my friend and my father in the

* Professor of Law, Vermont Law School. In the interest of space, I have not included footnotes in this chapter. Citations may be found in Michael Mello, The United States Versus Theodore John Kaczynski: Ethics, Power and the Invention of the Unabomber (1999); Michael.Mello, The Non-Trial of the Century: Representation of the Unabomber, 24 Vermont Law Review 417 (2000).

law. A few days before Christmas 1989, a racist coward with a grudge against the federal judiciary mailed a shoebox sized bomb to judge Vance. The bomb detonated in the kitchen of his home on the outskirts of Birmingham, Alabama. Judge Vance had been a genuine hero of the race wars in Alabama during the 60s and 70s. I mourn him every day. I miss him every day. His assassin now lives on Alabama's death row and, although I have spent a large portion of my life as a lawyer defending death row prisoners, when Judge Vance's killer is executed, part of me will cheer.

I mentioned Judge Vance's murder in my letter to the Unabomber because I wanted to be clear that I harbor a special venom in my heart for people who kill by sending bombs through the U.S. mails. That's what the Unabomber did. For nearly two decades, the Unabomber designed, and mailed, increasingly deadly bombs. Judge Vance, and the mailbomb that murdered him, are never far from my mind whenever I think or write about the Kaczynski case. Every aspect of my thinking about the Unabomber case was influenced, in some immeasurable way, by the fact and the means of Judge Vance's murder. Ted Kaczynski needed to know that.

After writing Kaczynski about my book and my judge, I fully expected never to hear from him again. But I did hear back again, and promptly. Kaczynski and I remained in touch, by letter and by phone, for more than a year after he first contacted me. The stack of materials he sent me is two feet tall and runs more than 2,000 pages. Although we've never met, we have exchanged about 150 pieces of mail and spoken by phone several times.

At first, the correspondence was almost exclusively about my book, but it soon turned to Kaczynski's legal hopes. In the early fall of 1998, Kaczynski asked me to try to find him a lawyer to represent him on a motion to vacate his guilty plea. I agreed, not realizing how hard that would be. As fall wore on, and I was unable to find the right lawyer for the Unabomber, it began to look as though I might come up empty. So Kaczynski asked me to work on a Plan B—to draft a motion attacking the guilty plea that he would file on his own, pro se. I agreed to write a draft, and three Vermont Law School students—Jason Ferriera, Ingrid Busson, and Rich Hentz—stepped forward to help. These three students volunteered their time—a lot of their time—to this project. These students worked their tails off on this project, yet they earned no money, no class credit, and no recognition from the law school. Although not lawyers yet themselves, these three exemplified the best in the calling that they were about to enter. I've never been prouder of law students.

Thus, we worked on two fronts. I still searched for a good lawyer—a seasoned lawyer with the experience and expertise to do the job right.

And the students and I researched and wrote a draft motion that Kaczynski could file in the event that no lawyer could be recruited. In December 1998, both efforts reached a culmination of sorts. We found Kaczynski a lawyer, one of my old law school professors. And we finished the draft pro se motion. I sent the draft to Kaczynski and to his new lawyer with a huge sigh of relief, confident that Ted was in good legal hands.

But it wasn't meant to be. As Kaczynski describes in his motion to vacate his guilty pleas, on April 3, three weeks before the filing deadline, the lawyer I had recruited backed out of the case. It was too late for new counsel to come in, and given the delays in the U.S. mails, it was too late for Kaczynski to run a draft past me or another lawyer. So he wrote the motion himself. He dusted off the draft my students so conscientiously prepared; he wrote the 123-page motion by hand, and he filed it. Our draft, which was designed to be a safety net of sorts, in case Kaczynski found no lawyer, served its purpose.

When District Judge Garland Burrell denied Kaczynski's motion to set aside his guilty plea, I called the prison to give him the bad news. Kaczynski's prison counselor agreed with me that it would be better for Kaczynski to hear of the denial from me rather than hearing it on the 6:00 news. As always, he took the result in stride, and we spent most of the conversation discussing where to go from there. At Kaczynski's request, I drafted an application for permission to appeal to the Ninth Circuit. That concluded my involvement in the litigation.

The Ninth Circuit granted Kaczynski permission to appeal. On the merits, the court split 2–1 in favor of affirming the guilty plea and sentence.

Most of what the public knows about the Unabomber case is wrong. But not for lack of media coverage. The media presence at the Unabomber's non-trial was massive. Seventy-five news organizations set up a center dubbed "Club Ted" near the Sacramento courthouse where the trial was to have been held. Media tickets to the courtroom went for $5,000 apiece, according to reporter Tom Nadau.

The mainstream media, despite its thorough and generally excellent daily coverage of Kaczynski's interaction with the criminal justice system, largely bought into Kaczynski's lawyers' spin on his travails. In particular, the daily press—which did not have access at the time to the court records upon which I rely—seemed to accept unquestionably these principles: (1) Kaczynski was a paranoid schizophrenic; (2) his lawyers acted properly in raising a mental illness defense regardless of their client's vehement objections; and (3) Kaczynski himself, not his lawyers, was responsible for the disruption of his trial. The chaos into which Kaczynski's trial plunged was blamed on Kaczynski's alleged manipu-

lation of the judicial process, rather than on his lawyers' ultimately successful manipulation and control of their client.

I believe this popular wisdom is wrong on all counts. First, I do not believe that the existing public record supports a conclusion that Kaczynski was suffering from any serious or organic mental illness, much less that he was so mentally ill that his lawyers' hostile takeover of the Unabomber defense was justified. My point is not to criticize the daily press; the reporters did the best job possible with the limited facts available to them. However, transcripts of the closed door meetings between Kaczynski, his lawyers, and the judge, present a different, more accurate picture of the Unabomber and his lawyers. That picture suggests that Theodore Kaczynski was unquestionably competent to stand trial and therefore was competent to make important decisions about his case. Kaczynski understood exactly what he was giving up in foregoing a mental health defense. And for him it was worth it, even though it virtually guaranteed a death sentence—which also was acceptable to him.

Second, I do not believe that Kaczynski's lawyers had any legitimate right to force their mentally competent client to stake his life on a mental illness defense. As long as he followed their instructions, the Unabomber's attorneys never doubted that he was mentally competent to stand trial. The fact that Kaczynski was mentally competent to stand trial meant that he was competent—and constitutionally entitled—to make important decisions about his defense: how to plea, whether to testify, whether to appeal, and whether to raise a mental illness defense. Given Kaczynski's decision months before trial that a mental illness defense was unacceptable to him, his lawyers were ethically obligated to either (a) honor their competent client's wishes, or (b) withdraw as Kaczynski's attorneys in time for another defense lawyer—one willing to follow his client's instructions—to take over the Unabomber's defense, and to do it at a time that gave the new lawyer time to prepare for trial.

Third, I believe that Kaczynski's lawyers, not Kaczynski himself, were responsible for disrupting the Unabomber trial. In the months leading up to the trial, Kaczynski's lawyers kept him uninformed about the defense they planned to raise. By the time Kaczynski figured out what his lawyers had planned, it was too late for him to change lawyers or, the judge ruled, to represent himself. Cornered by his lawyers and the judge, Kaczynski had only two ways to prevent his court-appointed lawyers from portraying him as a madman: to kill himself or to plead guilty. On the eve of his capital trial, Theodore Kaczynski made a serious suicide attempt. Then, failing suicide, Kaczynski was left with only one way to prevent being publicly cast as mentally ill. He pled guilty.

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Based principally on court documents and published accounts by first-hand observers of the events described, this is what I believe happened in the Theodore Kaczynski case.

B. The Crazy Hermit and His Lawyers

Soon after Kaczynski's arrest, the court determined that he lacked the money to hire a defense lawyer and therefore appointed Montana federal public defender Michael Donohue to represent him. Kaczynski described forming a quick and close relationship with Donohue. Five days after Kaczynski's arrest, the well known attorney J. Tony Serra wrote Kaczynski a letter in which he offered to represent him. Serra wrote: "My personal belief systems prompt me to volunteer my services to you.... I have done many cases with similar symbolic content. I would serve you loyally and well." Serra told Kaczynski that he viewed the case "as one where [Kaczynski's] ideology would be the crux of the defense (not insanity; not a 'whodunit')." After reviewing the letter, Kaczynski decided to continue to work with Donohue. However, Kaczynski remained in touch with Serra.

When it became clear that Kaczynski would be tried in California, federal public defender Quin Denvir was appointed lead counsel. Denvir asked the judge to appoint Judy Clarke, a passionate opponent of capital punishment, as co-counsel, which he did. A third lawyer, Gary Sowards, later joined the defense team. Sowards, a prominent specialist in mental illness defenses, seemed to be in charge of that aspect of the Kaczynski defense. Sowards had a leading role in selecting the defense mental health experts, and, like any good criminal defense lawyer, Sowards knew how to select experts who would give him the diagnosis he wanted.

Within the small community of experienced capital defense lawyers, Denvir, Clarke and Sowards are widely regarded by their peers as among the most competent. Long-time opponents of capital punishment, Denvir, Clarke and Sowards have for a professional lifetime put their principles first. Denvir and Clarke could have made far more money in private law practice. Both are federal public defenders—*capital* public defenders—by choice, and they are two of the best in the business.

According to the *Washington Post*, long in advance of trial—perhaps as early as May 1996—prosecutors and defense lawyers had agreed that Kaczynski was mentally competent to stand trial. The defense lawyers were right: Kaczynski clearly was competent to stand trial. Four decades ago the Supreme Court articulated the legal test for competency: To be tried, a criminal defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." Theodore Kaczynski obviously met this test.

Beginning before his arrest, and continuing until after he pled guilty in January 1998, Kaczynski's family portrayed him as seriously mentally ill. After Kaczynski's arrest on April 3, 1996, the Kaczynski family's lawyer cited Kaczynski's alleged mental illness as a reason the government ought not seek the death penalty in the case. "In his correspondence," the family's lawyer wrote to the prosecutor, "Ted projects his own feelings of anger, depression and powerlessness onto society at large—a society of which he has never really been a member. He blames these ill effects on a wide variety of external factors, including childhood classmates, teachers and his family as well as the media, chemical and electronic mind control, education, science and technology."

On November 12, the first day of jury selection in the Kaczynski case, the *Wall Street Journal* published an article headlined *Alleged Unabomber's Attorneys Press For "Mental Defect" Defense.* The article cited Kaczynski's lead defense attorney as saying that his client's refusal to be examined by prosecution psychiatrists might be due to paranoia.

On November 30, the Newark, New Jersey *Star-Ledger* published a story headlined *Contrary Kaczynski Hampers Defense.* The newspaper reported that "Kaczynski, based on claims put forward by his attorneys, suffers from a classic case of paranoid schizophrenia, an irreversible disease characterized by a preoccupation with one or more delusions, or with frequent hallucinations related to a single theme." The definition of the disease listed in the leading professional textbook of psychiatrist disorders states: "The combination of prosecutory and grandiose delusions with anger may predispose the individual to violence."

As a result of this extensive publicity, everyone seemed to know about the defense Kaczynski's lawyers were preparing for him—everyone, that is, except their client. He would first learn it during jury selection.

The process of selecting a jury was prolonged, beginning on November 12 and running through December 22. Because of the extensive pretrial publicity the case had received, and the need to "death qualify" the jury (i.e., to weed out prospective jurors whose personal feelings about capital punishment might prevent them from fairly considering the sentencing evidence), 600 jurors were summoned; of these, 450 jurors filled out extensive questionnaires. One hundred-eighty-two jurors were brought into court for individual questioning by the prosecution, defense and judge. Only at that point did Kaczynski learn that his lawyers intended that mental illness would be a significant feature of his trial.

It appears that prior to November 21, 1997, Kaczynski was not present in court during a single hearing on any of the motions surrounding the defense counsel's filing of the notice of intent to rely on expert psychiatric evidence. On November 21, 1997, the court directed lawyers

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for the defense and prosecution, as well as Kaczynski himself, to meet and confer concerning the extent to which the defendant would allow himself to be examined. At that hearing, defense counsel advised the court that they "were willing to speak with Mr. Kaczynski and encourage him to engage in any testing which the government experts find necessary." The court questioned Kaczynski at the conclusion of the proceedings.

On November 25, the judge addressed the government's motion to preclude expert mental defect evidence during jury selection; at that point, according to news reports, Kaczynski became noticeably agitated. He became agitated because he had just discovered that his lawyers had released a psychiatric report to the prosecution and public. He slammed his pen down on the defense table, where it skittered.

Kaczynski's surprise and anger during jury selection seemed genuine to perceptive observers. And if, as Kaczynski asserts, he was kept in the dark about trial strategy, this is consistent with one model of capital defense lawyering, where the idea is to "manage"—i.e., control—the client who resists following the attorneys' best judgment. Recalcitrant clients who insist on fruitless strategies may bend to arguments, threats, promises or other forms of pressure. Almost always, such techniques succeed in persuading clients whose lives are at risk to try and minimize the risk.

By keeping their client in the dark about the defense they planned to present, Kaczynski's lawyers precluded his ability to exercise certain options available to any criminal defendant. Kaczynski could have replaced his court-appointed lawyers with a lawyer willing to present the defense he wanted. Such an attorney, J. Tony Serra, was in fact ready and willing to do exactly that. Or, Kaczynski could have exercised his constitutional right to act as his own lawyer at trial, if he had adequate time to do so.

As it turned out, Kaczynski later tried to exercise both of these options—but Judge Burrell ruled that he did so too late. The judge ignored the fact that the *reason* Kaczynski made his lawful requests "too late" was because his own court-appointed attorneys manipulated him into that position, forcing his hand at a critical moment in the proceedings.

On December 5, 1997, the Montana cabin Kaczynski had built and lived in for more than two decades arrived, on a flatbed truck, in Sacramento for his trial. The truck, towing the cabin shrouded in a tarp, had departed Montana three days earlier. The driver, fearful of leaving his rolling cargo unguarded, slept in the truck for two nights and even ate his meals there; the driver made the 1,110–miles journey driving only at night. The truck arrived trailed by a media caravan. According to the

Associated Press, Kaczynski's lawyers paid to have the cabin transported to Sacramento to provide the trial jury with a window into his mind. The lawyers "say it is the most tangible proof that Kaczynski is mentally ill." Until needed as a defense exhibit at the trial, Kaczynski's Montana home would be kept at Mather Field, an old Air Force base near Sacramento.

The media drumbeat continued that Kaczynski's attorneys knew their client was mentally ill. The *Washington Post* reported that "the lawyers for Theodore Kaczynski have a problem, and the problem is their client. His attorneys believe Kaczynski is mad. So do at least two psychiatrists they hired." The message that Kaczynski was crazy influenced the way the outside world perceived and understood the coming battles between Kaczynski and his attorneys. Who would favor a madman's attempt to control his defense? Who would not support the poor lunatic's lawyers' attempts to call the shots and save his life? Kaczynski's attorneys took on a heroic role in the media. Soon, when the centrifugal forces of Kaczynski's resistance to his lawyers' pressure would tear the defense apart, who would side with the madman and against his lawyers? By now, the *New York Times* was speculating about the existence of "a serious conflict between Mr. Kaczynski and his lawyers over trial strategy." The day before, the judge had held an unusual closed door meeting with Kaczynski and his counsel, without any prosecutors present. The judge said afterward that the meeting "involved matters of attorney-client confidentiality."

C. Behind Closed Doors: A Fragile Truce

In early December, Theodore Kaczynski wrote a series of letters to the judge, prompting him to hold a series of extraordinary closed door meetings with Kaczynski and his lawyers, from which the prosecutors were excluded. Although the meetings focused on the deteriorating relationship between Kaczynski and his attorneys, they also dealt with Kaczynski's mental competency to stand trial. The competency issue and the representation issue were closely linked, at least in the minds of Kaczynski's lawyers. During the meetings, it became evident that the defense lawyers equated Kaczynski's "mental incompetence" with his resistance to their determination to portray him as mentally ill.

On December 18, there occurred an "unexpected" (as described by the court reporter who recorded it) closed door session between the judge and Kaczynski's lawyers. The judge, defense counsel and Kaczynski were present; the prosecutors were not. At that hearing, lead defense attorney Quin Denvir spoke of "a major problem" that had come up between Kaczynski and his lawyers. Denvir told the judge: "You just need an opportunity to explore with Mr. Kaczynski and counsel where things are and try to figure out where to go from here. We are all unhappy and sad

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to be in this position, but we are in the position." Denvir also addressed the issue of his client's mental competency to stand trial. Denvir said: "We are not requesting a hearing or inquiry into the issue of competency," and, second, that "as to the question of competency, we were fairly confident that Mr. Kaczynski understood the nature of the proceedings and the role of counsel and the Court and that we had been able to, up to that time, to accommodate his mental illness in preparing and presenting the defense."

Defense counsel also addressed, apparently for the first time, their views on the appropriate allocation of decision-making power and responsibility between attorneys and their clients. A footnote to their brief noted that prevailing American Bar Association standards on the control and direction of a case provide that "certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." The ABA standards provide that the decisions are to be made by the accused (after full consultation with counsel) include what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf, and whether to appeal. However, the text of defense counsel's brief argued that "the decisions whether to ... present a defense based on ... defendant's mental condition [as it] bears on guilt fall squarely within the category of strategic decisions that ultimately must be decided by trial counsel." Thus, defense counsel argued that they, not a client concededly competent to stand trial and to make the important decisions in his case, had the authority to stake Kaczynski's life on a mental illness defense.

Kaczynski himself disagreed, and he said so in a series of letters to the judge. In the first, Kaczynski set out three possible options that could satisfactorily resolve the conflict he was having with his lawyers: (1) proceed with current counsel under certain conditions; (2) obtain substitute counsel; or (3) represent himself, "preferably with an attorney appointed to provide [him] with advice." After receiving these letters, the judge ordered the secret, in-chambers meeting with Kaczynski and his lawyers; the prosecutors were excluded from these meetings. The meetings ended up taking two days.

The court observed that the closed-door meetings were necessary "to make an inquiry adequate for the court to reach an informed decision about Kaczynski's concerns with appointed counsel's representation. These concerns involved attorney-client communications." The court also sought to make clear that defense counsel were not questioning Kaczynski's competency. In addition, the court determined that there was "no need to give Kaczynski the warnings required [in order for him to discharge his defense counsel and represent himself at trial]."

On December 22, the court held another closed door hearing. There, Kaczynski accused his lawyers, particularly Gary Sowards, of deceiving him about their intent to use a mental illness defense. The defense lawyers did not exactly admit to their client's allegations, but they did not exactly deny them, either. The lawyers were evasive; Kaczynski was not. At the December 22 hearing, Kaczynski and his attorneys, with the court's assistance, reached an agreement over the mental illness defense. Kaczynski's lawyers would abandon their efforts to present expert evidence in support of a "mental disease or defect" at the guilt/innocence phase, but they reserved the right to present such evidence at the penalty phase. Kaczynski's lawyers may have been displeased about this compromise, but it did create the possibility of delaying the conflict for a while.

The question of Kaczynski's mental competency to stand trial also arose at the December 22 hearing, at least hypothetically. The judge ruled that there was no evidence that Kaczynski was incompetent; rather, the court stated, *"I personally have no doubt about your competency,"* and, *"I feel that Mr. Kaczynski is competent."*

The following exchange occurred (with my italics added):

THE COURT: I feel that Mr. Kaczynski factually and legally understands everything that has occurred during the proceedings against him; that he understands he has to make choices. One of the choices that he apparently has made is the abandonment of the [mental illness] defense. That abandonment may very well end up with a guilty verdict in this case.

You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But based upon the intelligent approach he has used in dealing with the issue, the eloquent manner in which he has voiced his opinions, it just *seems clear to me that he would rather risk death than to assert that as a defense.* Not to say that that's a necessary result—

THE DEFENDANT: (Nods head up and down.)

THE COURT:—because you would have to go to the sentencing phase. But it just seems that the only way he would have a chance of avoiding a guilty verdict . . . would be to assert the [mental illness] defense. But he's willing to give that up.

THE DEFENDANT: Yes. Yes, sir.

THE COURT: *But I don't see his abandonment of that defense as something that evidences incompetence.*

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As to Kaczynski's ability to "understand the nature and consequences" of the trial proceedings—the core of mental competency to stand trial—Kaczynski's lead defense counsel said, *"I don't think there's any doubt about that."* Denvir explained what he *meant* when they suggested, always hypothetically, that Kaczynski might possibly be incompetent: "our feeling ... is that any discussion of competency was merely raised in the context of if Mr. Kaczynski were to proceed with what he wanted to do in representing himself. I think that's what raised the question ... *So any questions of competency were raised only on the hypothetical that he was going to seek to have us discharged and represent himself.*"

As the prosecutor put it later, "the defense argument goes something like this: that in part the defendant is not competent, or they question his competence, because he refuses to go along with the defense that they have chosen. They have kind of equated his refusal with [in]competence."

This circular reasoning cannot be right, and it isn't. Professor Richard Bonnie is correct that "disagreement with counsel is not, in itself, evidence of incompetence. Counsel's advice may ... fail to take adequate account of the defendant's values and preferences ... unless the defendant is decisionally incompetent, his preferences bind the attorney." In fact, "the purpose of the competence requirement is to establish the minimum conditions for autonomous participation. From this standpoint, the necessary conditions are ordinarily satisfied if the client is aware that she has the prerogative to decline the attorney's advice, and is able to understand the nature and consequences of the decision."

The transcript of the December 22 hearing demonstrates that the negotiated truce between Kaczynski and his lawyers was tentative and provisional. The judge said: *"Why don't we try it this way first, to see if it works. And if you have difficulty with it, I think you know how to reach me."*

Thus, two days of closed door meetings addressing Kaczynski's competency and his relationship with his attorneys had produced a fragile truce. At the guilt/innocence phase of trial, defense lawyers would not present expert evidence that Kaczynski was mentally ill, and on that understanding he would continue with those lawyers. Also, because Kaczynski had agreed not to fire his attorneys, they would not challenge Kaczynski's competency to stand trial.

The truce didn't last, and probably couldn't, given the fundamentally antithetical positions taken by Kaczynski and his lawyers. Four days after the lawyers' abandonment of plans to raise a mental illness defense at the first phase of Kaczynski's bifurcated trial, his lawyers notified the

prosecution that if Kaczynski were convicted, they "plan to try to spare him a death sentence by arguing in the penalty phase that he is mentally ill." Further, defense counsel told the prosecution informally that they intended to introduce lay testimony at the guilt phase of trial to demonstrate Kaczynski's alleged mental illness. For example, the defense might show the jury photographs of Kaczynski "before and after" he became a hermit in the wilds of Montana. Kaczynski did not learn of these developments until the evening of Sunday, January 4, the night before the trial was scheduled to begin.

Thus, notwithstanding the withdrawal by Kaczynski's lawyers of their notice of intent to introduce *expert* evidence about Kaczynski's mental illness at the first phase of Kaczynski's trial, the lawyers still planned to present *non-expert* evidence of Kaczynski's mental condition. The stage was set for another confrontation between Kaczynski and his counsel over who controlled the case.

D. The Truce Collapses, and the Unabomber Tries to Fire His Lawyers

On what had been scheduled as the opening day of Theodore Kaczynski's capital murder trial, the drama began the instant Kaczynski entered the courtroom. There, in the front row, with his arm draped around their 80–year-old mother Wanda, was Ted's brother David. The *Washington Post* reported that "it is believed to be the first time the two brothers have been face-to-face since David alerted the FBI two years ago that his brother might be the elusive Unabomber." Kaczynski, refusing to acknowledge the presence in court of his brother and mother, sat with his back to them. Wanda and David held hands and wept, as Ted sat only a few feet away from them.

Also in the courtroom, on the front row behind the prosecution table, sat two survivors of the Unabomber's bombs: Charles Epstein and David Gelernter. David Gelernter, a Yale computer sciences professor, had been outspoken in his views that Kaczynski was an evil coward who deserved to die.

Just after the judge took the bench to begin the trial, Kaczynski addressed the judge. Kaczynski, dressed in a bulky knit sweater and blue pants (an observer would later write that he looked "more like an aging grad student . . . than the wild-haired hermit who was arrested nearly two years ago,") clutched an envelope as he spoke. Kaczynski said: "Your honor, before these proceedings begin, I would like to revisit the issue of my relations with my attorneys. It's very important."

The judge ushered Kaczynski and his lawyers into his chambers for meetings that dragged on so long that the jurors were sent home. For the next four-and-a-half hours, Kaczynski and his counsel met with the

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judge in closed session. The *New York Times* observed that "it was clear from the defense lawyers' remarks, in a brief courtroom session after the closed door proceeding, that Mr. Kaczynski was continuing to rebel against his lawyers' efforts to portray him as insane." According to the redacted transcript of the January 5, 1998 meeting, it was here that the question of Attorney J. Tony Serra's taking over Kaczynski's defense was raised. Serra, who had inspired a 1989 movie, *The True Believer*, starring James Woods, is a long-time radical lawyer known for his unpopular clients, his ponytail, and his marijuana habit. Serra's clients have included Hell's Angels and Black Panthers. He also successfully represented two inmates on death row. According to news reports, Serra's office had a resume painting him as as a legal "warrior" who has served his profession well, intent on "defending society's outcasts" and who believes the 1960s were the "golden age of law."

The judge asked Kaczynski: "What is your goal, Mr. Kaczynski, your ultimate goal as far as Mr. Serra is concerned?" Kaczynski's reply was redacted, according to the transcript, "for attorney-client privilege and representation matters." The judge noted that one issue on the table "is a presentation issue focused on a change of counsel, possible change of counsel, at this stage of the proceeding.... What I think I should do is maybe appoint another lawyer to assist Mr. Kaczynski with what he has characterized as a conflict-type issue. I'm saying that in front of you. And then that way he would have a lawyer to communicate with the court on these types of issues. He could communicate either personally or through a lawyer ... I don't foresee that the communications that Mr. Kaczynski has just related should be communication that should cause a breakdown in the attorney-client relationship."

Denvir as lead defense counsel replied: "It may be, though, your honor, to Mr. Kaczynski it has caused that or could cause that if it's confirmed. I think that's what he may be conveying to you. I'm not sure ... your honor, one thing I think Mr. Kaczynski has said is that he would like to know whether Mr. Serra would in fact be available to represent him, and the court might consider having—calling Mr. Serra or having us call him to see if he could make himself available on short notice to resolve that question for Mr. Kaczynski."

The judge then asked Kaczynski: "Do you want me to communicate with Mr. Serra's office, Mr. Kaczynski, as your attorney has indicated?" Kaczynski responded: "I think that would be a very good idea." Lead defense attorney Denvir then asked Kaczynski: "Would you like that? Would that be helpful?". Kaczynski responded: "Yes, it would." The court then held a telephone conversation off the record. The judge then observed, "His office doesn't open until around 9:00. The message center that receives messages for the office didn't have a pager number or any other means of communicating with the people in the office."

While waiting for Tony Serra's office to open, Denvir opined that the problem between Kaczynski and his lawyers wasn't simply a failure to communicate. It was more basic than that. Denvir: "I think without going into a lot of detail about it, I think that what you have termed a communication problem may be a much deeper one that goes into the representation problem. I think that Mr. Kaczynski's feelings may be that there is a much more fundamental breakdown in the attorney-client relationship. I'm not sure of that and—." Kaczynski: "Yes."

A moment later, the court told Kaczynski: "You have fine lawyers. I've seen a lot of lawyers appear in front of me in criminal cases . . . " Kaczynski: "Your honor, I do not question my attorneys' abilities." The court: "Okay." The court asked whether Kaczynski or his lawyers had "any problems if I call a [new] lawyer right now? . . . I am thinking about appointing another lawyer." Attorney Denvir replied, "I think it would be very helpful. I think Ted would like that." Kaczynski interjected: "I think that would be good."

The judge raised the question of delay, saying to Kaczynski: "I'm assuming that when I communicate with Mr. Serra's office, it's possible that this matter could be resolved and we could proceed on with the trial. . . ." But Kaczynski responded: *"I don't think it's likely that the matter can be resolved that easily. My lawyers have suggested that I should make it clear to you what I want. And what I'm looking for is a change of counsel."*

Not long afterward, the court said: "I just spoke to a secretary in Tony Serra's office. . . . She could not verify whether or not he's even going to come in the office. She thinks it's possible that he's on vacation right now and couldn't give me details about that." Later, the court received a message from Serra's office, that he was abroad, and no one was sure exactly when he would be back. The attorney sending the message further stated that Serra was interested in the case but had a conflict with the federal defender's office and unequivocally withdrew his offer to represent Mr. Kaczynski because of the conflict.

However, the judge came up with the name of another attorney to represent Kaczynski in his dealings with his current counsel and with the court: Kevin Clymo. Attorney Clymo arrived, met with the group, met with Kaczynski, and reported back: "In my conversations with Mr. Kaczynski, I do not get the impression that he has a desire to represent himself. . . ." For his part, Kaczynski stated, " . . . [T]he possibility of change of representation or representing myself is still very, very nebulous. There's still no definite intention there. It's just a possibility that may arise after present discussions continue. So I don't think change of counsel is yet the issue, though it may become an issue."

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While Kaczynski was out of the room, the judge told defense attorneys Denvir and Clarke: "I wanted to chat with you about that [mental competency] issue, because it's my discernment that you had previously indicated that if Mr. Kaczynski took a position that frustrated the defense you were going to assert on his behalf, that maybe that would indicate the need for a competency hearing. And I'm assuming, based on everything I heard, that Mr. Kaczynski may not agree with the defense you are asserting—at least you contemplate asserting. . . ." Attorney Denvir: " . . . There's the possibility, in my mind at least, of the need for a competency hearing, but I'm not in a position, I don't think we are, to tell the court that it is necessary at this time. We may know better after we explore the communication questions and these other questions with Mr. Clymo and Mr. Kaczynski to advise you in that regard." When attorney Clymo reported that he was making progress, but needed more time, Clymo suggested that, "with regard to these proceedings in open court, I think it would be appropriate to continue to have Ms. Clarke and Mr. Quin [Denvir] represent Mr. Kaczynski's interest with the government in public on the record. Is that all right with you?" Kaczynski: "That's agreeable to me."

Kaczynski's sense of the matter was that Clymo was in effect acting as an advocate *for* his lawyers (Denvir and Clarke) and *against* Kaczynski. To Kaczynski, Clymo's role seemed to be to persuade Kaczynski to accept what his attorneys wanted rather than vice versa. Among other things, Kaczynski claims, Clymo tried to frighten him away from requesting representation by Tony Serra; Clymo went so far as to say he would have doubts about Kaczynski's mental stability if he asked to be represented by Serra.

The judge then denied a motion from the prosecution seeking to preclude Kaczynski from introducing non-expert testimony to show that he had a mental defect. The judge's order implied that Kaczynski's attorneys would be allowed, over their client's vehement objection, to rely on non-expert testimony in evidence to establish that Kaczynski suffered from a mental defect.

The redacted transcripts of the closed-door meetings are confusing and disjointed. One plausible interpretation is that Kaczynski had agreed to continue with his current counsel in control of the defense. Another, equally plausible interpretation is that Kaczynski had put the court and his lawyers on notice that their control of his defense was unacceptable. My own best guess is more complicated. I think Kaczynski, his lawyers and his judge were all honestly seeking a compromise that would allow the trial to proceed. They all came away from the meetings with very different perspectives about what they thought had been agreed upon in those meetings. When subsequent events exposed the fault-lines of those rival interpretations, the Unabomber defense team fell apart.

The pressure on Kaczynski to acquiesce in what his lawyers and judge wanted him to do must have been intense. He was alone. He was isolated. He was a prisoner. He was vulnerable. He must have found it all but impossible to resist the pressure from his lawyers and the judge who had appointed them to represent him. The strain was beginning to show. During the closed-door meetings with the judge on January 7, Kaczynski indicated that he was simply too tired to argue his own case and had no choice but to continue with his lawyers. He said, "Your honor, if this had happened a year and a half ago, I would probably have elected to represent myself. Now, after a year and a half with this, I'm too tired and I really don't want to take on such a difficult task."

At the conclusion of this, the second day of closed-door meetings, Kaczynski stated in open court, for the first time, that he did not want his lawyers to pursue a mental health defense. But the judge told Kaczynski several times that his attorneys are "in control" of his case and that they would be allowed to introduce non-expert testimony about Kaczynski's alleged mental state.

Although Judge Burrell announced in open court that Kaczynski had agreed to proceed with his present lawyers, the court also explained that he had received a communication from J. Tony Serra, offering to represent Kaczynski for free. Serra wrote: "If he is successful in recusing his present attorneys, I'm willing to serve on his behalf," according to a note the judge read in court, and "I wish him well whatever way it goes." Then, still in open court, Kaczynski told the judge, "I think I would like to be represented by [Serra] . . . since he had agreed he was not going to pursue a mental health defense." Kaczynski added that Serra would be able to meet with him next week, but conceded "he would need considerable time to prepare."

Treating Kaczynski's request as a motion to substitute his present counsel with Serra, the judge told Kaczynski, "the motion is denied." The judge reiterated his prior rulings that it was too late for Kaczynski to change lawyers, reminding Kaczynski that a jury had been selected, witnesses were ready to go, and the trial was about to begin. The *Washington Post* described Kaczynski's reaction: "The alleged Unabomber looked at the judge for an instant, and then began rapidly writing on his legal pads." During the afternoon proceedings in open court, Kaczynski was "alternatively scribbling on his legal pads, shoving notes at his attorneys, or whispering animatedly at them. His brother, David, and mother, Wanda, attended the session. But Kaczynski did not look at them."

Also on January 7, the prosecution filed a brief arguing that the decision to pursue or forego a particular line of defense belonged to the defendant as long as he was mentally competent to stand trial. The

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prosecution argued that because the Sixth Amendment to the Constitution grants to the accused personally the right to raise his defense, "the government believes that the decision to forego a legally available defense rests with the defendant," rather than with the attorney for the defendant. The prosecution explained: "Any absence of a finding that the defendant is [mentally] incompetent, which defense counsel and the court have expressly and repeatedly rejected, the government sees no reason why the defendant cannot decide whether to pursue a mental defect defense during both the guilt and penalty phases of trial, as long as he is fully advised as to the wisdom of doing so and the potential consequences of ignoring his attorneys' advice. Once the defendant makes a knowing and intelligent decision concerning the defense he wishes to pursue, however, the government sees no reason why current counsel cannot continue to represent him. Aside from differences over the mental defect defense, there can be no doubt that counsel has been able to represent the defendant vigorously. Indeed, whatever the disagreement between the defendant and his counsel, it is unlikely that substitute counsel could put on a more effective defense or more vigorously represent the defendant."

The judge was unmoved. He informed Kaczynski that counsel controlled "major strategic decisions" in the case, including the decision whether to put on non-expert mental health testimony; Kaczynski said: "I've become aware that legally I have to accept those decisions whether I like them or not. So I guess I just have to accept them."

My view is that the prosecution's brief was correct and the judge's rulings were wrong, although not entirely implausible under the law. What was missing from the judge's reasoning was his failure to ask the question: In the months leading up to jury selection, did Kaczynski's lawyers keep him in the dark about the defense they were determined to raise? If not, then it was plausible for the court to refuse to allow Kaczynski to change the rules now, on the eve of trial. But, if the lawyers had misled their client as he asserted, then the fairest course would be to do one of two things: (1) require the lawyers to follow their mentally competent client's decisions about what defense to raise, or (2) dismiss the jury, put the trial on hold, and replace Kaczynski's attorneys with lawyers more compatible with Kaczynski's values and beliefs. Since delay appeared out of the question for this relentless judge, the most reasonable option was to ask Kaczynski and his lawyers the questions: what did Theodore Kaczynski know about his lawyers' plans, and when did he know it? If the judge ever asked these questions, it does not appear on the transcripts of the public court records.

By the end of the day of January 7, 1998, Theodore Kaczynski must have felt especially alone. On the eve of trial for his life, his only institutional allies in the courtroom—his lawyers—had kept him in the

dark. Now, the judge had authorized his lawyers to raise the issue of mental illness anyway, regardless of their client's wishes. Firing his lawyers and representing himself was still an option, but for the legally unschooled Kaczynski it must have been a terrifying one. He never wanted to represent himself; he wanted his lawyers to provide the assistance of counsel guaranteed him by the Constitution. Also, the judge didn't seem to want him to represent himself; although the law gave Theodore Kaczynski the right to represent himself, the judge might just deny him that right—and, if so, there would be nothing he could do to prevent his attorneys from portraying him as mentally ill.

E. Meltdown

Sometime during the night of January 7, Theodore Kaczynski tried to kill himself in his jail cell. He tried to hang himself with his underpants. Kaczynski's attempted suicide seemed to many observers the final confirmation of his mental illness. I don't think so. Consider it from Kaczynski's point of view. Under the circumstances, suicide was the only rational option open to him. He was utterly alone. His lawyers had betrayed him by keeping him in the dark until it was too late for him to replace them or to defend himself at trial without a lawyer. The law-challenged judge seemed poised to refuse even to allow him to exercise his constitutional right to fire those lawyers and represent himself. For the next few months, he would have to sit in court, listening to his own lawyers inexorably build a case that he was mentally ill—and there was absolutely no way he could stop it. Except for suicide.

Kaczynski's attempted suicide also was a communication directed at his lawyers. Kaczynski claims that his counsel told him that suicide was acceptable if he found life imprisonment unacceptable. The response conveyed by his hanging was equally to the point: Your defense is unacceptable. Yet Kaczynski's lawyers never got the message in their client's communicative act. Their determination to represent Kaczynski as mentally ill remained undeterred.

I followed the meltdown of the Kaczynski defense from my home in Vermont, a continent away from the Unabomber trial in Sacramento. I don't like to second-guess the tactical decisions made by trial lawyers in capital cases (especially high profile capital cases), particularly when I respect the lawyers as much as I do Kaczynski's lawyers; those lawyers always know facts about their case that can't be known by outside observers or commentators at the time. Still, the Unabomber's lawyers seemed to me to be denying their client his day in court.

Thus, I did something I have never done before: I wrote about a high-profile capital case that was still in trial. In the Rutland, (Vermont) *Herald*, and later in the *National Law Journal*, I published op-ed pieces

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arguing that Theodore Kaczynski was being denied his day in court by his own lawyers. I think I understood why Kaczynski's attorneys had seized control of his defense: they were trying to save his life—from himself, if necessary. But, it seemed to me, by saving his body by any means necessary, his well-intentioned lawyers were destroying his life and his life's work, his manifesto.

From my far-off observation perch in Vermont, I wondered who would crack first: Kaczynski or his lawyers. I didn't think Kaczynski would; he had already sacrificed so much for his political ideology, and I didn't see him giving it all up now to stake his life on a mental illness defense he abhorred. And, given that Kaczynski was obviously competent to stand trial, I couldn't see Kaczynski's lawyers abandoning him to represent himself rather than allow him to control the direction of his own defense. Yet, as the Unabomber non-trial entered its next level of weirdness, that's exactly what his lawyers seemed to do.

Over the past weeks, Kaczynski's choices had been narrowing progressively. Now, he had only one realistic option to avoid the mental illness defense: fire his lawyers and represent himself. Kaczynski clearly did not want to serve as his own attorney; he wanted—and understood that the Constitution guaranteed him—the *assistance* of counsel in presenting to his jury, as a defense against capital punishment, an ideological defense rather than a mental illness defense. But, if representing himself was the only way to avoid a mental illness defense, that was what he would do. Kaczynski hoped that the law gave him the right to fire his lawyers and represent himself. Kaczynski understood the law better than his judge understood it.

When court convened at 8:00 a.m. on January 8, neither the trial judge nor the lawyers were aware of the suicide attempt the night before. The judge had said that opening statements would begin that morning, and the prosecutors were preparing to lead off. During the morning's proceedings, no mention was made of Kaczynski's suicide attempt. Around half an hour after court opened on January 8, defense attorney Judy Clarke noticed a red mark on Kaczynski's neck. That was the first inkling Kaczynski's lawyers had of the suicide attempt, but they did not learn of the facts until after the hearing concluded. The proceedings began, however, not with opening statements, but with Clarke's announcement that Kaczynski now wanted to represent himself. It was, the lawyer said, Kaczynski's "very heartfelt reaction to the mental defense, a situation which he simply cannot endure." He "has lived with this fear all his life," she said, "that he would be described as mentally ill." He would prefer to conduct his own defense and he was ready to proceed immediately.

As for the defense lawyers, Clarke explained that they could not, consistent with their ethical responsibilities, continue as Kaczynski's attorneys if they were forced to forfeit a mental illness defense. The lawyers did not explain how their ethical duties allowed them to abandon a capital client on the day of trial—a client they had represented for a year and a half, a client who asserts they had kept him firmly in the dark about their intentions until it was too late for him to do anything other than represent himself. According to Kaczynski, what had happened was simple: in their game of chicken with their client, Kaczynski's lawyers had counted on him blinking. He didn't. As Clarke told the judge that Kaczynski insisted on representing himself, Kaczynski's mother Wanda wept, and his brother David appeared shaken.

On the other hand, perhaps Kaczynski's lawyers were gambling that the judge would not allow them to withdraw at this late date—that the judge would, in other words, deny their client his constitutional right to self-representation. The judge had already ruled that counsel, not the client, controlled the defense. Good defense lawyers know their judges, and these were two very good defense lawyers. They might well have been counting on the possibility that the judge might ignore the law and refuse to allow Kaczynski to represent himself at the trial.

Such a ruling would have been attractive to the defense lawyers—indeed, it would have given their client an insurance policy of sorts. The lawyers would remain on the case and in control of the defense; if their mental illness defense worked, and Kaczynski's jury voted to spare his life, then he would be sentenced to life imprisonment. If their mental illness defense failed, and the jury sentenced Kaczynski to death, then the judge's erroneous ruling (that Kaczynski did not have a right to self-representation) would require the appellate courts to throw out Kaczynski's conviction and order a whole new trial: a second bite at the apple. Either way, the lawyers stood to win by the judge ruling wrongly that Kaczynski could not represent himself at trial. Either way the client "wins," but at the price of day after day listening to his own lawyers portray him as a paranoid schizophrenic.

This entire scenario depends, of course, on the judge's willingness to disregard the law and deny Kaczynski his constitutional right to self-representation. As it turned out, that's exactly what the judge would do in the end.

Kaczynski's lawyer stressed, again and again to the judge, that Kaczynski was ready to proceed with the trial "*without any delay*." The defense lawyer emphasized: "Mr. Kaczynski has advised us he is ready to proceed [as his own lawyer] *today*. His request to proceed on his own behalf *would not delay the [trial].*" And: It is "*not Mr. Kaczynski's request that anything be delayed* . . . He is prepared in the sense that he

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I belabor this point—that Kaczynski was not seeking any delay of his trial—because, as subsequent events showed, the judge didn't get it. But the judge, on his own initiative, ruled that Kaczynski's mental competency to stand trial and to represent himself would have to be examined and decided. The trial would have to be delayed, again.

The judge's impatience was palpable. The court said Kaczynski had told him "categorically" that he did not want to represent himself—a bit of an overstatement, and one that understandably left Kaczynski "shaking his head in disagreement." Then the judge seemed to soften, acknowledging that he may have forced Kaczynski into it by ruling that he could not prevent his lawyers from presenting a mental illness defense.

The judge threatened to send Kaczynski to a mental institution for thirty days of observation unless Kaczynski cooperated with the psychiatric exam. Kaczynski agreed to cooperate. The message of the judge's anger and his actions could not have been lost on Kaczynski. One need not be paranoid to understand what was going on: The judge was angry at Kaczynski for exercising his constitutional right of self-representation. None of the lawyers in the case seriously believed that Kaczynski was even arguably incompetent to stand trial.

Why, then, did the judge order another delay in the trial for a psychiatric examination that had a foregone outcome? I don't know, because I can't read the judge's mind. However, I suspect that he was trying to buy himself some time to figure out what to do about Kaczynski's invocation of his right to self-representation. It should have been an easy call: Kaczynski had invoked his right, and he was ready to proceed with the trial "without any delay"—immediately. The judge should simply have granted Kaczynski's request and let the trial begin. Or, he could, and I believe *should*, have dismissed the jury and given Kaczynski—or J. Tony Serra—time to prepare to present the defense to which Kaczynski was entitled. That, however, was unacceptable to this judge, who seemed almost obsessed with his felt need to proceed. Indeed, he seemed oblivious to the risk that his rulings had made a guilty verdict extremely vulnerable to reversal by an appellate court, which would mean more delay—a retrial with a new jury.

The judge appeared determined to search until he found a plausible ground for preventing Kaczynski from serving as his own lawyer. Journalist William Finnegan suggested a possible explanation. As he saw it, the court seemed haunted by the experience of Judge Lance Ito in the

O.J. Simpson trial, and was determined not to allow the Unabomber trial to become a prolonged circus. Honoring Kaczynski's right to self-representation—and his right to put on an ideological defense—would have risked bringing upon Judge Burrell the wrath that had befallen Judge Ito. In short, even if his rulings laced the trial record with error that would require reversal by an appellate court, at least the proceedings in Burrell's court *would* be dignified—with the defense lawyers firmly in control of their potentially disruptive client.

Thus, perhaps the judge needed time to think. He needed the time-out from the trial to come up with a credible reason for denying Kaczynski his constitutional right of self-representation—preferably some reason that could be blamed on Kaczynski himself, and not upon his attorneys.

At the time the judge ordered the psychiatric evaluation, he was unaware that Kaczynski might have attempted suicide. After court had been recessed, the Sacramento sheriff's department announced that U.S. Marshals had reported at midmorning that Kaczynski had a red welt on his neck; he also had arrived at the federal courthouse the preceding day wearing his jail uniform without his underwear. Every day before court began, Kaczynski changed from his jail uniform into civilian clothes. He was also strip-searched. According to the *Washington Post*, Kaczynski told the U.S. Marshals he had lost his underwear in the shower after they noticed it missing. Eventually, the underwear was found inside a smaller plastic bag inside Kaczynski's trash can. According to a sheriff's department spokesman, "The underwear appeared to be stretched." Until the suicide attempt, he said, Kaczynski had been a "model prisoner."

Outside the courtroom, reporters asked Kaczynski's lawyers why he now appeared willing to cooperate with psychiatric testing. Lead defense attorney Quin Denvir gave a blunt answer: "He has no choice."

On the afternoon of January 9, the judge gathered the parties together to see if they could agree on "a psychiatrist to conduct a study and examination of Mr. Kaczynski to determine his competency to stand trial." The court said that the examination would occur in the Sacramento jail only if Kaczynski cooperated: "If he's not going to cooperate, he will be on a plane, and I will fly him to a psychiatric institution immediately." Kaczynski would be examined by North Carolina prison psychiatrist Dr. Sally Johnson, who had tested the competency of John Hinckley, the man who had attempted to assassinate President Ronald Reagan. Dr. Johnson planned to spend five days meeting with Kaczynski, evaluating the records in his case, and writing a report, which was to be sealed. Given the low threshold for finding competency to stand trial, no knowledgeable observer expected Kaczynski to be found incompetent.

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Certainly his lawyers didn't—they had conceded months ago that their client was indeed competent to stand trial. Although the court reasoned that Kaczynski's suicide attempt would be "significant to a determination of the competency issue," he had ordered the exam before learning of the attempt. His initial reason was Kaczynski's invocation of his right of self-representation. Like Kaczynski's lawyers, the judge equated Kaczynski's resistance to the mental health defense as possible evidence of mental incompetency. So long as Kaczynski had followed his lawyers' instructions, neither his lawyers nor his judge questioned his competency to stand trial.

Accordingly, the court issued an order stating that "the gist of the conflict between Kaczynski and his counsel relates to whether a mental status defense should be asserted and communications attendant to that defense." The court found that "while this conflict [has] presented problems, it has not resulted in a total lack of communication." The court explained that substitution of J. Tony Serra would "be inappropriate in the circumstances" because Kaczynski's request for Mr. Serra was untimely and because Kaczynski's conflict with current counsel was not "so great that it will result in a total lack of communication, thereby preventing an adequate defense."

Both the trial judge and the media made clear whom they felt was to blame for the disruption of the trial. According to a *New York Times* reporter, Kaczynski had "reduced his trial to chaos."

Dr. Sally Johnson ran a marathon psychiatric examination of Kaczynski, questioning him for twenty-two hours, on eight separate occasions, over five days. Johnson also reviewed transcripts of Kaczynski's conversations with his lawyers and the judge, and studied the reports of the defense and prosecution experts, along with other material provided by both the prosecution and the defense. A sheriff for the Sacramento Sheriff's Office reportedly said that interactions between Kaczynski and Dr. Johnson had been calm, that Kaczynski was cooperating with the testing, and that "things are going smoothly." Dr. Johnson submitted her 47 page written assessment to the judge at 9:00 pm on Saturday, January 17. The judge scheduled a telephone conference for the following Tuesday.

During this latest delay in the proceedings of the Kaczynski trial, his lawyers and prosecutors reopened conversations about a guilty plea. The *New York Times* reported that the "sticking point" in the negotiations was Kaczynski's insistence that he be allowed to appeal the court's rulings on certain pretrial motions. At least one such ruling, allowing the government to use at trial Kaczynski's private diaries, was a very strong appellate issue for Kaczynski.

The prosecution filed a brief asking for a hearing on issues concerning Kaczynski's representation. Given that Kaczynski was mentally competent to stand trial, the brief noted that the court would face difficult questions about who would decide whether to present a mental defect defense. The purpose of the prosecution's brief was to set forth the government's understanding of the court's options, and to recommend that the court instruct defense counsel to follow their client's wishes. The brief explained: "Based on the events of January 8, 1998, it appears that the defendant will assert his constitutional right to represent himself if the court rules that defense counsel may put on a mental defect defense of any kind during the guilt phase of trial. If the defendant, after proper warning from the court, knowingly and intelligently asserts his [right to represent himself at the trial] and is willing to proceed to trial immediately," the prosecution believed that the court must grant the defendant's request to represent himself.

The brief urged the court to direct defense counsel to follow their client's wishes concerning the mental defect defense. If they sought to withdraw, "the court would have the discretion to deny their request.... In addition, the court would have recourse through its civil contempt power to enforce its decision if defense counsel continued to refuse to represent the defendant under these circumstances. Should the court hold counsel in contempt, they would have the right to appeal, to challenge the court's conclusion that they must follow the defendant's instructions."

F. The Psychiatric Evaluation

Dr. Johnson stated in the cover letter to her report, "It is my opinion that, despite the psychiatric diagnoses [of paranoid schizophrenia] described in the attached report, Mr. Kaczynski is not suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature or consequences of the proceedings filed against him or to assist his attorneys in his own defense."

The press reported that Dr. Johnson had diagnosed Theodore Kaczynski as suffering from paranoid schizophrenia. The *New York Times*, citing "a lawyer who had consulted on the case and had read the report," informed its readers that Dr. Johnson's report had "concluded" that Kaczynski "suffers from serious mental illness, including 'schizophrenia, paranoid type.' " The *Washington Post* lumped Dr. Johnson in with the defense psychiatrists who had collectively "concluded Kaczynski suffers from the grandiose fantasies and delusional rage of an unmedicated paranoid schizophrenic in deep denial." The Associated Press wrote that Dr. Johnson had "diagnosed [Kaczynski] as a paranoid schizophrenic."

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This was not quite right. In fact, Dr. Johnson made a *provisional* diagnosis that Kaczynski suffered from paranoid schizophrenia and paranoid personality disorder. Like the mental health experts hired by the defense lawyers, the linchpin where Dr. Johnson hung her diagnosis of Kaczynski as schizophrenic was her conclusion that his politics were a delusional architecture, not a philosophy.

Dr. Johnson's report, despite the mass of detail, rested on two dubious propositions. The first was that Kaczynski's politics were a delusion rather than a philosophy, and that his decision in the early 1970s to return to nature indicated mental illness. The second was that Kaczynski blamed his parents for his discontent and unhappiness as an adult—an idea expressed every day in countless psychiatrists' offices across America. Like the mental health experts hired by Kaczynski's defense lawyers, Dr. Johnson's report reveals as much about her own values as it reveals about the mental health of Theodore Kaczynski.

Dr. Johnson was undoubtedly under tremendous pressure to find Theodore Kaczynski mentally ill in some way. The defense lawyers wanted this outcome for obvious reasons. The judge also must have wanted it, because a crazy Kaczynski would provide the judge with more ammunition for denying Kaczynski's right of self-representation. The prosecution also wouldn't have been displeased with a finding of some sort of mental illness, because then the judge might keep Kaczynski's lawyers in control of the defense. The media and public had already decided that Kaczynski was crazy.

In the Tuesday conference with the judge, Kaczynski's lawyers reiterated the obvious point that they had conceded since 1996: that their client was mentally competent to stand trial. Because prosecutors had always maintained that Kaczynski was competent, this latest concession by Kaczynski's lawyers resolved the issue without any ruling from the judge.

Given that Kaczynski's lawyers *never* doubted his competence to stand trial, Kaczynski had the right to decide the objectives of his own defense. As Professor Richard Bonnie notes, "unless the defendant is decisionally incompetent, his preferences bind the attorney . . . disagreement with counsel is not, in itself, evidence of incompetence. Counsel's advice may . . . fail to take adequate account of the defendant's values and preferences." The "client's prerogatives to define the basic objectives of representation and to select the main theory of defense lie at the core of the idea that the client acts as the principal and the attorney as the agent in legal representation. This means that the attorney must accede to the client's wishes in regard to these fundamental choices."

G. The Unabomber's Lawyers Play Chicken With the Court and With Their Client

Under the law, the judge's decision on Theodore Kaczynski's assertion of his right of self-representation should have been a no-brainer. Dr. Johnson, the defense lawyers, and the prosecution all agreed that Kaczynski was mentally competent to stand trial. That meant that Kaczynski was also mentally competent to make the important decisions about his defense—including whether to forgo the aid of a lawyer—so long as he was warned and understood the risks and disadvantages of self-representation. It does not matter that the judge might think the defendant is making a self-destructive choice. The law is that it is the *defendant*'s decision to make, not the judge's.

In order for the court to deny the defendant's clear constitutional right of self-representation, the judge would have to find a procedural technicality. The procedural flaw that the court invoked was delay: Kaczynski had waited too long to invoke his right of self-representation, and his invocation of that right was designed to delay the trial.

The judge's reasoning flatly contradicted the public record in the case. Kaczynski had invoked his right to self-representation more than a week earlier, at the latest—on January 8. At that time, as Kaczynski's lawyers had hammered home again and again, Kaczynski was seeking *no* delay: He was ready to go ahead with the trial *immediately*. The government's January 21 brief summarized the relevant history as follows:

> Thus, as the government understands the record, the defendant first raised the issue that later caused him to invoke his [right of self-representation] on December 22, before the jury was impaneled. He had no reason to assert his [self-representation] rights at that time because he believed the issue was resolved to his satisfaction. Presumably, the defendant learned that the issue was not resolved to his satisfaction on or after January 2, 1998, when the government filed a motion to preclude the defense from using non-expert testimony to show a mental defect defense. The defendant then immediately raised the issue again with the court when he next appeared in court on January 5, 1998. In camera proceedings followed. During these proceedings the defendant learned that the issue would not be resolved to his satisfaction. The redacted transcripts of these proceedings indicate that at one point on January 7, the defendant was informed by the court that he had the right to represent himself, but the defendant declined to do so. The next day, the defendant, through counsel, invoked his right to represent himself in open court. As the government understands the

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The defense agreed with the prosecution—a fairly uncommon event in a hard-fought capital trial. The defense's brief agreed that Kaczynski was not trying to delay the trial: he said he was ready to proceed immediately when, on January 8, he first asked publicly to represent himself. In their January 21 brief, Kaczynski's defense attorneys argued that his request to represent himself "was timely because the request was made before the jury was empaneled and sworn.... Moreover, *the request was clearly not made to delay the trial since Mr. Kaczynski announced he was ready to proceed with the trial as scheduled and did not seek any delay.... Mr. Kaczynski first moved to represent himself on January 8, 1998, and he has not wavered in this request.*" [emphasis added]

Denvir and Clarke threatened to withdraw from the case if the court ordered them to follow their client's instruction and thus "forgo what counsel believes is the only viable defense in favor of one that would lead to Mr. Kaczynski's conviction and execution." Indeed, according to some observers, including one *New York Times* reporter, the brief implied that defense counsel might engage in civil disobedience if ordered to allow their client to control his defense.

Kaczynski's lawyers also argued that the "prosecution takes the unprecedented step of asking the court to order defense counsel on a capital case to forgo counsel's own judgment of the best defense to present at trial, and requests instead that counsel be ordered to follow the wishes of a defendant, whom experts have diagnosed as suffering from paranoid schizophrenia, on the choice of a defense that will assist the prosecution in convicting and executing the defendant." The defense lawyers continued: "The decisions whether and how to present a mental status defense in the guilt phase (other than an insanity defense) and what witnesses to call in the penalty phase of a capital trial fall squarely within the category of strategic decisions that ultimately must be decided by trial counsel." Further, "the government's argument that defense counsel would not render ineffective assistance in this case by following the defendant's wish that no mental health evidence be presented at trial is a red herring. It means little that defense counsel might pass muster under the minimal standards of performance required under the Sixth Amendment if counsel should decide to accede to a defendant's request not to present certain evidence at trial.... It is unconscionable for the government to ask the court—in a capital case—to order defense counsel to forgo the only defense that is likely to prevent the defendant's conviction and execution. In fact, the government's improper interfer-

ence with defense counsel's choice of a defense and relationship with Mr. Kaczynski infringes his Sixth Amendment right to counsel."

H. Judgment Day

What turned out to be the final day of the Unabomber's non-trial began with the by-now predictable ruling by the judge that Kaczynski had made his request to act as his own attorney too late. The court held that allowing Kaczynski to represent himself would amount to providing him with a "suicide forum." In the judge's view, Kaczynski must have known that his public defenders planned to portray him as mentally ill; therefore the court found that Kaczynski's request was too late.

The judge began his opinion by criticizing Kaczynski for sending him a letter. The letter, dated January 21, covered two areas: Kaczynski's desire to represent himself; and his views on his counsels' filing of the notice of intent to rely upon mental health experts at sentencing. Although the court had in the past received letters from Kaczynski regarding these matters, this time he found it "an inappropriate ex parte communication with a jurist" because "it contained advocacy which should have been made through counsel." The judge added that "Mr. Kaczynski does not represent himself, at least not yet." The opinion then acknowledged that: "A criminal defendant has a Sixth Amendment constitutional right to self-representation if it is timely asserted and the assertion is not a tactic to secure delay." In the court's view, Kaczynski's request to proceed pro se failed to satisfy this standard.

On the matter of timeliness, the court found that "Kaczynski's first unequivocal request for self-representation occurred on January 8, 1998, seventeen days after the jury had been empaneled. Although the subject of self-representation was discussed several times over the course of the ex parte, in camera proceedings [between December 18 and January 7] Kaczynski never made a statement that could even remotely be construed as an *unequivocal* request to represent himself." Of course not: Kaczynski never *wanted* to represent himself; he wanted—and was entitled, as a matter of federal constitutional law—to be represented with the assistance of counsel. His decision to represent himself was a last resort. Before January 8, Kaczynski hoped to be able to work out some sort of compromise with his lawyers. Only when that proved impossible—on January 7—did he ask to represent himself, and to proceed with the trial "without any delay."

In addition to ruling that Kaczynski's request for self-representation was untimely, the judge held that it was a "tactic to secure delay." In effect, the judge reasoned that Kaczynski's willingness to proceed "without any delay" did not really mean "without any delay." "Although Kaczynski did not accompany his request [to represent himself] with a

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motion [for delay to allow him time to prepare], granting Kaczynski's request at this stage will undoubtedly result in a substantial impediment to the orderly process of this capital case." In the court's view, Kaczynski would need time to prepare—something Kaczynski emphatically was not asking for—and granting him that time would require selection of a new jury. The judge then explained that Kaczynski must have known that his lawyers intended to raise a defense against capital punishment based on his mental illness. At the end of his ruling, the judge did acknowledge "the paramount principle at the heart of [the right of self-representation], ... the freedom of the accused to personally manage and control his own defense in a criminal case." But in this case, "if Kaczynski abandons the mental health defense, he will forgo the only defense that is likely to prevent his conviction and execution." That would convert his courtroom into a "suicide forum." Quoting from the *dissenting* opinion—*i.e.*, the losing side—of the leading Supreme Court case on self-representation, *Faretta v. California*, the judge reasoned that the "system of criminal justice" cannot be used as "an instrument of self destruction."

However, what the *majority* of the Court had to say in that landmark case is more to the point. Many legal doctrines are unclear and difficult to apply. The right of self-representation is not one of them. The right has been well established since 1975, when *Faretta* reached the Supreme Court. In that case, the defendant, Anthony Faretta faced charges of grand theft. He was dissatisfied with the California state public defender the court assigned to represent him, and also requested to represent himself instead. The judge, after initially allowing self-representation, held a hearing to determine Faretta's ability to conduct his own defense. The court then ruled that Faretta must be represented by the public defender. He was, and the trial resulted in a conviction. The Supreme Court granted certiorari to determine whether a defendant "has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a state may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." The Court ruled that "a state may not constitutionally do so."

In so holding, the majority reasoned that the "right of self-representation—to make one's defense personally—is ... necessarily implied by the structure" of the constitutional source of the right to counsel, the Sixth Amendment. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." The Sixth Amendment itself speaks of the "assistance" of counsel. The Supreme Court explained that:

> an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the state interposed between an unwilling defendant and his right to represent himself personally.

To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment, the Supreme Court continued. In such a case:

> counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to counsel the power to make binding decisions on trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. [An] unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution for, in a very real sense, it is not *his* defense.

In Faretta's case, the Supreme Court recognized that virtually all defendants would be better off with counsel; the old saw, "the person who represents himself has a fool for a lawyer," is firmly rooted in the experience of most criminal attorneys. Still, the court in *Faretta* justly concluded that free will should trump paternalistic choice which "must be honored out of that respect for the individual which is the lifeblood of the law."

Kaczynski's choice was not honored and no trial took place. Immediately after the judge's rulings, Denvir approached the bench and stated: "Your Honor, Mr. Kaczynski would like to offer the government that he would plead guilty ... if the government would withdraw the death penalty notice. We have not been authorized to make that offer before." All the lawyers needed was an hour, defense counsel said, "just an hour." The judge initially refused, but then relented with a warning: "You'd better do it before an hour."

With that deadline in view, the defense team then met privately, to work out terms of the plea agreement. For the first time, Kaczynski agreed to plead guilty with no strings attached, except a reprieve from a death sentence. The plea negotiations apparently took less than an hour.

Cornered by the judge's erroneous rulings, and by his own lawyers' apparent willingness to disobey even a court order to allow him to take control of his own case, Kaczynski finally caved in to the pressure.

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Kaczynski pleaded guilty. The plea agreement provided that, "in return for the defendant's guilty plea, the government agrees that it withdraw the Notice of Intent to Seek the Death Penalty . . .'" During the process of pleading guilty, Kaczynski acknowledged publicly that he was the Unabomber, responsible for the series of bombings between 1978 and 1995, throughout the United States.

Kaczynski plead guilty in this way:

THE COURT: Mr. Kaczynski, please state your full and true name for the record.

THE DEFENDANT: Theodore John Kaczynski.

THE COURT: How old are you?

THE DEFENDANT: Fifty-five years old.

THE COURT: How far did you go in school?

THE DEFENDANT: I have a Ph.D in mathematics.

THE COURT: What is your occupation?

THE DEFENDANT: That's an open question right now. My occupation, I suppose, now is jail inmate.

THE COURT: Okay. What past occupations have you held?

THE DEFENDANT: I was once an assistant professor of mathematics. Since then I have spent much time living in the woods in Montana and have held a variety of unskilled jobs.

THE COURT: Have you ever been treated for any mental illness or addiction to drugs of any kind?

THE DEFENDANT: No, your Honor.

. . .

THE COURT: Mr. Kaczynski, are you fully satisfied with the counsel, representation and advice given you in this case by Mr. Denvir and Ms. Clarke as your attorneys?

(Discussion off the record between Ms. Clarke and Mr. Kaczynski).

THE DEFENDANT: I am satisfied except as reflected otherwise in this record.

THE COURT: You need to explain that, sir.

THE DEFENDANT: All right, your Honor.

You know that I have had certain dissatisfactions in my relationship with my counsel. And those dissatisfactions are reflected in the record. Apart from those dissatisfactions that

are reflected in the court record, I have no other dissatisfactions with my representation by counsel.

(Discussion off the record between Mr. Denvir and the defendant.)

THE DEFENDANT: I am willing to proceed for sentencing with present counsel.

THE COURT: My understanding of your dissatisfaction with present counsel is that there was a disagreement as to the assertion of the mental status defense and you had some problems with present counsel concerning communications surrounding the presentation of mental status-type evidence.

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that what you are referencing?

THE DEFENDANT: Yes, your Honor. That is what I am referring to.

THE COURT: Are you referring to anything other than that?

THE DEFENDANT: No, your Honor.

THE COURT: Is it your understanding that your attorneys had discussions with the attorneys for the Government in this case concerning your change of plea?

THE DEFENDANT: Yes, your Honor.

THE COURT: Does your willingness to plead guilty result from those discussions?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you entering this plea of guilty voluntarily because it is what you want to do?

(Discussion off the record between Ms. Clarke and the defendant.)

THE DEFENDANT: Yes, your Honor.

William Finnegan described the close of the hearing:

Next, the prosecutors laid out some of the facts that they would be prepared to prove at trial. The recitation lasted nearly an hour. It was gory—shrapnel piercing a heart, hands blown off—and what was particularly horrifying were decoded "lab notes" from Kaczynski's journals, in which he recorded the results of his "experiments." "Excellent" was his judgment on the swift, bloody death of Hugh Scrutton, a young computer-rental-busi-

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After each horror story—and all sixteen bombings were described—the Judge asked Kaczynski, "Do you agree with the factual representation just made by the Government's attorney?"

And Kaczynski answered, in a clear, unreadable tone, "Yes, your Honor."

Relatives of Kaczynski's victims who were in court wept. As her son confessed publicly for the first time, Wanda Kaczynski wept as well. She and her son David leaned into one another for comfort. Ted Kaczynski studiously ignored them, as he had done from the outset of the proceeding.

Why did the parties agree to the plea bargain? The prosecutors, no doubt, agreed for the reason they gave: Kaczynski, for the first time, was willing to plead guilty and spare the government the enormous expense of trial. They may also have been worried that legal errors by the trial judge, especially his denial of Kaczynski's right of self-representation, would have rendered any verdict of guilt highly vulnerable to reversal on appeal. The reasons the defense lawyers jumped at the plea bargain were also obvious. From the start, counsel had identified their goal as a life sentence. The plea gave them that. Less clear was why Kaczynski accepted the agreement. Perhaps he wanted to avoid the death penalty. Perhaps he wanted to prevent his lawyers from portraying him as mentally ill; that's what he said. Perhaps both reasons, combined with exhaustion and isolation, came into play.

In reporting on the plea, the press repeated, with plodding predictability, their misstatement that Dr. Johnson had diagnosed—as opposed to *provisionally* diagnosed—Kaczynski as a paranoid schizophrenic. The *Washington Post* wrote that Dr. Johnson had "concluded" that Kaczynski "suffers from the grandiose fantasies and delusional rage of an unmedicated paranoid schizophrenic in deep denial." *Time* magazine, in an article headlined *Crazy Is As Crazy Does*, reported that Dr. Johnson had "found that he was a delusional paranoid schizophrenic." The *New York Times* reported that after Dr. Johnson had "diagnosed [Kaczynski] as a paranoid schizophrenic," Kaczynski's "struggle seemed more and more to highlight the legal system's difficulties in dealing with the mentally ill." A *Times* editorial maintained that Johnson's "sealed report, according to people who have seen it, says that he suffers from schizophrenia and has delusions of persecution that can lead to violence. Dr. Johnson's diagnosis is in accord with the defendant's own [sic] psychiatric experts, who have said he is severely mentally ill."

Formal sentencing was deferred until May 1998. Between the time Kaczynski pleaded guilty in January, and his formal sentencing in May, he continued to be represented by public defenders Quin Denvir and Judy Clarke; during this time, he did not challenge the legality of his guilty plea or the manner in which his lawyers represented him. Kaczynski's lawyers objected to the prosecution's filing of a brief on sentencing, which the judge overruled. The prosecution's sentencing brief is a singularly powerful document on the harm wrought by Kaczynski's bombing campaign, and the methodical records Kaczynski himself kept about that campaign.

On May 4, 1998, Theodore Kaczynski was formally sentenced to four life terms plus thirty years—life imprisonment without possibility of parole, ever. On that day, Kaczynski spoke. He also listened—to the statements by people he had maimed and families of those he had killed. "May your own eventual death occur as you have lived, in a solitary manner, without compassion or love," said Lois Epstein, whose husband was disfigured by one of Kaczynski's bombs. "Lock him up so far down that, when he dies, he will be closer to hell," said Susan Mosser, whose husband's body was torn apart by one of the Unabomber's bombs.

When it was Kaczynski's turn to speak, the following dialogue occurred:

> THE COURT: Does the defendant wish to make a statement before I pronounce sentence?
>
> THE DEFENDANT: Yes, your Honor.
>
> Your Honor, may I come to the podium?
>
> The COURT: You may.
>
> THE DEFENDANT: My statement will be very brief.
>
> A few day ago the government filed a sentencing memorandum, the purpose of which was clearly political. By discrediting me personally, they hope to discredit the ideas expressed by the Unabomber. In reality, the government has discredited itself. The sentencing memorandum contains false statements, distorted statements and statements that mislead by omitting important facts.
>
> At a later time I expect to respond at length to the sentencing memorandum and also the many other falsehoods that have been propagated against me.
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> Meanwhile, I only ask that people reserve their judgment about me and about the Unabomb case until all the facts have been made public.

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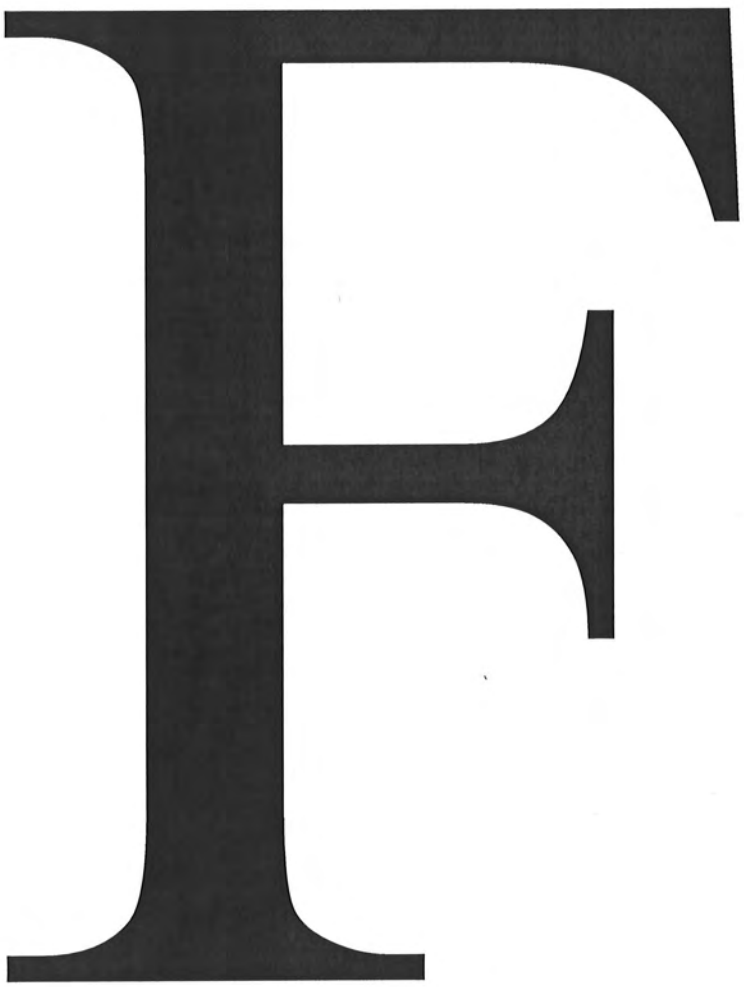
e until all the facts have

THE COURT: Let the record reflect Mr. Kaczynski has finished making his statement and returned to counsel table.

The victim impact evidence was not the aspect of the prosecution's brief that seemed to trouble Kaczynski the most. What bothered the Unabomber was the brief's use of his private diary: The diary passages quoted in the brief portrayed Kaczynski not as a principled neo-Luddite warrior trying to protect society from technology, but rather as a petty, childish murderer who killed to extract "personal revenge" (words he had used) on the kinds of people who annoyed him: women who rejected him; business travelers who flew in the planes above his home; campers who wandered onto his property. This petulant misanthrope, the prosecution argued in its sentencing brief, was the *real* Theodore Kaczynski.

The Unabomber promised an eventual reply: "At a later time I expect to respond at length to the sentencing memorandum. Meanwhile, I hope the public will reserve judgment against me and all the facts about the Unabomb case until another time." At that later time, Kaczynski implied, he will show the world the *real* Theodore Kaczynski—when he gets the day in court denied to him by his lawyers and the judge.

*



CBA

Ethics Help & Lawyer Assistance

Ethics Hotline

Need help sorting out an ethical quandary?

Help is just a phone call away!

The members of the CBA Ethics & Professional Responsibility Committee listed below will help you interpret your obligations under the Ohio Rules of Professional Conduct. Please note that questions posed should be framed hypothetically and relate to your own prospective conduct. The committee also accepts requests for written opinions.

April Ethics Hotline Attorneys

Frederick H. Gribbell (513) 891-2100
G. Todd Hoffpauir (513) 768-5238

Ethics inquiries may also be posed to CBA Bar Counsel by calling (513) 381-8213.

Terry Patterson - General Counsel
(513) 699-1403

Maria Palermo - Senior Counsel
(513) 699-1402

Other Outside Attorney ASSISTANCE

George D. Jonson
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Ohio Board of Professional Conduct

Advisory Opinions

Advisory Opinion Process
The Ohio Board of Professional Conduct may issue nonbinding advisory opinions in response to prospective or hypothetical questions from members of the bar and judiciary. Written requests to the Director are reviewed by a committee under the guidelines in the Regulations for Issuance of Advisory Opinions.

The Board is solely responsible for the content of the advisory opinions, and the advice contained in the opinions do not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio.

Advisory Opinion Status List
The Advisory Opinion Status List identifies the opinions as "Withdrawn," "Modified," or "Not Current," "CPR Opinion" or other designations as decided upon by the Board.

Advisory Opinion Master Index
The Advisory Opinion Master Index enables opinions to be researched by subject area.

Advisory Opinion Inquiries

- **Telephone Inquiries:**
  A legal staff member is usually available to discuss ethics questions with judges, lawyers, and judicial candidates.
  Call 614.387.9370
- **Written Inquiries:**
  Richard A. Dove, Esq., Director
  Board of Professional Conduct
  65 South Front Street, 5th Floor
  Columbus, Ohio 43215-3431

OHIO

DISCIPLINARY PROCESS

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that tsubstantial credible evidence of professional misconduct exists, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct, and issues an appropriate sanction.