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The Mentally Impaired Client: Who Decides Trial Strategy?

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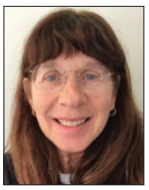

By **Diane Goldstein Temkin**

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On Jan. 17, 2018, the U.S. Supreme Court heard oral argument on the capital murder conviction of Robert McCoy, who was sentenced to death by a Louisiana court after his own lawyer told the jury he was guilty of a triple homicide. According to The New York Times, defense counsel Larry English made a tactical decision, over his client's objection, to tell the jury that his client had committed the homicides in order to maximize his client's chances at avoiding the death penalty. Adam Liptak, "Supreme Court Skeptical of Lawyer's Conduct in Death Penalty Case," N.Y. Times (Jan. 17, 2018). English reasoned that, given the overwhelming mountain of evidence against McCoy, his best bet was to concede guilt and focus on mitigation at the sentencing phase of trial.

The lawyer's ploy didn't work, as the jury convicted McCoy and imposed the death sentence. In addition, McCoy explicitly objected to the strategy and insisted on maintaining his innocence, arguing that he had an alibi. The question in the Supreme Court is whether the lawyer, in disregarding his client's explicit instructions to protest his innocence, arrogated to himself a fundamental decision that belonged to the client rather than the lawyer, and thereby violated the client's Sixth Amendment right to assistance of counsel. A decision is expected before the Court's June recess.

The question in the Supreme Court is whether the lawyer, in disregarding his client's explicit instructions to protest his innocence, arrogated to himself a fundamental decision that belonged to the client rather than the lawyer.

This was not the first time the High Court has grappled with this issue. In a 2004 case, the Supreme Court considered whether counsel must obtain explicit consent from the client before conceding guilt in a capital case. *Florida v. Nixon*, 543 U.S. 175 (2004). Rejecting the need for explicit consent, the court held in *Florida v. Nixon* that, "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Nixon*, 543 U.S. at 192. Rather, the court held that conceding guilt to avoid the imposition of the death penalty may be a reasonable trial strategy, and is

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permissible when the defendant neither consents nor objects to the strategy. Of course, there is a difference between a client who stands mute and one who vociferously objects, as was the case in *McCoy*.

Longtime followers of criminal defense and legal ethics will recall that a similar controversy arose during the prosecution of convicted Unabomber Theodore Kaczynski in 1998, who unsuccessfully tried to dismiss his court-appointed lawyers because they wanted to plead insanity in order to avoid the death penalty. Kaczynski's lawyers used a ruse to trick him into agreeing to a court-appointed psychiatric examination so that they could portray him as mentally ill, a defense to which their client objected, as he felt he wanted his political message, however twisted, to reach the public. Lerman and Schrag, Ethical Problems in the Practice of Law (3d Ed. 2012) at 351-52; *U.S. v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001). Following a 1998 plea bargain, Kaczynski was sentenced to life in prison. The lawyers' ruse prompted a debate about whether defense lawyers may ethically deceive their client into agreeing to a forensic examination that is contrary to the client's expressed wishes.

While Kaczynski and McCoy represent examples of lawyers' conflicts with high-profile clients, lawyers for less-famous clients may also face gut-wrenching decisions in interacting with their clients. When do lawyers cross the line between acting as trusted advisors on the one hand and wresting control of the case from the client on the other?

The allocation of authority between lawyer and client is set forth in Rule 1.2 of the American Bar Association Model Rules of Professional Conduct, which provides that the most basic, fundamental decisions about a case must be made by the client:

> Subject to paragraph (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> ABA Model Rule 1.2.

The New York version of RPC 1.2 is virtually identical.

But what if the client is mentally impaired? This issue is addressed in ABA Model Rule 1.14, titled, "Client With Diminished Capacity," which provides that a lawyer should attempt to maintain an ordinary relationship with the client if possible, and to seek appointment of a guardian if unable to do so. According to RPC 1.14:

> When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> RPC 1.14(a).

However, when the lawyer believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, or cannot act adequately in the client's own interest, the rule provides that "the lawyer may take reasonably necessary action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases seeking the appointment of a guardian ad litem, conservator or guardian." RPC 1.14(b). The commentary to RPC 1.14 provides that while a "severely incapacitated person" may not be able to make decisions involving her legal affairs, "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions

about matters affecting the client's well-being." RPC 1.14, Cmt [1].

For example, children may have the ability to make informed decisions about their cases, and it is not uncommon for lawyers in custody disputes or other family law cases to take directions from underage or incapacitated clients. Even individuals who have been adjudicated incapacitated and have guardians appointed are permitted by statute to bring applications to discharge or modify their guardianships. See N.Y. Mental Hygiene Law 81.36(b). In criminal cases, it is not uncommon for a judge to make a competency determination at the onset of the case in order to ascertain whether or not the defendant is sufficiently able to understand the nature of the proceedings and to participate meaningfully in his defense.

Lawyers for persons who suffer from mental illnesses do not assume that their clients cannot make reasoned decisions. To the contrary, lawyers for the mentally ill generally accede to their clients' decision-making prerogative and rarely take protective action on a client's behalf against the client's expressed wishes. The courts have recognized this principle. As the Second Circuit has noted, "Diminished capacity alone cannot serve to undermine" an individual's due process protections. *Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983). Likewise, even psychiatrists cannot assume that their patients lack decisional capacity. The fact that a patient receiving mental health treatment may disagree with his psychiatrist's judgment concerning the treatment "does not make the patient's decision incompetent." *Rivers v. Katz*, 67 N.Y. 2d 485, 495 (1986).

On Jan. 23, 2018, the Second Circuit addressed the allocation of decision-making prerogative between client and lawyer in *United States v. Tigano*, 2018 U.S. App. LEXIS 1544 (2d Cir., Jan. 23, 2018), in which the court dismissed the defendant's indictment on drug charges due to excessive trial delays in violation of his Sixth Amendment right to a speedy trial. The Second Circuit attributed the delays, in part, to "needlessly repetitive and dilatory competency examinations," all of which found Tigano competent, and which were ordered because of "Tigano's assertion of his speedy trial right and his refusal to accept a plea." 2018 U.S. App. LEXIS 1544 at *23, 25. The court noted that this case was "unusual" because, while "Tigano himself made very clear that he desired a speedy trial," his attorney's choices did not always reflect Tigano's desire. 2018 U.S. App. LEXIS 1544 at *37. As the Second Circuit concluded, "Quite simply, the right to a speedy trial belongs to the defendant, not to defendant's counsel." 2018 U.S. App. LEXIS 1544 at *37.

So getting back to *McCoy*, did defense counsel have the right to overrule his client's decision to protest his innocence and force the district attorney to prove every element of the case beyond a reasonable doubt? While the evidence against McCoy was overwhelming, it does not appear that the trial judge ruled him unfit either for trial or to participate in his own defense. http://www.scotusblog.com/wp-content/uploads/2017/09/16-8255-petition.pdf. As a matter of professional responsibility, it was the client's decision, not the lawyer's, whether or not to admit guilt to the jury.

Conclusion

The Rules of Professional Conduct allocate primary decision-making about fundamental strategic issues to the client. While superseding the client's decision-making with that of the lawyer is permissible for routine tactical matters, that is not the case for fundamental decisions such as whether or not to plead guilty, whether to settle a civil case, whether to go to trial, whether to assert an insanity defense, or whether to concede guilt at trial in the hope of averting greater punishment.