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## Right to Counsel

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## RIGHT TO COUNSEL

*N.Y. CONST. art. I, § 6:*

*In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . .*

*U.S. CONST. amend V:*

*In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.*

## COURT OF APPEALS

People v. Kieser<sup>1183</sup>  
(decided March 31, 1992)

The criminal defendant claimed that his right to counsel under the state<sup>1184</sup> and federal<sup>1185</sup> constitutions was violated because at the time of his trial his attorney had been temporarily suspended from the New Jersey bar and had failed to secure admission *pro hac vice* in New York. A unanimous court held that the defense counsel's failure to be admitted *pro hac vice* in New York and his temporary administrative suspension did not deprive the defendant of his right to counsel.<sup>1186</sup>

In this case, the defendant was convicted of grand larceny in the second degree in the Supreme Court, Queens County, and that conviction was subsequently affirmed by the Appellate Division, Second Department. The defendant's attorney attended law school and subsequently became licensed to practice law in

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1183. 79 N.Y.2d 936, 591 N.E.2d 1174, 582 N.Y.S.2d 988 (1992).

1184. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . ." *Id.*

1185. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of counsel for his defence." *Id.*

1186. 79 N.Y. 2d at 937, 591 N.E.2d at 1174, 582 N.Y.S.2d at 988.

New Jersey.<sup>1187</sup> The attorney was then suspended from practice by the State of New Jersey for failing to pay his Bar dues.<sup>1188</sup> After his suspension, the attorney represented the defendant in the instant proceeding without securing admission *pro hac vice* to practice in New York.<sup>1189</sup>

The court of appeals stated that “[a]lthough the defendant’s right to counsel is guaranteed by the Sixth Amendment of the Federal Constitution and Article I, section 6 of the New York State Constitution, not every defect in an individual’s ability to practice law renders his representation a deprivation of that right.”<sup>1190</sup> The court explained that there is a distinction between those defects which are “technical” and those that are “serious and substantive.”<sup>1191</sup> The court described technical defects as “those resulting from administrative suspension or censure for failure to comply with State Bar rules and which have no bearing on the ‘qualification, competence or moral character of the defendant’s representative.’”<sup>1192</sup> A serious defect, one that specifically affects a representative’s legal ability, will occur if the representative has failed to seek admission to the State Bar or has been denied admission.<sup>1193</sup> The court reasoned that even though the defense counsel failed to secure admission *pro hac vice* to practice in New York, this omission did not affect his competence as an attorney. Therefore, the defendant was adequately represented.<sup>1194</sup> The court concluded that such “technical” defects cannot serve to support a finding that the defendant’s right to counsel had been violated.<sup>1195</sup>

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1187. *Id.* at 938, 591 N.E.2d at 1175, 582 N.Y.S.2d at 989.

1188. *Id.*

1189. *Id.* at 937, 591 N.E.2d at 1174, 582 N.Y.S.2d at 988.

1190. *Id.* at 937, 591 N.E.2d at 1175, 582 N.Y.S.2d at 989 (citations omitted).

1191. *Id.*

1192. *Id.* (quoting *People v. Chin Min Foo*, 144 Misc. 2d 589, 592, 545 N.Y.S.2d 55, 58 (Sup. Ct. N.Y. County 1989)).

1193. *Id.* at 937-938, 591 N.E.2d at 1175, 582 N.Y.S.2d at 989.

1194. *Id.* at 938, 591 N.E.2d at 1175, 582 N.Y.S.2d at 989.

1195. *Id.*

Prior to this case, the New York courts had left this precise issue open. In *People v. Felder*,<sup>1196</sup> the court of appeals held that a criminal defendant's rights under both the state and federal constitutions were violated when he was represented by a layman pretending to be an attorney.<sup>1197</sup> In *Felder*, the court of appeals defined "Counsel" as "nothing less than a licensed attorney"<sup>1198</sup> and thus, a layman would not be effective "counsel." However, the court limited its holding to the particular facts of the case.<sup>1199</sup> The court intentionally left open the issue regarding whether a defendant's representation by a lawyer, not a layman, who has been temporarily suspended may violate a defendant's constitutional rights.<sup>1200</sup>

More recently, in *People v. Chin Min Foo*,<sup>1201</sup> the Supreme Court in New York County held that a criminal defendant's constitutional rights were violated when he was represented by an attorney who practiced law using a license procured by fraud.<sup>1202</sup> In specific, the defendant's attorney, Joel Steinberg, failed to disclose information in respect to "lack of qualifications for admission under a rule of court allowing waiver of the bar examination for persons whose course of law school study had been interrupted by active service in the Armed Services after completing two thirds of the requirements for graduation."<sup>1203</sup> It was later discovered that his law studies were not broken-up by active service, and that in fact, he was forced to leave law school as a result of his poor academic standing.<sup>1204</sup> It should be noted that the defects discussed in *Felder* and *Chin Min Foo* are considered "serious and substantive."

Federal case law in this area similarly tracks the New York Court of Appeals' definition of "counsel" under the Sixth

1196. 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979).

1197. *Id.* at 287, 391 N.E.2d at 1275, 418 N.Y.S.2d at 296.

1198. *Id.* at 293, 391 N.E.2d at 1276, 418 N.Y.S.2d at 297.

1199. *Id.* at 293 n.6, 391 N.E.2d at 1277 n.6, 418 N.Y.S.2d at 298 n. 6.

1200. *Id.*

1201. 144 Misc. 2d 589, 545 N.Y.S.2d 55 (Sup. Ct. N.Y. County 1989).

1202. *Id.* at 591, 545 N.Y.S.2d at 58.

1203. *Id.* at 589-90, 545 N.Y.S.2d at 56.

1204. *Id.* at 590.

Amendment. In *United States v. Novak*,<sup>1205</sup> the Second Circuit echoed the New York courts' finding that when "serious" defects exist in an individual's ability to practice law, the defendant's right to counsel has been violated.<sup>1206</sup> The facts in *Novak* are substantially similar to those in *Chin Min Foo* because the attorney in question was the same person, Joel Steinberg, and the issue regarding his fitness as "counsel" was the same.<sup>1207</sup>

It appears that the Second Circuit and the New York state courts are in harmony on this issue. If a defendant is represented in a criminal matter<sup>1208</sup> by an individual whose inability to practice law is due to a "technical" defect, such as nonpayment of bar dues or failure to get admission *pro hac vice*, then it will not constitute a violation of the right to counsel under either the Sixth Amendment or article I, section 6 of the New York State Constitution. Only "serious" defects, such as failure to pass the bar examination, will render that individual a layman, and not "counsel," thereby affording the defendant a valid constitutional claim.

People v. Enrique<sup>1209</sup>  
(decided July 7, 1992)

A criminal defendant claimed that his right to effective assistance of counsel under the federal<sup>1210</sup> and state<sup>1211</sup> constitutions was violated when, at his trial, his attorney was denied permission to confer with him during a lunch recess while the defendant was being cross-examined.

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1205. 903 F.2d 883 (2d Cir. 1990).

1206. *Id.* at 888.

1207. *See id.* at 885-88.

1208. It should be noted that none of these cases have determined whether a violation of the constitutional right to counsel would exist in a similar civil matter.

1209. 80 N.Y.2d 869, 600 N.E.2d 229, 587 N.Y.S.2d 598 (1992).

1210. U.S. CONST. amend. VI.

1211. N.Y. CONST. art. I, § 6.