

CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH

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PART I: THE CRIMINAL JUSTICE SYSTEM AND THE MENTAL HEALTH SYSTEM

Standard 7-1.1. Terminology

- (a) Unless otherwise specified, these Standards adopt the definition of “mental disorder” found in the current Diagnostic and Statistical Manual of the American Psychiatric Association.* In the settings addressed by the Standards, mental disorder is most likely to encompass mental illnesses such as schizophrenia, bipolar disorder, and major depressive disorders; developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof.
- (b) “Mental health professional,” as used in these Standards, includes psychiatrists, psychologists, social workers and psychiatric nurses and other clinicians with expertise in the evaluation and treatment of mental disorders.
- (c) “Mental health evaluation,” appearing throughout the Standards as “evaluation,” means an evaluation by a mental health professional of an individual accused of, charged with, or convicted of a criminal offense or detained by the police for the purpose of assessing:
 - i. mental competence, as defined in (f),
 - ii. mental state at the time of the offense as it relates to the insanity defense and other criminal responsibility issues, including mitigation at sentencing,
 - iii. risk for reoffending (referred to as “risk assessment” herein) or

* The current edition of the Diagnostic and Statistical Manual, DSM-5, defines mental disorder as “a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.”

iv. treatment needs.

- (d) “Mental health treatment,” appearing throughout the Standards as “treatment,” includes but is not limited to the appropriate use of psychotropic medications, habilitation services, assertive community treatment, supported employment, family psychoeducation, self-management, and integrated treatment for co-occurring mental disorder and substance abuse.
- (e) “Mental health facility” refers to a facility designated for treatment of individuals with mental disorder, such as public and private mental and medical hospitals, community mental health centers, and crisis intervention units, but not including jails or prisons. A “forensic” mental health facility is a secure government facility reserved for individuals who have been charged with or convicted of crime.
- (f) “Mental competence,” appearing throughout the Standards as “competence,” is defined in detail in Parts IV and V of these Standards, but at a minimum requires present understanding of the likely consequences of a particular course of action. A valid “assent” requires only this minimal level of competence, accompanied by an affirmative indication of agreement with a particular course of action, after an explanation of the likely consequences of the action.

Standard 7-1.2. Responding to persons with mental disorders in the criminal justice system

- (a) Officials throughout the criminal justice system should recognize that people with mental disorders have special needs that must be reconciled with the goals of ensuring accountability for conduct, respect for civil liberties, and public safety.
- (b) Criminal justice officials should work with community mental health treatment providers and other experts to develop valid and reliable screening, assessment, diversion, and intervention strategies that identify and respond to the needs of individuals with mental disorder who come into contact with the justice system, whether the setting is traditional criminal court, problem-solving court, a diversion program, or post-adjudication supervision and monitoring.
 - (i) When appropriate, services should be configured to divert people with mental disorders from arrest and criminal prosecution into treatment, consistent with the [draft ABA Diversion Standards].
 - (ii) Court systems should consider establishing special dockets for defendants with mental disorders, consistent with the [draft ABA Specialized Courts Standards].

~~and as early as possible ascertain how such obligations might affect the legal process. Attorneys should not attempt to compromise either a mental health professional's legal obligations (by, for instance, knowingly encouraging an expert to violate a statutory reporting requirement) or ethical obligations (by, for instance, knowingly providing misleading information to an evaluator, or refusing to pay an expert unless favorable conclusions are reached).~~

Standard 7-1.4. Roles of the attorney representing a defendant with a mental disorder

- (a) Consistent with the ABA Resolution on Comprehensive Criminal Representation, attorneys who represent defendants with mental disorders should provide client-centered representation that is inter-disciplinary in nature. These attorneys should be familiar with local providers and programs that offer mental health and related services to which clients might be referred in lieu of incarceration, in the interest of reducing the likelihood of further involvement with the criminal justice system.
- (b) Attorneys who represent defendants with mental disorders should work particularly closely with their clients to ensure that the clients understand their options. Attorneys should be prepared to deal with difficulties in communication that can result from the client's mental disorder or from transfers to a different locale necessitated by treatment needs.
- (c) Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client's capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant's mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.
- (d) Attorneys who represent defendants with mental disorders should seek relevant information from family members and other knowledgeable collateral sources. Attorneys should share information about their clients with family members and knowledgeable collateral sources only with their clients' assent, and in a way that does not compromise the attorney-client privilege.
- (e) Attorneys who represent defendants in specialized courts should be familiar with and abide by the [draft ABA Specialized Court Standards]. Because a defendant may relinquish substantial rights in a specialized court, the attorney's role as counselor is particularly important in this setting.

Standard 7-1.5. Role of the judge and prosecutor in cases involving defendants with mental disorders

PART IV. COMPETENCE TO PROCEED: GENERAL PROVISIONS

Standard 7-4.1. Competence to proceed; rules and definitions

- (a) In any criminal proceeding that takes place prior to or during adjudication of guilt and that requires the presence of the defendant, other than a proceeding pertaining to the defendant's competence to proceed and proceedings (such as bail hearings) where a competence requirement would seriously prejudice the defendant, the defendant must be competent to proceed.
- (b) The test for determining the defendant's competence to proceed when the defendant is represented by counsel should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings.
- (c) The tests for determining whether the defendant is competent to waive representation by counsel and to proceed pro se are specified in Standard 7-5.3.
- (d) The terms *competence* and *incompetence* as used with Part IV of this chapter refer to mental competence or mental incompetence. A finding of incompetence to proceed may arise from any mental disorder or condition as long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

Standard 7-4.2 Competence to Plead

- (a) No plea of guilty or nolo contendere should be accepted from a defendant who is incompetent to proceed.
 - (i) Absent additional information bearing on the defendant's competence, a finding that the defendant is competent to proceed should be sufficient to establish the defendant's competence to enter a plea of guilt or nolo contendere.
 - (ii) The test for determining mental competence to proceed with pleading should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, given the nature and complexity of the charges and the potential consequences of a conviction, the defendant has a rational as well as factual understanding of the proceedings relating to entry of a plea of guilty or nolo contendere.

- (b) Evaluations of persons believed to be incompetent to proceed with pleading and treatment of persons found incompetent to proceed with pleading should take place in accordance with this part.

Standard 7-4.3. Responsibility for raising the issue of competence to proceed

- (a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to proceed at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.
- (b) The prosecutor should move for evaluation of the defendant's competence to proceed whenever the prosecutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information that has come to the prosecution's attention relative to defendant's incompetence to proceed.
- (c) Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant's competence to proceed whenever counsel has a good faith doubt about the defendant's competence, even if the motion is over the defendant's objection.
- (d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt about the defendant's competence to proceed consistent with (f). Defense counsel should make known to the evaluator the specific facts that have formed the basis for the motion.
- (e) Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant's competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant's competence to proceed; rather such treatment should be sought pursuant to Part II of these Standards, whether the defendant is in jail, the community, or an inpatient facility.
- (f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

Standard 7-4.4. Judicial order for competence evaluation

- (a) Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to proceed and the requirements below are met, the court should order an evaluation and conduct a hearing into the competence of the defendant to proceed. The court should follow this procedure whether the doubt arises from a motion of counsel, from information supplied by counsel, from the court's own observation of the defendant, or from any information otherwise known to the court.
 - (i) The court should not order an evaluation of a defendant's competence to proceed before there has been a determination of probable cause by a judge, grand jury or prosecutor unless an earlier evaluation is requested by defense counsel. If it is determined that probable cause for criminal prosecution does not exist, there should be no further inquiry into the defendant's competence to proceed.
 - (ii) An evaluation to determine competence to proceed should not be ordered before the defendant is represented by counsel who has had an opportunity to consult with the defendant and to be heard by the court.
- (b) The evaluator(s) appointed to perform the evaluation of the defendant's competence to proceed should be qualified by training and experience to offer testimony to the court on matters affecting competence. A mental health professional who is appointed as an evaluator should have the qualifications set forth in Standard 7-3.9.
- (c) The order for evaluation should specify the nature of the evaluation to be conducted and should specify the legal criteria to be addressed by the evaluator in accordance with the requirements set forth in Standard 7-3.4(e). Unless requested by the defendant, or for good cause shown in accordance with Standard 7-3.4(d), the evaluation should not include an evaluation into the defendant's mental condition at the time of the offense or other matters collateral to the issues of competence to proceed.
- (d) Each jurisdiction should establish time periods by which the evaluation should be concluded and a report returned to the court. Such periods normally should not exceed [fourteen] days unless good cause is shown that an extension is necessary for an adequate evaluation. Such extensions should last no longer than [fourteen] days.

Standard 7-4.5. Location of competence examination

- (a) Whenever feasible, evaluation of a defendant's competence to proceed should be conducted in the locality in which the defendant is charged. A defendant should be evaluated in jail only when the defendant is ineligible for release to the community. A defendant may be evaluated in an inpatient facility only when
 - (i) an outpatient evaluation of the defendant determines that the defendant must be admitted to the facility for a professionally adequate evaluation to be completed
 - (ii) the defendant is admitted to the facility for treatment unrelated to the evaluation, or
 - (iii) the defendant will not submit to outpatient examination as a condition of pretrial release.
- (b) Confinement authorized under (a) may continue for such time as is necessary for the evaluation to determine competence, consistent with Standard 7-4.4(c).
- (c) Pendency of proceedings to determine competence to proceed should not postpone judicial determination of eligibility for pretrial release.

Standard 7-4.6. Report of evaluator

- (a) The first matter to be addressed in the report should be the defendant's competence to proceed. If the opinion of the evaluator is that the defendant is competent to proceed, issues relating to treatment should not be addressed. If the opinion of the evaluator is that the defendant is not competent to proceed, or that the defendant is competent to proceed but that continued competence is dependent upon maintenance of treatment, the evaluator should then report on the treatment necessary for the defendant to attain or maintain competence, with a presumption that such treatment should take place in the community.
- (b) If the evaluator determines that treatment is necessary for the defendant to attain or maintain competence, the report should address the following issues:
 - (i) the condition causing the incompetence;
 - (ii) the treatment required for the defendant to attain or maintain competence and an explanation of appropriate treatment alternatives in order of choice;

- (iii) the availability of the various types of acceptable treatment in the local geographical area. The evaluator should indicate the agencies or settings in which such treatment might be obtained, including the jail. Whenever the treatment would be available on an outpatient basis in the community, the evaluating expert should make such fact clear in the report;
 - (iv) the likelihood of the defendant's attaining competence under the treatment and the probable duration of the treatment.
- (c) If the evaluator determines that the only appropriate treatment requires that the defendant be taken into custody or involuntarily hospitalized, then the report should include the following:
 - (i) an analysis of the defendant's treatment needs that require attention in a custodial or inpatient setting;
 - (ii) whether the defendant, because of the condition causing incompetence, meets the criteria for placement in an inpatient setting, as set forth by law;
 - (iii) whether there is a substantial probability that the defendant will attain competence to proceed within the reasonably foreseeable future;
 - (iv) the nature and probable duration of the treatment required for the defendant to attain competence;
 - (v) alternatives to involuntary confinement the evaluator considered and the reasons for the rejection of such alternatives.

Standard 7-4.7. Use of reports

- (a) Any information or testimony elicited from the defendant at any hearing or examination on competence or contained in any motion filed by the defendant or any information furnished by the defendant to the court or to any person evaluating or providing mental health services, and any information derived therefrom, and any testimony of experts or others based on information elicited from the defendant, should be considered privileged information and should be used only in a proceeding to determine the defendant's competence to proceed and related treatment issues unless the privilege is waived.
- (b) The defendant waives the privilege established in (a) by using or indicating an intent to use the report or parts thereof for any other purpose. Upon such

waiver, the prosecutor should be permitted to use the report or any part of the report to address the mental condition issue for which the defendant uses the report, subject only to the applicable rules of evidence.

- (c) If the privilege is not waived pursuant to (b), the report should be put under seal after its use to determine competence and may only be unsealed if subsequent proceedings relitigate that issue.

Standard 7-4.8. Necessity for hearing on competence to proceed

- (a) In every case in which a good faith doubt of the defendant's competence to proceed has been raised and as soon as practical after receipt of the reports of the evaluators, the court should conduct a hearing on the issue of competence to proceed unless all parties stipulate that no hearing is necessary and the court concurs. If the defendant has been confined for examination, the hearing should be held within [seven] days of the receipt of the report of the evaluators; if the defendant is at liberty it should be held within [thirty] days.
- (b) If, after the competence evaluation, defense counsel and the defendant disagree about whether a plea of incompetence should be asserted, special counsel should be appointed to represent the defendant's position during the competency hearing.
- (c) If the parties agree on the issue of competence to proceed or issues related to treatment, a stipulation containing the factual basis for the agreement may be accepted by the court. The court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation. In the absence of stipulation by the parties and concurrence by the court, a hearing on the issues should occur.
- (d) Trial by jury should not be required for the hearing on competence to proceed, provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil commitment, jury trial should be available to a defendant to determine issues of competence to proceed and of involuntary confinement for treatment to restore competence.
- (e) In lieu of or after a hearing, the parties may request that the court dispose of the case by either dismissing the charges without prejudice or placing the charges in abeyance, pending the defendant's successful participation in treatment, if
 - (i) based on the reports of the evaluators, it appears that the defendant is incompetent to proceed but would be a suitable candidate for mental health treatment,

- (ii) the prosecutor and the defense attorney agree that such diversion would be preferable to an order for restoration of competence to proceed, and
- (iii) the defendant assents to such diversion.

Standard 7-4.9. Hearing on competence; defendant's rights, evidence, and priority of issues

- (a) In all hearings regarding competence, a defendant should have:
 - (i) the right to be present at the hearing, to fully cross-examine witnesses, to call independent expert witnesses, to have compulsory process for the attendance of witnesses, and to have a transcript of the proceedings. Either party should have the authority to call and examine any person identified by the evaluators as a source of information for the evaluative report other than the defendant or the defense attorney.
 - (ii) the right to adequate notice and time to prepare for the hearing, including timely disclosure of the report of appointed evaluators and, if necessary, opportunity to interview or, in those jurisdictions that so provide, to depose the evaluators before the hearing.
- (b) Evidence presented at the hearing should conform to rules of evidence applicable to criminal cases within that jurisdiction. The evaluators, whether called by the court or by either party, should be subject to examination.
 - (i) Defense counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose the substance of confidential communications or violate the attorney-client privilege; counsel so electing may be cross-examined to that extent. Such testimony does not disqualify the attorney from representing the defendant.
 - (ii) The court may properly inquire of defense counsel about the attorney-client relationship and the client's ability to communicate effectively with counsel. The defense counsel, however, should not be required to divulge the substance of confidential communications or those that are protected by the attorney-client privilege. Defense counsel responding to inquiry by the court on its own motion should not be subject to cross-examination by the prosecutor.
- (c) At the hearing, the court should consider separately each discrete issue raised and should first consider the issue of the defendant's competence to proceed.

- (i) The party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence.
- (ii) If the court, after hearing the evidence, finds by a preponderance of the evidence that the defendant is competent to proceed the matter should proceed to trial; if the defendant is found not competent, the court should proceed to issues of treatment to restore competence.

Standard 7-4.10. Hearing on competence; dispositional issues

- (a) Once the court has found that the defendant is not competent to proceed or that competence depends on continuation of treatment, the court should consider issues relating to treatment to restore competence.
 - (i) A defendant may be ordered to undergo treatment if the court finds that there is a substantial probability the treatment will restore the defendant to competence in the foreseeable future.
 - (ii) The court may order treatment be administered on an outpatient basis (including as a condition of pretrial release), at a custodial facility, or at an inpatient mental health facility.
 - (iii) A defendant should not be involuntarily hospitalized to restore or sustain competence unless the court determines by clear and convincing evidence that:
 - (A) treatment appropriate for the defendant to attain or maintain competence is available in the facility; and
 - (B) no appropriate treatment alternative is available that is less restrictive than placement in the facility.
- (b) At the conclusion of the hearing the court should enter its written order for treatment to restore competence. The order should contain the following:
 - (i) written findings of fact setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary hospitalization, if applicable;
 - (ii) information sufficient for a professional involved in providing treatment to ascertain the charge against the defendant and the nature of the condition causing the incompetence;

- (iii) a finding that the institution, program, or provider to which the defendant is to be committed or referred is sufficiently staffed and equipped to meet that defendant's treatment needs, or a finding that the ordered disposition is the best available option; and
 - (iv) when reports will be required under 7-4.12 from the professionals providing treatment.
- (c) An order adjudicating the defendant incompetent to proceed should be an appealable order.

Standard 7-4.11. Right to treatment and to refuse

- (a) A defendant determined to be incompetent to proceed has a right to prompt and adequate treatment to restore competence and a right to have such services administered by competent and qualified professionals.
- (b) Within [fourteen] days after entry of an order detaining or committing a defendant for treatment or directing that a defendant report for treatment on an outpatient basis, and assuming the person is not already restored to competence, the professional providing such services should develop and file with the court, copies being made available to both parties, an individualized plan of treatment. Each treatment plan should contain the following:
 - (i) a statement of the specific causes of defendant's incompetence including, where appropriate, diagnosis and description of any mental disorder, and reference to any other factors causing the incompetence to proceed;
 - (ii) a statement of the planned treatment, whether medical, psychological, educational, or social, appropriate to restore competence;
 - (iii) a statement setting forth any restrictions to be placed on the defendant and the reasons for imposing such restrictions;
 - (iv) a statement of the expected duration of treatment required to restore the defendant's competence.
 - (v) provision for periodic review of the plan's efficacy.
- (c) A defendant has a right to treatment in the least restrictive setting appropriate to restore competence to proceed.

- (i) If the criteria for commitment to an inpatient facility in Standard 7-4.10(a) (iii) are met, a defendant may be treated in a forensic facility or a general treatment facility whose staff have training and experience in the treatment of persons under criminal charges.
 - (ii) Whenever a defendant who is incompetent to proceed has been denied pretrial release or is unable to meet the release conditions imposed, that defendant may be detained in jail only if adequate treatment to restore competence is provided in that setting. Otherwise treatment must be in a mental health facility.
- (d) A defendant determined to be incompetent to proceed and committed for treatment should have the right to refuse any treatment that has an unreasonable risk of serious, hazardous or irreversible side effects. Otherwise, such a defendant may be subject to psychoactive medication over objection if:
 - (i) the government's interests in prosecuting the defendant are important;
 - (ii) the medication proposed is substantially likely to restore the defendant to competence and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel;
 - (iii) the medication is necessary to restore competence, and any less intrusive treatments are unlikely to achieve the same result; and
 - (iv) the medication is in the defendant's best medical interests in light of the defendant's medical condition.
- (e) If a defendant found incompetent to proceed is treated with medication in an inpatient facility, becomes competent, and is returned to jail or to the community to await further legal proceedings, the court should order as a condition of the defendant's return that the receiving facility or local treatment facility continue such treatment as the inpatient facility may recommend to maintain the defendant's competence. Only if such treatment in the local facility is clearly not feasible should the court consider ordering the defendant returned to the inpatient facility pursuant to Standard 7-4.10 (a) (iii) until proceedings against the defendant are ready to commence.

Standard 7-4.12. Periodic redetermination of incompetence

- (a) Defendant's continuing incompetence to proceed should be periodically redetermined by the court without the necessity of motion by either party. The facility or person responsible for treatment should therefore be required

periodically to file with the court a report on the defendant's current status, with copies to the prosecutor and defense counsel and with notice to the defendant. The report should be filed:

- (i) any time the treating facility or person responsible for treatment concludes that the defendant has attained competence to proceed;
 - (ii) any time the treating facility or person responsible for treatment concludes that there is not a substantial probability that the defendant will attain competence within the foreseeable future; or
 - (iii) at the following intervals: 30 days, 90 days, 180 days, and every 180 days thereafter.
- (b) The report should contain the following:
 - (i) a reevaluation of those issues required by Standard 7-4.6 to be contained in the initial report to the court;
 - (ii) a description of the treatment administered to the defendant;
 - (iii) an evaluation of the defendant's continued progress toward attaining competence within the reasonably foreseeable future, if the report concludes that the defendant remains incompetent to proceed.
- (c) Either party should have the right to contest the report or any issues addressed in the report within such time as is established in that jurisdiction and the right to demand a hearing on the issues contested, pursuant to Standard 7-4.10.
 - (i) Before the hearing, upon motion of either party and upon cause shown, the court should order that the defendant be evaluated by independent mental health professionals and that reports be submitted;
 - (ii) Each party should have the right to present evidence at the hearing. At the conclusion of the hearing the court should enter its written order setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary confinement.
- (d) If neither party contests the report within the time set, the court should independently review the report and:

- (i) if the court concurs in the report's conclusions the court should enter an order accepting the report and continuing the defendant's treatment or setting the case for trial, as appropriate;
 - (ii) if the court does not concur in the report's conclusions the court, if appropriate, should order an independent reevaluation of the defendant and should hold a hearing on the issues addressed in the report.
- (e) Notwithstanding the availability of periodic redeterminations by the court, either party should, upon good cause to believe that a defendant has attained competence to proceed, be able to initiate a redetermination of the defendant's competence under Standard 7-4.10.
 - (i) The prosecutor or defense counsel, upon a showing of good cause, should be able to make a motion for reevaluation of a defendant by independent evaluators or for rehearing by the court of the issue of the defendant's continuing incompetence. For good cause shown, the court should be empowered to order such reevaluation or rehearing at any time.
 - (ii) Defense counsel should be permitted to have the defendant reevaluated at defense expense at any time, and the treating institution should be mandated to make the defendant available to the evaluator for reexamination. All records necessary for independent evaluation should be available to the prosecutor or defense counsel at any time.

Standard 7-4.13. Defense motions; proceedings while defendant remains incompetent

The fact that the defendant has been determined to be incompetent to proceed should not preclude further judicial action, defense motions, or discovery proceedings which may fairly be conducted without the personal participation of the defendant.

Standard 7-4.14. Disposition of unrestorably incompetent defendants

- (a) A defendant may be adjudged unrestorably incompetent to proceed (unrestorable) if the defendant has previously been adjudged incompetent and the court finds by a preponderance of evidence that there is no substantial probability that the defendant will become competent to proceed within the foreseeable future.

- (b) The court should hold a hearing to determine whether the defendant is unrestorable whenever the issue has been raised by the report of the professional providing treatment, at the expiration of the maximum time of sentence for the crime charged or [twelve/eighteen] months from the date of adjudication of incompetence to proceed, whichever first occurs.
- (c) If the defendant has been found unrestorable then the defendant should be released from any detention or commitment for treatment to attain or restore competence. If the defendant meets the criteria for involuntary civil commitment, the court may order such commitment and may direct that initial commitment take place in a forensic facility.

Standard 7-4.15. Conducting proceedings when the defendant is taking medication

- (a) A defendant should not be considered incompetent to proceed because the defendant's competence is dependent upon continuation of treatment which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.
- (b) If the defendant proceeds to trial with the aid of treatment that may affect demeanor, either party should have the right to introduce evidence regarding the treatment and its effects, and the jury should be instructed accordingly.

Standard 7-4.16. Credit for time served

A defendant who has been detained or committed for examination of competence to proceed or treatment to restore competence to proceed should receive credit against any sentence ultimately imposed for the time of such pretrial confinement.

PART V. COMPETENCE IN SPECIFIC CONTEXTS

Standard 7-5.1 Competence to proceed in specific contexts and related issues

- (a) Legislatures and courts should recognize that special competence issues arise when defense counsel has good faith doubts about the defendant's ability to make significant decisions, when the defendant wants to proceed pro se, when the defendant is subject to police interrogations, and when the proceeding at issue occurs after conviction.
- (b) Standard 7-5.2 applies when defense counsel has doubts about the defendant's competence to make decisions about matters within the defendant's sphere of control.
- (c) Standard 7-5.3 applies when the defendant elects to proceed without counsel and when, after such election, the defendant proceeds pro se.
- (d) Standard 7-5.5 governs the admissibility of statements made by people with mental disorder during interrogation and related issues.
- (e) Standards 7-8.7 and 7-8.8 govern competence to proceed of defendants represented by counsel in noncapital sentencing and post-conviction proceedings and Standards 7-9.8 and 9.9 govern competence issues relating to capital sentencing and post-conviction proceedings.

Standard 7-5.2 Competence to proceed with specific decisions: control and direction of case

- (a) Matters that are under the defendant's sphere of control include the decisions to plead guilty, assert a defense of nonresponsibility [insanity defense], and waive the rights to jury trial, testify, and appeal.
- (b) The test for determining whether the defendant is competent to make a decision regarding control and direction of the case should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration.
- (c) If the defense attorney has a good faith doubt concerning the defendant's competence to make decisions within the defendant's sphere of control under (a), the defense attorney may make a motion to determine the defendant's competence to proceed under Standard 7-4.3 even if the defendant has previously been found competent to proceed in the case. Upon such motion,

the court should order a mental health evaluation, if necessary, according to the procedures set forth in Standard 7-4.4, and indicate the specific decisional issue in question. If, after a hearing, the court finds the defendant competent to proceed, defense counsel should follow the defendant's direction on matters within the defendant's sphere of control. If the defendant is found incompetent, the court should order treatment according to Part IV.

Standard 7-5.3. Competence to elect to proceed without representation by counsel; competence to proceed pro se

- (a) A defendant who is incompetent to elect to proceed without representation by counsel should not be permitted to proceed to trial or enter a plea of guilt or nolo contendere while unrepresented by counsel.
- (b) The test for determining competence to elect to proceed without representation by counsel should be whether the defendant
 - (i) is competent to proceed under Standard 7-4.1(b),
 - (ii) has a rational and factual understanding of the possible consequences of proceeding without legal representation, including difficulties the defendant may experience due to his or her mental or emotional condition or lack of knowledge about the legal process, and
 - (iii) the ability to make a voluntary, knowing, and rational decision to waive representation by counsel.
- (c) A defendant who is competent to elect to proceed without representation by counsel may plead guilty if competent to do so under Standard 7-4.2.
- (d) A defendant who is competent to elect to proceed without representation by counsel may represent him or herself at trial unless the court finds that, as a result of mental disorder,
 - (i) the defendant lacks the capacity to carry out the minimum tasks required for self-representation at trial to such a substantial extent as to compromise the dignity or fairness of the proceeding, or
 - (ii) the defendant will significantly disrupt the decorum of the proceeding.
- (e) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive representation by counsel and proceed pro se, the trial judge has a good faith doubt about the defendant's competence with respect to either waiver or pro se representation, the judge should order a

pretrial evaluation of the defendant according to the procedures set forth in part IV of this chapter.

- (f) After obtaining the report of the evaluators, the court should hold a hearing at which the defendant is represented on the issues raised according to the procedures set forth in part IV of this chapter.
 - (i) If the court determines that the defendant is both competent to elect to proceed without representation by counsel and competent to proceed *pro se*, the court should proceed with the case. The court in any such case should consider the appointment of standby counsel in accordance with Standard 6-3.7 to assist the defendant or, if it should prove necessary, to assume representation of the defendant.
 - (ii) If the court determines that the defendant is incompetent to elect to proceed without representation by counsel, the court should proceed to consider treatment in accordance with part IV of this chapter.
 - (iii) If the court determines that the defendant is competent to elect to proceed *pro se* but is not competent to proceed to trial without representation of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.

Standard 7-5.4. Use of statements by people with mental disorder at trial

- (a) This Standard addresses competence and admissibility issues that arise when people with mental disorder make incriminating statements to the police that are potentially:
 - (i) unreliable, as described in (b).
 - (ii) involuntary, as described in (c),
 - (iii) obtained in violation of *Miranda v. Arizona*, as described in (d).
- (b) Where the court finds that the reliability of a statement has been significantly impaired by a person's mental disorder, it should exclude the statement from evidence even in the absence of official misconduct. Where the statement has not been excluded, the court should permit evidence to be presented to the trier of fact regarding the effect of the defendant's mental disorder on the reliability of the statement.
- (c) Courts should recognize that official conduct that does not constitute impermissible coercion when persons without mental disorder are interrogated may impair the voluntariness of the statements of persons with mental disorder.

Where such impairment of voluntariness is significant, the court should exclude the statement from evidence. However, in the absence of any such impermissibly coercive official conduct, such statement should not be excluded from evidence solely because it was the product of the person's mental disorder, unless it is found unreliable pursuant to Standard 7-5.4(b).

- (d) Statements made by persons with mental disorder in response to custodial interrogation should be admissible only if the person has a factual and rational understanding of his or her rights and makes a knowing and voluntary waiver of them. A person's mental disability can affect and impair each element of an otherwise valid waiver.
- (d) The court should admit into evidence at both pretrial hearings and trial otherwise admissible expert testimony by qualified mental health professionals bearing on the effect of a person's disorder on the reliability and voluntariness of a statement and the validity of any waiver of rights that preceded such a statement.

PART VI. NONRESPONSIBILITY FOR CRIME

Standard 7-6.1. The defense of mental nonresponsibility [insanity]

- (a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disorder, that person was unable to appreciate the wrongfulness of such conduct.
- (b) When used as a legal term in this Standard, mental disorder refers to any disorder that substantially affected the mental or emotional processes of the defendant at the time of the alleged offense, unless it was a disorder manifested primarily by repeated criminal conduct or was attributable solely to the acute effects of voluntary use of alcohol or other drugs.

Standard 7-6.2. Admissibility of other evidence of mental condition

Evidence, including expert testimony, concerning the defendant's mental condition at the time of alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible, consistent with Standard 7-3.8(a) restricting experts to testimony based on their specialized knowledge.

Standard 7-6.3. Control and notice of defense based on mental condition

- (a) The decision whether to raise a defense of mental nonresponsibility under Standard 7-6.1 is the defendant's. The decision whether to introduce evidence of mental condition under Standard 7-6.2 is the defense attorney's.
- (b) If the defense intends to rely upon the defense of mental nonresponsibility [insanity] or introduce expert testimony relating to mental condition at the time of the offense charged, it should, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the prosecuting attorney in writing of such intention and file a copy of such notice with the clerk. The court may, for cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate. If notice is not given in compliance with the requirements of this Standard, the court may impose sanctions appropriate to the degree of prejudice to the prosecution.

Standard 7-6.4. Evaluation procedures to determine mental condition at the time of the offense

- (a) Prior to the notice required in Standard 7-6.3(b) the defense may seek evaluation of the defendant's mental condition at the time of the offense.

Standard 7-3.3(a) governs when the defendant is entitled to funding for this evaluation.

- (b) After the defendant's notice as provided in Standard 7-6.3(b) and a finding that the defendant intends to rely upon expert testimony, the court may, on motion of the prosecuting attorney, order the defendant to be examined by an expert designated in the order for the purpose of determining the mental condition that is being put in issue by the defendant. If the court determines that an adequate evaluation of defendant's mental health condition at the time of the alleged crime has been precluded because the defendant has refused to cooperate with the mental health professional, it should adopt remedial measures proportionate to the degree of prejudice to the prosecution and the extent to which the non-cooperation was influenced by the defendant's mental disorder.
- (c) The court should not on its own motion order an evaluation of the defendant to determine mental condition at the time of the offense and should not grant such a motion from the prosecution except as provided in (b) of this Standard.
- (d) Procedures for conducting evaluations of mental condition at the time of the offense, including the attorneys' duty to provide information, the terms of the court order, the presence of counsel during the evaluation, recording of the evaluation, and the conduct of joint evaluations are governed by Standards 7-3.4 and 7-3.5.
- (e) Procedures for preparing reports on the mental condition at the time of the offense are governed by Standards 7-3.6.

Standard 7-6.5. Discovery and disclosures

- (a) Upon giving notice under Standard 7-6.3(b), the defense should provide the prosecution with the results of its evaluation(s), as provided in Standard 7-3.7(b)(i).
- (b) Pursuant to Standard 11-2.1 in the Discovery Standards, the prosecution should timely provide the defense with information bearing on the defendant's mental condition at issue, including expert reports or statements, the results of mental evaluations and tests, and any written or recorded statements and the substance of any oral statements made by the defendant. Additionally, upon receiving notice under Standard 7-6.3(b), the prosecutor should, as soon as reasonably practicable, disclose to defense counsel:
 - (i) any information that tends to rebut the factual data upon which the experts called by the defendant are relying, including documents, names

and addresses of witnesses and their relevant written or recorded statements, and substance of any oral statements;

- (ii) the names, addresses, and statements of any experts whom the prosecutor intends to call for the purpose of discrediting the mental nonresponsibility [insanity] defense or evidence of mental condition.
- (c) Admissibility and disclosure of evaluation results are governed by Standard 7-3.2(a)(on the admissibility of defendant's evaluation statements), Standard 7-3.2(b) (on the use of information relevant to competence to proceed or imminent risk), and Standard 7-3.4(c) (on disclosure of evaluation results to the public).

Standard 7-6.6. Limitation on opinion testimony concerning mental condition

Expert testimony as to how the development, adaptation, and functioning of the defendant's mental processes may have influenced the defendant's conduct at the time of the offense charged should be admissible. Consistent with Standard 7-3.8(a), expert reports and testimony should be based on specialized knowledge of the expert and the insanity test language should be used only if the expert can explain its clinical relevance. Testimony that a defendant is "sane" or "insane" should not be used unless required by the jurisdiction.

Standard 7-6.7. A unitary trial

The defense of mental nonresponsibility [insanity] and all other evidence pertaining to the defendant's responsibility for the acts charged should be heard in a unitary trial unless, upon the defendant's request, the court determines that trying the issue of guilt separately from the issue of responsibility is necessary to prevent substantial prejudice to the defendant.

Standard 7-6.8. Instruction to the jury

Upon motion of either party, the court may instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of mental nonresponsibility [insanity].

Standard 7-6.9. Burden of production and burden of persuasion

- (a) The defense should have the burden of ensuring that evidence of mental nonresponsibility [insanity] is introduced.
- (b) Once evidence of mental nonresponsibility [insanity] has been introduced at trial, the party with the burden of persuasion should prevail if it meets the preponderance of the evidence standard of proof.

- (c) Nothing contained in paragraph (b) above relieves the prosecution of its burden of proving beyond a reasonable doubt all elements of the offense charged including the mental state required for the offense charged.

Standard 7-6.10. Forms of verdict

- (a) When the defense of mental nonresponsibility [insanity] has been properly raised, the verdict returned should be in the form of either guilty, not guilty, or not guilty by reason of mental nonresponsibility [insanity]. The jury should be instructed that it may consider the verdict of not guilty by reason of mental nonresponsibility [insanity] only after finding, beyond a reasonable doubt, that the defendant committed the conduct charged.
- (b) Legislatures should not enact statutes that supplant or supplement the verdict of not guilty by reason of mental nonresponsibility [insanity] with a verdict of guilty but mentally ill.

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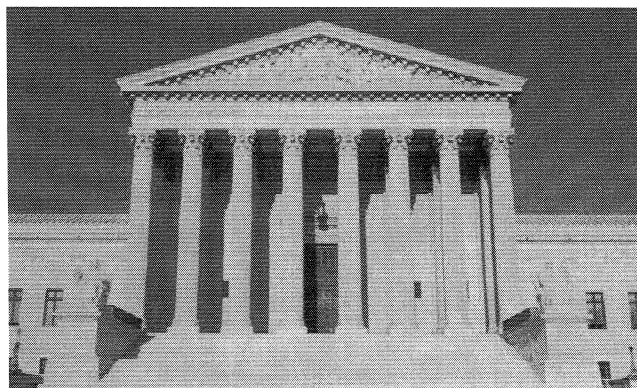
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'McCoy v. Louisiana': Whose Case Is It Anyway?

Steven Zeidman writes: In 'McCoy', the Supreme Court must decide whether it is unconstitutional for defense counsel to concede a client's guilt over his express objection.

By **Steven Zeidman** | January 19, 2018

Robert McCoy repeatedly told his lawyer that he was innocent of the murders of the mother, stepfather and son of his estranged wife, and yet defense counsel told the jury "[T]here is no way reasonably possible that you can listen to the evidence in this case and not come to any other conclusion than Robert McCoy was the cause of these individuals' deaths." McCoy was convicted and sentenced to death. Now the Supreme Court must decide whether it is unconstitutional for defense counsel to concede a client's guilt over his express objection.



U.S. Supreme Court in Washington, D.C.

On the face of it, most people, lawyers and non-lawyers alike, will see this as an easy call. Surely, a lawyer cannot tell the jury his client is guilty when his client has told him, indeed has insisted, that he is innocent.

Actually, the issue is thornier and even more important than it appears. Ultimately, the case is about the allocation of decision-making authority between lawyers and clients. The critical issue of who has the power to make certain decisions extends beyond capital cases and the question of conceding guilt. There are countless decisions to be made in the course of a criminal case. What happens when the client wants the lawyer to call an alibi witness but the lawyer disagrees, or when the client and lawyer cannot agree about the best defense theory, which jurors to select, which motions to file, or which objections to raise? Does, or should, it matter if the client expressly objects to counsel's chosen path?

Thirty-five years ago, the Supreme Court distinguished between fundamental decisions reserved for the accused and tactical or strategic decisions that were ceded to defense counsel and could be made without the defendant's knowledge or consent. Although the court stated that it was "recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal," the court failed to explain to whom or how this was recognized or what made only those particular decisions fundamental. Still today there is no explanation for how or why the vaunted four—whether to plead, whether to waive a jury, whether to testify at trial, and whether to appeal—came to be singled out as the only decisions reserved for the defendant.

In the capital trial of Joe Elton Nixon, his appointed lawyer clearly and forcefully conceded his client's guilt: "In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death."

It became apparent at a post-conviction hearing that although Mr. Nixon had been consulted about the plan, he never expressly consented. The question raised on appeal was whether the lawyer's concession of guilt was the functional equivalent of a guilty plea, and, as such, a decision reserved for the defendant. Justice Ginsburg, writing for a unanimous court, ruled that counsel was obliged to, and did, consult with his client, but since the concession of guilt was not akin to a guilty plea the lawyer did not need his client's affirmative, express consent. In other words, it was a strategic decision that was for the lawyer ultimately to make.

McCoy addresses a strikingly similar situation. In each case, defense counsel believed that conceding guilt and thereby maintaining credibility with the jury would increase the chances that the jurors in the penalty phase of the trial would opt for a life sentence instead of death. The essential difference between the cases is that McCoy, unlike Nixon, loudly and clearly expressed his objection to his lawyer's decision.

At first glance, the court's decision seems a *fait accompli*. After all, the *Nixon* court has already ruled that conceding guilt is a strategic decision for counsel to make, rather than the functional equivalent of a guilty plea for the client to decide. The question becomes whether the accused's forceful objection to counsel's strategic decision somehow transforms the decision into a fundamental one to be made by the defendant. Should the court so rule it

would be a rare and significant step toward increasing the accused's decision-making authority, and open the door for those who seek to vest more power with the accused to control his or her case.

On the facts of the *McCoy* case it is easy, as many have done, to write off McCoy's lawyer as disloyal or incompetent. But it is far too simplistic to conclude that any lawyer who overrides a client is similarly disloyal or incompetent.

Many lawyers believe that those who abdicate decision-making authority are shirking responsibility. They believe it is too easy for lawyers to absolve themselves of the onerous task of making difficult decisions by saying "Well, it's the client's choice." Would McCoy's counsel be roundly criticized if he had acceded to McCoy's wishes and argued his client's innocence, but McCoy was still found guilty and sentenced to death? Would the lawyer be absolved from criticism merely because he did as his client insisted? And if the maxim is true that "the lawyer who represents himself has a fool for a client," then is giving the accused decision-making power a variation on that theme? Is someone likely filled with anxiety, fear, frustration, and anger (and typically lacking in legal training) in the best position to make critical legal decisions?

These lawyers seek to use their training and experience to get the results their clients want, and willingly exercise independent professional judgment if they disagree with their clients. They take solace in and ascribe to Justice Harlan's words from more than 50 years ago: "[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."

Other lawyers rebel against this view of counsel's role. They argue it is grounded in paternalism and populated by lawyers with huge egos and inflated senses of their abilities. They believe these lawyers subjugate their clients, who are often poor and people of color. Instead, they believe the

lawyer's role is to be client-centered, which they define as imbuing clients with agency, authority and autonomy. After all, who bears the consequences of a conviction and sentence?

The difference between the two views of counsel's role was perhaps best captured by the Fifth Circuit in *Wright v. Estelle*, a 1978 case that wrestled with the question whether it was constitutional error for defense counsel to override his client's expressed desire to testify. According to the majority, counsel was the ultimate decision-maker since "there is no constitutional requirement that a court-appointed attorney must walk his client to the electric chair." The dissent, on the other hand, argued that "[T]he wisdom or unwisdom of the defendant's choice does not diminish his right to make it. The lawyer's authority is vindicated when he advises his client."

The "who decides" debate must acknowledge that the majority of criminal defendants are unable to afford private counsel. Most publicly appointed lawyers don't look like their clients or come from similar backgrounds. How should differences between lawyers and clients with respect to race, ethnicity, language, etc., affect who gets to make which decisions? There is also the well-documented crisis in indigent defense characterized by lawyers with too many clients and too little resources. How much attention can typical Public Defenders pay to each client to inform their decision making?

The "who decides" question bedevils judges as well as lawyers. During pretrial hearings at Guantanamo Bay in the ongoing prosecution of Khalid Shaikh Mohammad and others accused of planning the 9/11 attacks on the World Trade Center, a defendant sought to terminate his relationship with one of his appointed lawyers. Presiding Judge Colonel James L. Pohl denied that motion but said "the fact that [she] is still a member of your defense team does not mean that you do not have the right to tell her and any other member of your defense team of what you want them to do ... ultimately it's your defense, and

in this case it is your life. So, ultimately, you are the decision maker.”

Subsequent questions from the attorneys prompted Judge Pohl to opine that the issue was more complicated than he indicated and that “[I]t’s clear from what I’ve been talking about that I don’t necessarily have a clear view.”

In one of the only examples of a Supreme Court Justice reflecting about which decisions are for the lawyer or the accused, Justice Antonin Scalia captured the extant lack of clarity: “I would not adopt the tactical versus fundamental approach, which is vague and derives from nothing more substantial than this court’s say-so What makes a right tactical? ... Whether a right is ‘fundamental’ is equally mysterious.” *McCoy* presents an overdue opportunity for the court to finally solve that mystery.

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The Ethics of Representing People with Diminished Capacity

MHLS CLE

JANUARY 19, 2018

NAOMI M. WEINSTEIN, ESQ.

Introduction

- ▶ Maintaining a normal attorney-client relationship
- ▶ Client autonomy vs. ethical obligations



"We need to draw the line on unethical behavior.
But let's draw it with an Etch-a-Sketch and
don't be afraid to shake it a little."

New York Rules of Professional Conduct

- ▶ Based on the ABA Model Rules, adopted 12/16/08
- ▶ Diminished capacity not defined
- ▶ What is a normal client-attorney relationship in the context of serious mental illness

Rule 1.14

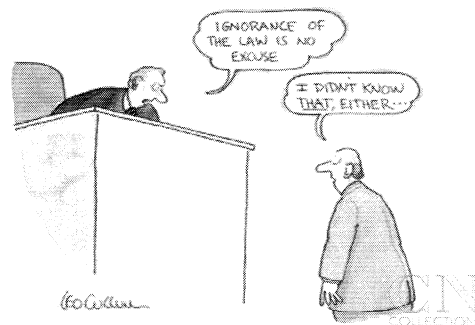
- ▶ Even if client has diminished capacity, lawyer shall maintain conventional relationship as much as possible
- ▶ Allows lawyer to take protective action which includes:
 - ▶ Consulting with individuals or entities that could take the action
 - ▶ Seeking the appointment of GAL, conservator or guardian
- ▶ When taking protective action lawyer is authorized under Rule 1.6(a) to reveal information but only to extent reasonably necessary to protect

Rule 1.6

- ▶ Lawyer shall not reveal confidential information unless:
 - ▶ Client gives informed consent
 - ▶ Disclosure is impliedly authorized to advance best interests of client and is reasonable or customary
- ▶ Lawyer may reveal/use confidential information:
 - ▶ To prevent reasonably certain death or bodily harm
 - ▶ To prevent client from committing crime
 - ▶ To withdraw written/oral opinion or representation
 - ▶ To secure legal advice about compliance with ethics rules
 - ▶ To defend against accusation of wrongful conduct

Rule 1.1

- ▶ Competent representation = having the legal knowledge, skill, thoroughness and preparation reasonably necessary
- ▶ Mental disability law often requires going beyond basic services in order to serve clients



Rule 1.4

- ▶ Must promptly inform client of any decision, reasonably consult with the client and keep them informed, comply with requests for information, and consult about any limitation of the lawyer
- ▶ Must explain a matter to the extent reasonably necessary to permit the client to make informed decisions

Rule 3.3

- ▶ Prohibits attorneys from making false statements or offering evidence known to be false
- ▶ If client intends to engage/ is engaging/has engaged in criminal or fraudulent conduct, lawyer must take remedial measures including disclosure to court

McCoy v. Louisiana

- ▶ Defense attorney told jury over client's objection that his client was crazy and guilty (in attempt to avoid death penalty)
- ▶ Is it a legal strategy or does it violate Sixth Amendment right to assistance of counsel?

The Role of Counsel: Balancing Competing Interests

- ▶ "The governing standard for representation of impaired adult clients is not the protection of their interests, but to the extent possible, the zealous advocacy of their expressed preferences." *Gross v. Rell*, 40 A.3d 240 (Conn. 2012)
- ▶ The importance of dignity

Client vs. Attorney Decisions

- ▶ Rule 1.2 – client decision whether to settle matter, enter plea, waive jury trial, client will testify
- ▶ Attorney decides overall legal strategy, what motions to make, etc.
- ▶ Hypo #

Acting as Standby Counsel

- ▶ What happens when client wants to go pro se or attorney seeks to be removed
- ▶ Standby counsel should not actively participate in conduct of defense unless requested → even when counsel actively assists, defendant has right to make final decisions on all matters
- ▶ *Indiana v. Edwards*, 128 S.Ct. 2379 (2008)

Revealing Confidential Information

- ▶ Reaching out to collateral sources without client permission
→ impermissible unless taking protective action pursuant to Rule 1.14

The Duty to Warn

- ▶ Determining whether client's statements are true/reasonably certain to occur
- ▶ *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (1976) – failure to report to authorizes and warn victim can lead to personal and professional liability for therapist

Attorney Liability

- ▶ *In re Goebel*, 703 N.E.2d 1045 (Ind. 1998) (attorney wrongfully revealed confidential info of firm's guardianship client to criminal client that led to death of guardianship client)
- ▶ *Hawkins v. Kings Co. Dept. of Rehab. Serv.*, 24 Wash. App. 338 (1978) (attorney not liable for failing to disclose defendant's mental disability at bail hearing or failing to warn potential victims)
- ▶ *State v. Hansen*, 122 Wash. 2d 712 (1993) (lawyer didn't breach any duty when warned judge about threat because no attorney-client relationship for defendant seeking potential legal representation)

ABA Criminal Justice Standards on Mental Health

- ▶ Standard 7-1.4(d) – encourages attorneys to seek relevant info from family members and other collateral sources, but only with client permission
- ▶ Standard 7-4.1(b) – competency to proceed = having ability to consult w/counsel w/reasonable degree of rational understanding and otherwise assist in defense
- ▶ Standard 7-4.3 – allows defense counsel to seek competency evaluation even over defendant's objection

Raising the Issue of Incapacity

- ▶ Mental illness vs. developmental disabilities
- ▶ 730 Temp vs. Final
- ▶ Inpatient vs. Outpatient restoration
- ▶ Case examples

Ethical Issues in Other Contexts

Elder Law, Juvenile Law and MHLS



Elder Law

- ▶ Elderly people with mental disability suffer double prejudice
- ▶ Raising the issue of competency in cases with dementia diagnosis
- ▶ Seeking guardianship as protective action

Juvenile Law

- ▶ Competency complications – cognitive and developmental limitations, legal rights routinely restricted
- ▶ Issue whether parents should be consulted

Recommendations/Public Policy Concerns

- ▶ Cultural competence
- ▶ Eschewing paternalism
- ▶ Promoting least restrictive alternatives
 - ▶ Psychiatric advance directives
 - ▶ Supported decision-making model

Conclusion

- ▶ Being aware of client's potential mental health issues and raising issue of incompetency
- ▶ Don't substitute judgment
- ▶ Preserve client autonomy and dignity
- ▶ When in doubt, check with others or local bar associations