17-03

Opinion No. 17-03

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

May 9, 2017

ISSUE

¶1 Is it ethical for a criminal defense attorney who suspects his client is not competent to allow that client to enter a guilty plea without first filing for a competency evaluation? What are the defense attorney's ethical obligations toward a client of questionable competence?

ANSWER

¶2 The criminal defense attorney who questions her client's competence is not obligated to seek a competency evaluation unless she is otherwise unable to proceed in a way that protects her client's interests and autonomy. An attorney who questions the client's competence should first try to carry out a normal client-attorney relationship. When there is risk of substantial harm and the client cannot act in his own interest, the attorney is permitted to take protective action, such as involving family and professionals serving the client to assist. If the attorney needs guidance from a mental health expert, the attorney should generally seek a confidential psychological evaluation protected by attorney-client privilege before asking for a competency evaluation.

BACKGROUND FACTS

¶3 Sometimes a defendant is charged with a serious crime. When the attorney suspects that such a defendant may not be competent, the attorney may request a competency evaluation.[1] This may entail confinement.[2] If the defendant is found not competent to stand trial, the defendant must be committed for treatment intended to restore his competency.[3] This may be for an extended period of time. At some point the court may decide that the defendant's competency will never be restored and dismiss the case in furtherance of justice.[4] At that point, the defendant could be civilly committed if the defendant were a danger to himself or others.[5]

¶4 In many other cases a defendant is charged with a misdemeanor or infraction and the defendant's attorney believes that the defendant may not be competent. In such a case, the defense attorney could ask for a competency evaluation. However, if the defendant is in custody, further confinement for that evaluation may well exceed the sentence the defendant is likely to receive. If such a defendant is found incompetent, further confinement at a mental hospital to achieve competence may result in confinement that vastly exceeds the sentence that could be imposed for the misdemeanor. If the prosecutor makes a plea offer with little or no jail time, is it proper for defense counsel to urge the client with questionable competence to accept the offer and plead guilty?

ANALYSIS

¶5 The Utah Rules of Professional Conduct that address these questions are Rule 1.1 Competence, Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer, and Rule 1.14 Client with Diminished Capacity.

¶6 All clients are entitled to competent representation.[6] "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[7] Competent representation of a criminal defendant includes the ability to recognize and duty to investigate mental health issues.

¶7 A mentally impaired individual may have been "unable to form the requisite intent to commit the crime" at the time of the alleged offense.[8] This could provide a defense that counsel should pursue. Such a defendant might have diminished capacity that would justify mitigation in sentencing. Alternatively, a mentally ill individual may have an insanity defense to the charge(s). This opinion only addresses whether the client's current competency should be questioned or raised by defense counsel. There are substantial legal differences between competency for trial and a defendant's mental state at the time of the alleged offense and whether there is a basis for an insanity defense.

¶8 Rule 1.2 establishes the division of authority between attorney and client. With respect to criminal defendants, it states:

> 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.[9]

¶9 Comment 4 to this rule addresses how the attorney should proceed when he questions the client's competence:

> In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule

1.14.[10]

¶10 Rule 1.14 provides a number of important points regarding representing the questionably competent client. First, it establishes that "when a client's capacity to make adequately considered decisions in connection with the representation is diminished, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[11] The comments expand upon this point:

[M]aintaining the ordinary client-attorney relationship may not be possible in all respects. . . . Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.[12]

¶11 Under this rule, when an attorney suspects the client may have a mental illness or cognitive disability, the first step should not be to seek a mental health evaluation, including for competency, but to attempt to carry out the normal client-attorney relationship. The client may be able to express strong preferences -- such as to stay out of jail, or to enter a treatment program, for example.

¶12 The second point to take away from Rule 1.14 is that the lawyer may take protective action in certain circumstances:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client . . . .[13]

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest.[14]

¶13 The comments expand upon the relationship between the values of client autonomy and the need to protect the client:

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless protective action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, . . . consulting with support groups, professional services, adult-protective services or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.[15]

¶14 An attorney may reasonably conclude that, while relatively capable of functioning in matters of day-to-day life, a criminal defendant client is insufficiently competent to make informed decisions required in the usual allocation of authority between lawyer and client contemplated by Rule 1.2(a), Utah R. Prof. Conduct. In such circumstances the attorney would be justified in taking limited protective action. The attorney might involve the client's family, caretaker, or therapist in consulting with the client to try to arrive at a decision that is in the client's best interests and acceptable to the client. The attorney and such consultants might work with the client to develop a plan that will allow the client to achieve his goals of avoiding confinement and to comply with the terms of probation.[16]

¶15 If this limited protective action is ineffective, the next step would be for the attorney to "seek guidance from an appropriate diagnostician."[17] It is preferable for counsel to obtain a confidential psychological evaluation protected by the attorney-client privilege instead of getting an evaluation ordered by the court.[18] As the advisory ABA Standards for Criminal Justice suggest:

If defense counsel has a good faith doubt regarding the client's competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.[19]

¶16 The Comments to Rule 1.14 highlight the possible negative effect of the attorney publically raising an issue of diminished capacity or incompetence:

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, . . . proceedings for involuntary commitment. . . . At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.[20]

¶17 Raising questions of competence with the court could result in confinement while competence is determined and to restore competence, and further confinement, under civil commitment proceedings, if there is a risk to bodily injury

to another or serious damage to the property of another.[21]

¶18 The ABA Criminal Justice Standards regarding mental health provide that the court and the prosecutor "should" move for an evaluation of the defendant's incompetence whenever they have a "good faith doubt," but the defense counsel has no such affirmative obligation:

> 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.[22]

¶19 The ABA Standards suggest the test for competency to plead[23] 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.[24]

¶20 Some commentators argue that defense counsel has a responsibility to seek appropriate treatment for a mentally impaired client, due to his fiduciary obligations and respect for client autonomy, however, this need not be done through challenging competency.[25]

¶21 In opining that a defense attorney does not have an affirmative obligation to raise the question of competency, we have also considered Rule 3.3 Candor Toward the Tribunal and Rule 4.1 Truthfulness in Statements to Others.[26] Neither of these rules establish an affirmative duty for a defense attorney to raise questions about his client's competence with the Court. While Rule 3.3 prohibits knowingly making a "false statement of fact or law to a tribunal," it places no obligation on the attorney to divulge confidential information about the client which falls under the protection of Rule 1.6. If the court were to pose questions during the plea colloquy, the answers to which defense counsel believed would make it unlikely that the court would accept the plea, counsel must be candid and truthful, but would be entitled to object or decline to respond to any question. Likewise, Rule 4.1 prohibits knowingly making a "false statement of fact or law to a third person" and counsel could respond to any similar inquiry from the prosecutor, but must be candid about any affirmative representation made with respect to the client.[27] Of course, as a practical matter, it may be the most realistic and wise course of action for defense counsel to inform the prosecution and/or the court in advance that, due to the client's somewhat impaired condition and state of mind, certain accommodations to the typical process of pleading guilty may be needed in light of the client's diminished capacity and that is the best course of action for all concerned. Most courts and prosecutors will likely be sympathetic to that approach.

¶22 In some cases the lawyer may and should raise the issue of competence. "When a lawyer has reason to believe that her client may not be mentally competent to stand trial, she does not render ineffective assistance of counsel by making her concerns known to the court" even where the client objects.[28] In some cases a lawyer's failure to request a competency hearing may constitute ineffective assistance of counsel and be grounds to overturn the conviction.[29]

¶23 However, raising competence with the Court should rarely be the first approach a defense attorney takes to address a client's questionable competence. Rather, the attorney should raise the issue of the client's competence with the court only after attempting other approaches and when the attorney is unable to effectively proceed in any other way to protect both her client's interests and autonomy.

Notes:

[1] See Utah Code Ann. §77-15-1 et seq.

[2] See: Utah Code Ann. §77-15-5(3) which provides that the defendant "shall be retained in the same custody or status as he was in at the time the examination was ordered" unless the court or executive director of the Department of Human Services directs otherwise. Also see: 18 U.S.C.A. s 4241.

[3] Utah Code Ann. §77-15-6(1). The period of time when the defendant is detained for evaluation or to restore competency is not computed to determine his rights to a speedy trial. Utah Code Ann. §77-15-7.

[4] Utah R. Crim. P. 25(e) provides the trial court may dismiss a case in "its discretion, for substantial cause and in furtherance of justice." See *State v. White*, 256 P.3d 255 (Ut. App. 2011) where dismissal of criminal nonsupport charges was not an abuse of discretion where, in addition to defendant's incompetence and improbability of restoration to competence, the evidence was stale, the children almost adults, and the possibility of the defendant paying restitution was slim.

[5] Utah Code Ann. §62A-15-629 or 631. See *Jackson v. Indiana*, 406 U.S. 715 (1972).

[6] Rule 1.1, Utah R. Prof. Conduct.

[7] *Id*.

[8] *Bemore v. Chappell*, 788 F.3d 1151, 1165 (9th Cir. 2015).

[9] Rule 1.2, Utah R. Prof. Conduct.

[10] Comment [4], Rule 1.2, Utah R. Prof. Conduct.

[11] Rule 1.14(a) Utah R. Prof. Conduct.

[12] Comment [1] Rule. 1.14, Utah R. Prof. Conduct.

[13] Rule 1.14(b) Utah R. Prof. Conduct.

[14] Rule 1.14(c) Utah R. Prof. Conduct.

[15] Comment [5] Rule 1.14 Utah R. Prof. Conduct.

[16] This Committee has addressed the need for appropriate protective action in a prior opinion in which a criminally incompetent client wished to appeal a judgment terminating parental rights but refused to sign the necessary notice of appeal. Utah Ethics Advisory Opinion 13-03

[17] Comment [6] Rule 1.14 Utah R. Prof. Conduct.

[18] *See* 18 U.S.C.A § 3006A(e)(1).

[19] ABA Standards for Criminal Justice, Standard 4-5.2(c) (4th ed. 2015).

[20] Comment [8], Rule 1.14 Utah R. Prof. Conduct.

[21] *See* Utah Code Ann. §§77-15-5(3), §77-15-6(1), and 18 U.S.C. § 4241(d) and § 4246(d).

[22] Standard 7-4.3(c), ABA Criminal Justice Mental Health Standards (2016).

[23] The U.S. Supreme Court has held that a person is competent to stand trial if he understands the proceedings and is able to assist counsel in his defense. *Dusky v. United States*, 362 U.S. 402, 402 (1996). *Godinez v. Moran*, 509 U.S. 389 (1993), states that the standard of competency for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial.

[24] Standard 7-4.2, ABA Standards

[25] *See* Slobogin & Mashburn, *supra*, note 24.

[26] Utah R. Prof. Conduct.

[27] Comment [1] to Rule 4.1 indicates, inter alia, that a lawyer ". . . generally has no affirmative duty to inform an opposing party of relevant facts. . . ."

[28] *United States v. Boigegrain* 155 F.3d 1181, 1187 (10th Cir. 1998).

[29] *Id*. at 1188.
