

Andrew M. Kohlmetz, OSB 955418
Kohlmetz Steen & Hanrahan PC
741 SW Lincoln Street
Portland, OR 97201
(503) 224-1104
andy@kshlawyers.com

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,)	Case No. 3: 16-CR-00051-BR-09
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM IN SUPPORT OF MOTION
)	TO WITHDRAW AS COUNSEL AND TO
JASON PATRICK,)	ALLOW SELF-REPRESENTATION
)	
Defendant.)	
)	
)	

Mr. Patrick has requested to be able to represent himself in this matter. Moreover, he has objected to the appointment and assistance of standby counsel in the event he is allowed to proceed pro-se. Because Mr. Patrick so objects, and because the Court has advised Mr. Patrick that standby counsel will be appointed over this objection, current CJA appointed counsel submits this brief memorandum on the limits of standby counsel’s role under such circumstances.

According to the American Bar Association, the attorney-client relationship is a consensual one.

A competent client properly advised is, and should be, able to make all important decisions about the representation. The notion that the client-lawyer relationship can be created absent consent or by or on behalf of a client – or acquiescence amounting to consent – is foreign to the concept in the [ABA Model] Rules [of Professional Conduct.

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-448 (attached hereto as Exhibit A). ABA formal opinion 07-448 goes further and states plainly that when a court appoints standby counsel over the objection of a pro-se defendant that there is no client-lawyer relationship unless and until the pro-se defendant accepts such representation. Because no attorney-client relationship is formed, the attorney's only obligations under the Model Rules are those to the tribunal and to person other than a client.

On May 5, 2016, I spoke personally with Deputy General Counsel with the Oregon State Bar seeking any further guidance on this issue. I am informed that the position of the Bar, informal as it may be, is consistent with that of ABA formal opinion 07-448: That the appointment of stand-by counsel, absent the pro-se defendant's consent does not create an attorney-client relationship.

This is consistent with United States Supreme Court and subsequent Ninth Circuit case law concerning the proper role of standby counsel appointed over the objection of a pro-se defendant.¹ A pro-se defendant has specific rights in conducting the defense.

The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. at 174. In *McKaskle*, the Supreme Court addressed directly the limited role of stand-by counsel in cases where the pro-se defendant objects thereto, holding that standby counsel's role in such instances is limited to assistance with routine procedural and technical matters.

A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel even over the defendant's objection to relieve the judge

¹ The two lead cases in this regard are: *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), and *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008).

of the need to explain and enforce the basic rules of courtroom procedure or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals.

McKaskle v. Wiggins, 465 U.S. at 184. Such tasks can easily be accomplished without creating or implicating an attorney-client relationship. Beyond such routine tasks, *McKaskle* provides "considerable guidance" on the limits of standby counsel's role. *Frantz v. Hazey*, 533 F.3d at 739. These limits are designed to insure that the *Farretta* rights of the pro-se defendant are not eroded by the unwanted participation of standby counsel.

[T]he pro-se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded.

McKaskle v. Wiggins 465 U.S. at 178. Limiting stand-by counsel's role in this manner also recognizes and preserves the fact that there exists no attorney-client relationship between standby counsel and the pro-se defendant. If standby counsel were to engage in a more substantive role absent the consent of the defendant, then the question of whether an attorney-client relationship has arisen unintentionally becomes a very real issue. In such a circumstance the unconsented to activities of stand-by counsel could not only inadvertently erode the pro-se defendant's *Faretta* rights, but could expose the attorney to ethical complaints and/or professional malpractice claims.

Thus the role of standby counsel in the face of the defendant's objection thereto carries with it several important general limitations that require clarity on the part of the Court, standby counsel and the pro-se defendant. These include:

- 1) That no attorney-client relationship exists between stand-by counsel and the pro-se defendant,

- 2) That defendant maintains the right to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses and to address the court and the jury when and if appropriate,
- 3) That stand-by counsel is prohibited from making or interfering with any significant tactical decisions in the case,
- 4) That stand-by counsel may not appear for or speak in lieu of the defendant on any matter of importance,
- 5) That in matters left normally to the discretion of trial counsel, any disagreements between stand-by counsel and the defendant be resolved in favor of the defendant.

Respectfully submitted this 5th day of May, 2016.


Andrew M. Kohlmetz,
Attorney for Defendant

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-448

October 20, 2007

Appointed Counsel's Relationship to a Person Who Declines to be Represented

The client-lawyer relationship is a consensual one. Situations arise, however, in which a lawyer is appointed to represent someone who declines the representation. Whatever purposes may be served by requiring lawyers to provide services relating to such a person, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship. The lawyer's legal duties – if any – are defined in such circumstances by the order of the assigning tribunal, and the lawyer's ethical duties are limited to those obligations a lawyer owes under the Rules to tribunals or to persons other than a client.¹

The Committee here addresses the circumstance in which a lawyer is appointed or directed by a tribunal to represent a competent individual who refuses the representation. Most commonly, although not always, such an individual is a defendant in a criminal proceeding.² Defense lawyers in criminal matters, once accepted as counsel by an accused, are sometimes not permitted to withdraw by the court, despite a client's subsequent demand to exercise the right to self-representation.³ Similarly, death penalty statutes in some

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. Although there may be unusual circumstances in which such a person is not a criminal defendant, because that is the usual context, a person who refuses representation from the moment counsel is appointed for them will in this opinion be termed the "defendant."

3. In *Faretta v. California*, 422 U.S. 806, 819 (1975), the Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when that choice is voluntary and intelligent. That right is not absolute, however, and it may properly be denied when a request that counsel be removed from the case is not clear, knowing, or timely. See also *Daniels v. Lee*, 316 F.3d 477, 489 (4th Cir. 2003), cert. denied, 540 U.S. 851 (2003) ("a fundamental part of the *Faretta* doctrine is that the defendant must clearly and unequivocally assert his right to self-representation").

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
321 N. Clark Street, Chicago, Illinois 60610-4714 Telephone (312)988-5300

CHAIR: Steven C. Krane, New York, NY □ T. Maxfield Bahner, Chattanooga, TN □ Amie L. Clifford, Columbia, SC □ Edwin L. Felter, Jr., Denver, CO □ Terrence M. Franklin, Los Angeles, CA □ Susan R. Martyn, Toledo, OH □ Robert H. Mundheim, New York, NY □ Arden J. Olson, Eugene, OR □ Mary Robinson, Downers Grove, IL □ Sylvia E. Stevens, Lake Oswego, OR □

CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

states require an appeal to the state's highest court, regardless of whether the convicted person wishes to appeal.⁴ The questions facing a lawyer in such situations arise from the tension between the defendant's wish not to be represented and the lawyer's duties to the tribunal that appointed the lawyer.

The ethical quandary a lawyer may face where representation is refused from the onset is whether, in fact, the lawyer has a client to whom he owes duties, or whether any duties the lawyer has flow from the tribunal's order assigning him to undertake the representation. Resolving that difficulty requires considering the source of obligations imposed on the lawyer for the benefit of the defendant. Those obligations do not create a conflict between the responsibilities the lawyer owes to the tribunal and those the lawyer owes to the defendant, at least until such time as the defendant accepts the representation,⁵ when all the requirements of the Rules apply (including those that limit the terms under which the lawyer may withdraw from the representation).⁶

Examination of the dilemma faced by appointed counsel when the defendant refuses representation begins with Rule 1.2(a), which states that a lawyer "shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued." Thus a lawyer is required, for example, to abide by his client's decisions with respect to civil settlements, criminal pleas, waiver of criminal jury trials, and testifying in a criminal trial. As a further example, under Rule 1.2(c), a lawyer may limit the scope of the representation only if he obtains his client's informed consent. In the situation considered here, however, the defendant's desire to proceed without a lawyer's assistance makes it impossible for the lawyer to provide, or to participate in, a true "representation."

4. *See, e.g.*, 11 DEL. CODE ANN. tit. 11, § 4209(g)(1) (2007) (automatic appeal of death penalty cases, with counsel appointed "to respond to the State's positions"); MO. ANN. STAT. § 565.035(6) (West 1999) (mandated attorney considered an "assistant to supreme court" appointed in all cases). *See also* GA. CODE ANN. § 17-10-35(a) (2006) (whenever death penalty is imposed, upon judgment becoming final in trial court, sentence shall be reviewed on the record by state supreme court); S.C. CODE ANN. § 16-3-25(A) (Law. Co-op. 1976) (same).

5. Paragraph [17] of the Rule's Scope section provides that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." The precise meaning of this comment is unclear, and no explanation exists in the history of its adoption by the ABA. Substantive law in a given jurisdiction may place additional requirements on the creation of a client-lawyer relationship or define who may provide consent; the rules describing the client-lawyer relationship may only be understood, however, to presume some expression of assent on behalf of a client to determine whether the relationship has been created.

6. Viewed in one light, the relationship to which a client consents when creating the "client-lawyer relationship" carries with it limitations, including limitations on the circumstances under which it may be terminated.

Other Rules defining the lawyer's obligations to a client similarly make sense only after a client has accepted the client-lawyer relationship. Rule 1.1 obligates a lawyer to act competently; Rule 1.3 requires a lawyer to be prompt and diligent; and Rule 1.4 requires a lawyer to inform the client as necessary to permit informed decisions regarding the representation. If a defendant has not accepted the client-lawyer relationship, he has no basis upon which to hold the lawyer accountable to such standards.

This principle applies equally to duties imposed by several other Rules. Among these is Rule 1.6, which obligates a lawyer not to reveal information relating to the representation of a client absent informed consent. Rules 1.7, 1.8, and 1.9 define the obligations of a lawyer to avoid conflicts of interest, and Rule 2.1 approaches that subject from a different vantage point by requiring "independent professional judgment" in representing a client. More specifically, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing the client from a person other than a client unless (a) the client consents, (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and (c) information related to the representation is kept confidential.⁷ If the defendant never accepts the client-lawyer relationship, and thus never becomes a client or (eventually) a former client, he has no basis upon which to contend that the lawyer is or was ever obliged to avoid conflicts of interest.

Underlying these and other Rules describing the client-lawyer relationship are the premises that a lawyer's role in the client-lawyer relationship is to further the goals and interests of a client, and that a competent client has the ultimate authority to determine what the client's goals and interests may be. In short, the client-lawyer relationship, at its inception, can only be understood under these Rules as a relationship in which a lawyer and client agree that the lawyer will follow the client's instructions unless to do so would be unlawful. A competent client properly advised is, and should be, able to make all important decisions about the representation.⁸ The notion that the client-lawyer relationship can be created absent consent by or on behalf of a client – or acquiescence amounting to consent – is foreign to the concepts in the Rules.⁹

7. *See also* Rule 5.4(c) (prohibiting a lawyer from permitting a person who "recommends, employs, or pays the lawyer to render legal services for another" to "direct or regulate the lawyer's professional judgment in rendering such legal services"); *cf.* Rule 1.18 & cmt. 2 (protecting information communicated to a lawyer by a prospective client who demonstrates a reasonable expectation that the lawyer is willing to discuss forming a client-lawyer relationship, whether or not the client-lawyer relationship ultimately is formed).

8. *See* Rule 1.14 cmt. 1 ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.")

9. *Cf.* *Faretta v. California*, 422 U.S. at 821 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction.")

When a tribunal requires a lawyer to act on behalf of a person against that person's will, there are two potential sources for the lawyer's obligations: (a) the express or implied terms of the order under which the obligation to act is imposed,¹⁰ and (b) the lawyer's obligations under the Rules to persons other than clients.¹¹ Because the defendant never has accepted the representation, he has no basis to require or even to expect the lawyer to satisfy any of the obligations defined by those Rules that apply to the client-lawyer relationship.

Courts may appoint "standby counsel" for a criminal defendant who elects to represent himself to avoid disruption if the defendant later demands a lawyer.¹² There is no client-lawyer relationship unless and until the defendant accepts representation. Such defendants sometimes turn to "standby counsel" and seek advice or assistance without intending to waive their self-representation right.¹³ The substantive Sixth Amendment principles defining when a defendant has waived that right differ from those addressed in this opinion. Whenever such a defendant turns to appointed counsel and seeks advice or representation, the defendant may be found to have consented to and thereby to have created a client-lawyer relationship under the Rules.¹⁴

There are a number of situations in which a routine client-lawyer relationship arises because the law allows someone other than the client to consent to the relationship, or the client's acquiescence may be implied by contract or by some action or failure to act. For example, parents or courts are routinely authorized by state law to engage counsel or a guardian ad litem to represent a child, or other person under legal disability, even when the person may not

10. This opinion assumes that a court or other tribunal has the power to enter such an order under applicable law, a question beyond the purview of the Rules and beyond the scope of this opinion. Whether a party is deemed to be represented under the rules of a tribunal is a different from the question of whether the party has representation as that term is used in the Rules. The former turns on the law of criminal or civil procedure, the latter on legal ethics.

11. *See, e.g.*, Rule 7.1 (prohibiting false or misleading communications about the lawyer's services); Rule 8.4(c) & (d) (prohibiting conduct that is dishonest or prejudicial to the administration of justice).

12. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9, "Hybrid and Standby Counsel," available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>; *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) ("standby counsel" must not interfere with self-representing defendant's control or appearance of control over defense); *see also* *United States v. Salerno*, 81 F.3d 1453, 1460 (9th Cir.), *cert. denied*, 519 U.S. 982 (1996) ("standby" or "advisory" counsel do not represent pro se defendants).

13. *Cf.* *United States v. Swinney*, 970 F.2d 494, 498 (8th Cir.), *cert. denied*, 506 U.S. 1011 (1992) (defendant found to have accepted "standby counsel" as his defense counsel by authorizing counsel to conduct voir dire and make opening statement).

14. *Cf.* *McKaskle v. Wiggins*, 465 U.S. at 182 (under Sixth Amendment "[a] defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense").

wish to be represented.¹⁵ Additionally, unnamed class members in a class action lawsuit will be deemed after certification of the class to be represented by class counsel, absent their affirmative election to “opt out” of the certified class.¹⁶

The principles concerning withdrawal from a client-lawyer relationship once it has been established, moreover, are also distinguishable from those applicable to the forming of a relationship. When ordered to do so by a tribunal, Rule 1.16(c) requires a lawyer to continue representation notwithstanding good cause for terminating the representation. Clients, particularly criminal defendants, are not permitted to throw the judicial system into disarray by firing their counsel at a time when doing so would prejudice the administration of justice.¹⁷ The authority of the court to order that a representation be continued does not undermine the principle that initial client consent is essential to the creation of a client-lawyer relationship.

It has been suggested¹⁸ that lawyers may be compelled by a tribunal to represent a defendant regardless of client consent based on the notion that lawyers are “officers of the court.”¹⁹ That notion has roots in the English legal system, where some lawyers were subject to the court’s discipline, including members of its clerical staff who did not represent clients but primarily performed ministerial tasks. In contrast, English barristers never were considered officers of the court, owing their duties to the crown not to the court.²⁰ In the United States, however, lawyers have never been considered court “officers”

15. Rule 1.14 addresses a client with diminished capacity. The law of minority and guardianship provides a substitute for what would be the consent of a competent client, a topic beyond the scope of this opinion.

16. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 & cmt. g (2000) (client-lawyer relationship is consensual and arises when a person manifests to a lawyer an intent that the lawyer provide legal services and the lawyer accepts, and even when a lawyer is appointed by a court without the lawyer’s consent, that appointment may be rejected by the prospective client unless the client lacks capacity to choose); ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 31:101 (2004) (“the client’s consent is generally necessary” to formation of client-lawyer relationship).

17. *See, e.g.*, *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000) (affirming district court insistence that defendant proceed with appointed counsel).

18. *See* Iowa Bar Ass’n, Ethics & Practice Guidelines Committee, Opinion Concerning Representation (Feb. 24, 2006), available at <http://www.defenselink.mil/news/Mar2006/d20060329Bahlu1vol11.pdf> at 137 (“officer of the court” notion overrides lawyer’s obligation to respect will of a client who refuses representation). We disagree with the Iowa Bar’s conclusion.

19. The term used by the Rules in Preamble paragraph [1] is “officer of the legal system.”

20. *See* Beth M. Coleman, *The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard*, 68 N.C. L. REV. 575, 586 (1990).

in this sense.²¹ The Rules generally implicated by the concept of lawyers as officers of the legal system are those that limit the lawyer's ability to comply with a client's objectives, not those that address the duties owed directly to the client.²² This does not undercut the basic principle that a client-lawyer relationship arises only when a client consents to a representation.

A lawyer whose would-be client never has accepted the client-lawyer relationship, therefore, has no such relationship, and the unwilling client has no representation, at least as that term is used in the Rules. Any legal obligation owed by the lawyer to the defendant, which may be analogous to those embodied in the ethics rules, arises from the authority of the appointing tribunal and includes whatever obligations the tribunal may identify.²³ The lawyer's ethical duties are limited to complying with the Rules defining a lawyer's obligations to persons other than a client.

21. *See Cammer v. United States*, 350 U.S. 399, 405 (1956) (lawyers are not "officers" under a statute empowering the court to punish "misbehavior of any of its officers").

22. *See United States v. Cuevas-Andrade*, 232 F.3d 440, 445 (5th Cir. 2000), *cert. denied*, 532 U.S. 1014 (2001) (as officer of the court, an attorney has "an obligation and an interest in insuring that a guilty plea proceeding complies with all constitutional and statutory requirements" [*see Model Rule 3.8*]); *McCleod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990) (lawyer as officer of the court must "assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests" [*see Model Rule 3.4*]); *United States v. Singleton*, 107 F.3d 1091, 1102 (4th Cir.), *cert. denied*, 522 U.S. 825 (1997) (as officer of the court, the lawyer has the "duty of disclosure, the duty to ask only appropriate questions, and the duty not to suborn perjury" [*see Model Rule 3.4*]); *In re Solerwitz*, 848 F.2d 1573, 1577 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989) (lawyer as officer of the court has a duty to "promote the administration of justice and to comply with the court's rules, notices, and orders" [*see Model Rules 3.1, 3.4, & 8.4*]); *Shisler v. Heckler*, 787 F.2d 76, 84 (2d Cir. 1986), *aff'd in part & rev'd in part*, 851 F.2d 43 (1988) (lawyer as officer of the court has a duty of candor to the court [*see Model Rule 3.3*]).

23. It may happen that a court or other tribunal, when appointing counsel for a client unwilling to be represented, expressly or impliedly requires a lawyer to behave as if the client had accepted the representation, thereby imposing on the lawyer obligations similar to those a client could expect of the lawyer if the representation had been accepted. If that happens, however, the obligations arise from the authority of the tribunal, not from obligations the lawyer has to the client by virtue of the Rules.