

Originally published in

New York Law Journal

February 11, 2019

Potential Public Backlash to Zealous Representation

By [Joel Cohen](#)

In his column on Ethics and Criminal Practice, Joel Cohen writes: Paul Whelan, a U.S. citizen, has been accused of spying by Russia. His Russian lawyer, Vladimir Zherebenkov, is a former Soviet government investigator. Zherebenkov was challenged in the U.S. press for seeming to do the Kremlin’s bidding in the guise of representing his client. But what if his actions are in the best interest of his client?

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In 1820, King George IV, who had just succeeded to the throne of England, sought to divorce his wife, Queen Caroline, on grounds of adultery. The Parliament sought a special bill that would deprive Caroline of her title as Queen. If Caroline could prove that the King, too, had committed adultery, however, the Queen was entitled to a “right of recrimination” that would be a complete defense to the King’s suit.

The Queen’s lawyer, Lord Henry Brougham, not only discovered many adulterous affairs, but he apparently also had the goods that, while Prince of Wales, George had secretly married one of his mistresses, a *Roman Catholic*—which “intermarriage” could mean forfeiture of the Crown. Just imagine the constitutional crisis that would result—it was a defense that could end George’s reign before it even began!

Needless to say, many urged Brougham to be a “good citizen” and promote the kingdom’s welfare by not presenting the titillating evidence which gave Queen Caroline her defense. Brougham’s response, however, became the gold standard for what is required of a zealous litigator:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

These words are “the core of the profession’s soul,” said Professor Geoffrey C. Hazard Jr., legal ethics scholar and Reporter for the ABA Model Rules of Professional Conduct. Or, as put by Monroe Freedman and Abbe Smith: “Let justice be done—that is, for my client . . . though the heavens fall.” *Understanding Legal Ethics*, at §4.01 (Freedman).

And with this, let’s turn to modern day Russia. Now, I claim no expertise concerning the Russian legal ethical code, or in international law or treaties, or how lawyers are appointed or tied to the Russian government. Paul Whelan, who is somehow an American, Irish, Canadian and British citizen, was arrested in Moscow this past December and charged with espionage. For our purposes, it doesn’t really matter whether Whelan is guilty. He is represented by Vladimir Zherebenkov, likely assigned by the Federal Security Service (FSB), who appears to have no background in espionage cases and is a former Soviet government investigator. We don’t know why Zherebenkov is counsel (he [says](#) he was “recommended” but nothing more), but does it matter if he was assigned by Putin, or referred by an inmate, or by the Moscow Bar Association? Probably not.

If you’re Whelan—whoever your lawyer is—presumably you want one thing: to get out of Russia and, somewhat less important, to have the charges against you dismissed. If your lawyer’s plan is to publicly lobby the State Department, maybe even President Trump himself, to “trade” you for a Russian citizen currently in United States custody, you want that strategy to work. And this is likely true even if the American people and the president himself believe that such a lobbying campaign in the public square disserves the United States.

Now, Zherebenkov publicly and repeatedly—and without prompting—stated that his goal was to arrange “to trade and bring home at least one Russian soul,” likely Maria Butina who has pleaded guilty to acting as an unregistered agent for Moscow and is said to be [cooperating](#) with the Justice Department. Was Whelan’s arrest a setup to have Butina released? Maybe. Is Zherebenkov, for lack of a better word, a stooge for the Kremlin (even though he does publicly maintain Whelan’s innocence—Whelan [didn’t know](#) he had classified material)? Maybe. But his goal—whether motivated by Whelan’s direction, the Kremlin’s, or both—appears to be to help his client, even if the United States may possibly be harmed. This, even though Whelan, assuming his innocence, might prevail without potentially forcing the United States into a compromised position.

Let’s suppose, instead, that Zherebenkov was an American lawyer bound by American ethics rules. Whether or not Whelan had available the defense of actual innocence, would there be anything wrong with “publicly” proposing a prisoner exchange as Zherebenkov seems to be

doing—even if it would be inimical to the interests of the United States? The answer is simple, even if the proverbial man on the street might argue that such a defense would be unpatriotic. Just ask Lord Brougham.

Without question, assuming the client's desire was to be released and returned from Russia pronto, not only would the lawyer be well within his rights, it would be his absolute duty to take the precise measure that Zherebenkov took: that is, to publicly propose a prisoner swap. After all, a "lawyer should pursue a matter on behalf of a client despite opposition ... and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Thus, a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." ABA Rules 1.3, c. 1; cf. NY Rule of Professional Conduct 1.3 c. 1. Indeed, it is a lawyer's obligation to "zealously assert the client's position under the rules of the adversary system." ABA Preamble 2. This zeal in representation is considered to be the "fundamental principle" and "dominant standard of lawyerly excellence." Freedman, §4.01(citations omitted).

Of course, if Whelan wants to remain in Russia, and be proved innocent, Zherebenkov is out of line—he must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." NY and ABA Rule 1.4. Indeed, "a lawyer shall abide by a client's decisions concerning the objectives of representation" as it is the client who is vested with the "ultimate authority." NY Rule 1.2; cf. ABA Rule 1.2; NY and ABA Rule 1.2, c. 1. And if Zherebenkov is nothing more than an FSB stooge, with his duty of loyalty to Mother Russia and adverse to his client, then the representation would obviously violate our rules—a lawyer cannot represent a client if there is a "significant risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests." NY Rule 1.7; cf. ABA Rule 1.7. Indeed, there must be "entire devotion to the interest of the client ..." Freedman, §4.01 (citations omitted).

At least until now, it appears that Zherebenkov is doing what he is supposed to do. When we Monday morning judge the ethical propriety of a lawyer's advocacy, we always need to remember precisely to whom the lawyer owes his primary duty—especially when utmost zealotry on the client's behalf is required.

Would the calculus change if, hypothetically, the proposed prisoner exchange intended that the United States release an ISIS terrorist for Whelan? There would surely be a hue and cry over a lawyer's very public, arguably unpatriotic, effort. The U.S. government would, again hypothetically, be in the unenviable position of having to weigh the (sympathetic) advocacy of a lawyer for an innocent American who may be forced to spend the rest of his life in a Russian gulag after having been provably framed by the Kremlin, in exchange for a terrorist bent on a mission of violent U.S. destruction.

Sure, it would likely be strategically preferable to first try to negotiate a swap discreetly in confidential dialogue with the Justice and State Departments. That, though, would only be because the confidentiality of the move might be more effective, not because it would

implicate any ethical considerations on the lawyer's part (aside from the lawyer's overarching ethical duty to give competent representation to his client).

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