

LEGAL ETHICS OPINION 1816

MUST AN ATTORNEY COMPLY WITH
THE CLIENT'S REQUEST NOT TO
PRESENT A DEFENSE AT TRIAL WHEN
THE CLIENT IS SUICIDAL?

You have presented a hypothetical involving an attorney's defense of a criminal defendant charged with capital murder. The client displays suicidal tendencies. He was suicidal before and during the time of the alleged crime. He has attempted to commit suicide not only prior to incarceration but also while in jail for the present charges. He has explained to the attorney that as those attempts were unsuccessful, he now intends to "commit suicide by state" by allowing the state to succeed in its efforts to have the death penalty imposed upon him. The client says that he does not believe that his actions necessarily meet all of the requirements for capital murder, since his actions were neither premeditated nor intentional. The client wants to plead not guilty and request a trial by jury because he believes that a jury is more likely to sentence him to death. In furtherance of that objective, the client has instructed the defense attorney not to present any evidence or defense during either the guilt or the penalty phases of the trial. The client has previously been evaluated for competency; the forensic psychologist concluded that the client met the legal standard for competency at that time. The defense attorney has developed evidence for both the guilt and penalty phases of the trial. This attorney does not believe that the client is making a rational, stable and informed decision since his actions are motivated by his suicidal tendencies.

Under the facts you have presented, you have asked the committee to opine as to the following:

- 1) Is the lawyer ethically bound by his client's instructions that the lawyer is not to present any evidence or argument during either the guilt or penalty phase of the trial?
- 2) What actions should the lawyer take if he believes that his client is not making an informed, rational and stable decision?
- 3) What action should the lawyer take if he believes that this client is pursuing an unlawful objective?

This committee first analyzed this phenomenon of criminal defendants electing execution in LEO 1737. That opinion involved a competent client requesting that the attorney refrain from presenting mitigating evidence at sentencing. The opinion acknowledged the difficulty of these situations as involving both moral and ethical issues for the attorney. Also adding to the complexity of the analysis of such situations are the constitutional issues regarding criminal defendants.¹

¹ A distinction can be made between the questions of what decisions should all attorneys leave to their clients to comply with Rule 1.2's concept of scope and what decisions must any defense attorney leave to a criminal defendant to preserve that client's constitutional protections. This opinion addresses the first question, but of course any decisions of the latter variety would necessarily come within the category

In LEO 1737, the analysis focused on the attorney's duty to pursue the lawful objectives of his client. The conclusion of that analysis was that

Where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls.

The present scenario differs from that of LEO 1737 in two ways. First, the client is asking the attorney to forgo the presentation of evidence not only at sentencing but also at the guilt phase of the trial. Second, while the client has been found competent, the attorney, in whole or in part because of the suicidal tendencies, does not consider his client able to make a rational decision about this important matter.

Is the ethical dilemma different for this attorney considering evidence for trial than for the LEO 1737 attorney, asked only to refrain from presenting mitigating evidence at sentencing? Your inquiry raises a question of the scope of the attorney's authority. Who gets to decide what, if any, evidence should be put forward – the attorney or the client? Rule 1.2 governs issues of scope. That rule, in pertinent part, states as follows:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of 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.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

Comment One to the rule elaborates upon this distinction between means and objectives:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution

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processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

As acknowledged in that Comment, distinguishing between means and objectives in a particular instance is not always easy to make.

The committee does not read Rule 1.2(a)'s list of four decisions that must be made by the client in criminal cases as an exclusive list. To the contrary, as quoted above, Comment One suggests other possible examples that could arise: "questions as to the expenses to be incurred and concern for third persons." The committee concludes that Rule 1.2 presents no exhaustive list of decisions that must be made by the client; rather, the rule and its comments provide a standard and guidance for that determination to be made on a case-by-case basis.

The Criminal Justice Section of the American Bar Association provides similar guidance for defense attorneys in the form of Standards. Pertinent here are paragraphs (a) and (b) of Standard 4-5.2, "Control and Direction of the Case," stating:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused; others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

Thus, rather like Rule 1.2's delineation of decisions involving means as within the purview of the attorney, this standard places "strategic and tactical decisions" in that category.² The judicial decisions addressing this issue, frequently in the context of ineffective assistance of counsel claims, make similar distinctions. Courts have identified a number of decisions involving the basic objectives of the representation, and therefore in the purview of the client: whether to plead guilty³, whether to waive a jury trial⁴, whether to testify⁵, whether to take an appeal⁶, whether to be represented by counsel⁷, what types of defenses to present⁸, whether to submit a lesser-included-offense instruction⁹, and whether to refrain from presenting mitigating evidence at sentencing.¹⁰ In contrast, identified as tactical decisions of strategy, within the purview of the attorney, are which witnesses to call¹¹, how to conduct cross-examination¹², choice of jurors¹³, which motions to file¹⁴, whether to request a mistrial¹⁵, whether to stipulate to easily provable facts¹⁶, and when to schedule court appearances.¹⁷ The judicial decisions provide two categories, which are consistent with the distinction made in Rule 1.2 between "objectives" and "means."

The answer to your first question involves this difficult distinction regarding the scope of the attorney/client relationship. Critical to that determination for the attorney in this hypothetical is the issue raised in your second question: what if the attorney does not believe his client is able to make an informed, rational and stable decision on this matter. The facts of the hypothetical suggest that the client has had repeated suicide attempts and is seeking to limit the representation in his case as just one more suicide effort.

A client's mental state is relevant to the scope determination discussed above. Specifically, Comment 2 to Rule 1.2 states as follows:

² As with Rule 1.2, the committee reads neither category presented in Standard 4-5.2 as establishing an exhaustive list; both paragraphs (a) and (b) use the word "include" before listing examples. Decisions not listed in that standard's examples could, depending on the character of the decision, belong to either category.

³ See *Jones v. Barnes*, 463 U.S. 745 (1963)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., *U.S. v. Boyd*, 86 F.3d 719 (7th Cir. 1996).

⁸ See, e.g. *Meeks v. Berg*, 749 F.2d 322 (6th Cir. 1984); *State v. Hedges*, 8 P.3d 1259 (Kan. 2000); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993); *People v. Frierson*, 705 P.2d 396 (Cal. 1985).

⁹ *People v. Segoviano*, 725 N.E.2d 1275 (Ill. 2000).

¹⁰ See *LEO 1737 and cases cited therein*.

¹¹ See, e.g., *People v. McKenzie*, 668 P.2d 769 (Cal. 1983); *State v. Davis*, 506 A.2d 86 (Conn.1986).

¹² *Id. and see, e.g., United States v. Claiborne*, 509 F.2d 473 (D.C. Cir. 1974).

¹³ *Id. and see, e.g., State v. Burnette*, 583 N.W.2d 174 (Wis. Ct. App. 1998).

¹⁴ *Id.; and see Sexton v. French*, 163 F.3d 874 (4th Cir. 1998); *State v. Gibbs*, 758 A.2d 327 (Conn. 2000); *State v. Mecham*, 9 P.3d 777 (Utah 2000); *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).

¹⁵ See, e.g., *United States v. Washington*, 198 F.3d 721 (8th Cir. 1999).

¹⁶ See *Poole v. United States*, 832 F.2d 561 (11th Cir. 1987).

¹⁷ *New York v. Hill*, 528 U.S. 110 (2000).

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In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14.

Rule 1.14 addresses how an attorney's representation is affected when the client has impairment. That rule provides the following direction:

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

(b) 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 and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. 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 interests.

Thus, the committee opines that the answers to questions 1 and 2 for this attorney are inextricably linked. The committee concludes, based on both the facts and the particular questions asked in this request, that this attorney does consider that, as described in Rule 1.14(a), his "client's ability to make adequately considered decisions in connection with the representation is diminished," as contemplated in Rule 1.14(a). The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14. The determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.

LEO 1737 suggests that for an attorney properly to follow a client's directive regarding an important decision, the attorney should have a reasonable basis to believe that the client is able to make a rational, stable decision. In contrast, the attorney in the present scenario believes that the client is unable to make such a decision. Accordingly,

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assuming the attorney has a rational basis for that belief, Rule 1.14 permits this attorney to take such protective action as is necessary to protect his client. Such action may properly include, but is not limited to, seeking further evaluation of the client's mental state, seeking an appointment of a guardian, and/or going forth with a defense in spite of the client's directive to the contrary. The precise steps appropriate will depend on the attorney's conclusion regarding the degree of the client's impairment.

Finally, your third question suggests that perhaps the attorney need not follow this client directive as it seeks an unlawful objective. The committee disagrees with that characterization. The imposition by the state of the death penalty is a lawful process, governed by constitutional parameters. A client's election preference for that penalty does not convert the imposition of that sentence to an unlawful act. As one commentator explained it, a client's preference for the death penalty is not "state-assisted suicide" as the state's imposition of the penalty is not a homicide.¹⁸ In LEO 1737, the committee concluded that an attorney should respect a client's wishes to refrain from presenting mitigating evidence at the sentencing hearing, so long as the client was capable of a rational decision, even where that decision was "tantamount to a death wish." As the committee does not consider this client's objective "unlawful," the committee rejects the suggestion raised by the third question. However, as stated above, Rule 1.14 may nonetheless support this attorney disregarding this particular directive of his client should the attorney conclude, as discussed above, that his client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.

¹⁸ Bonnie, "The Dignity of the Condemned", 74 Va. L. Rev. 1363, 1375 (1988).