



New York State Bar Association Committee on Professional Ethics

Opinion 1175 (10/29/2019)

Topic: Withdrawal of guilty plea; allocation of authority between lawyer and client.

Digest: Once a lawyer has explained the material risks and chances of success of the withdrawal of a previously entered guilty plea to a criminal defendant, the lawyer must follow the decision of the client to withdraw the plea.

Rules: 1.2(a), 1.4, 3.1

FACTS

1. The inquiring lawyer has been assigned as counsel to a criminal defendant who, while represented by previous counsel, had entered a guilty plea to a criminal charge with an understanding of the sentence to be imposed. On the date set for that sentencing, defendant did not appear and later was re-arrested on two misdemeanor charges. The sentencing was adjourned.

2. On the new date set for sentencing, the defendant discharged his prior attorney and advised the court that he wished to withdraw his prior guilty plea. On that same date, the inquirer was appointed by the court and the case adjourned to allow the inquirer to bring a motion to withdraw defendant's prior guilty plea.

3. The inquirer has obtained a transcript of the plea proceedings and interviewed prior counsel and finds nothing which would support the contention that the plea was not knowingly and voluntarily made. The inquirer is likewise convinced that the evidence would result in a guilty verdict if the matter were taken to trial and that if he withdraws his prior guilty plea he will not be afforded a drug treatment program that was in the previous plea agreement.

QUESTION

4. Is a lawyer required to follow the client's decision to withdraw a guilty plea when the consequences of such withdrawal will result in a more severe sentencing of the defendant and the motion has little chance of success?

DISCUSSION

5. Our jurisdiction is limited to interpreting the N.Y. Rules of Professional Conduct (the “Rules”). It is our understanding that New York’s Criminal Procedure Law section 220.60 (c) permits the withdrawal of a guilty plea at any time before sentencing upon the discretion of the court. Nothing in this opinion addresses the legal sufficiency of any argument under this section nor of the probability of success of a motion addressed to the court’s discretion. Nor do we opine on constitutional issues that may arise under the Sixth Amendment concerning a client’s rights in entering pleas. *See, e.g., Missouri v. Frye*, 566 U.S. 139 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

6. Rule 1.2(a) addresses the allocation of responsibility between a lawyer and client regarding pleas in criminal matters and states: “Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Comment [1] to Rule 1.2 reinforces the point: “Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.”

7. Rule 1.2(a) makes clear that, “in a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to,” among other things, “the plea to be entered.” The lawyer’s ethical obligation is to consult with the client on the means of achieving the client’s objectives and “to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4(b). Here, this includes the lawyer’s assessment of the probability of success on any motion as well as any adverse consequences flowing from its denial. Having explained to the client the advantages and disadvantages of a particular objective the client desires, the lawyer has satisfied the lawyer’s obligations under Rules 1.2 and 1.4. We detect no difference in Rule 1.2(a) between a decision to enter a particular plea and a decision later to seek to withdraw it. *See generally* Criminal Procedure Law §§ 220 *et seq.*

8. This Committee has extended the application of Rule 1.2(a) to a client’s decision to enter a drug treatment program as part of the resolution of a criminal proceeding. In N.Y. State 1106 ¶ 20 (2016), we said: “Once the client makes his or her choice, whether it be to attend a treatment

program or to go through the traditional criminal justice system, the lawyer must abide by that decision.”

9. We note that a lawyer is always bound by Rule 3.1(a), which says that a “lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” The Rule continues: “A lawyer for a defendant in a criminal proceeding or for a respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.”

CONCLUSION

10. Once a lawyer has explained the material risks and chances of success of the withdrawal of a previously entered guilty plea to a criminal defendant, the lawyer must follow the decision of the client to withdraw the plea.

(10-19)