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- Prior experience in capital cases as lead counsel or co-counsel
- Two qualified attorneys assigned to the case
- Manageable caseload

- ABA Performance Guidelines in Capital Cases

- Requires an immediate investigation into defendant's guilt

AND:

- Adequate and independent investigation for the sentencing phase – with an eye toward mitigating evidence (mental health, social history, education, family history, rehabilitative potential, expert testimony)
 - Investigation must also seek evidence to rebut prosecutor's evidence of aggravation
 - Must collect all confidential records – medical and mental health records
- **ABA Performance Guidelines in Capital Cases**

- Virginia has four regional capital defender offices Northern (Vienna), Southwest (Roanoke), Southeast (Norfolk), and Central (Richmond).
- Virginia's requires that two attorneys be appointed to any capital case involving an indigent defendant from a list of attorneys certified by the Va Indigent Defense Commission. - **Va. Code § 19.2-163.7**
- To qualify as capital trial lead counsel, an attorney must
 - Complete capital certification training (or seek a waiver)
 - Have demonstrated a commitment to providing zealous advocacy and high quality legal representation
 - Describe qualifications including all capital murder cases where the attorney served as counsel for the prior 10 years; relevant trainings in the prior 5 years, and any other experience he/she considers relevant

Virginia Capital Punishment

- Virginia has executed more people in its history than any other state.
 - 1390 people executed (1277 before 1976; 113 since)
 - Texas has the highest number of executions since 1976
- Following *Furman v. Georgia* (1972), the death penalty was reinstated in Virginia on October 1, 1975
- There has been a decline in the use of the death penalty in Virginia since the establishment of regional capital defender offices in 2004
 - 2 people currently on VA death row – Anthony Juniper (Norfolk); Thomas Porter (Norfolk); Both African American.
 - Mark Lawlor (Fairfax, Caucasian) was on death row until earlier this year when Fairfax County prosecutor Steve Descano agreed to resentence Lawlor to life without parole after his conviction was overturned by a federal appeals court in 2018.
 - Virginia has not imposed any new death sentences since 2011.

Which of these are client decisions?

- Pleading guilty?
- Taking the stand?
- Having a jury trial?
- Whether to plead insanity?
- Deciding what defense to present at trial?
- Deciding what mitigation evidence to present?
- Whether to appeal guilty verdict?
- Whether to accept death sentence?

Where Client Autonomy is Recognized

- Whether to testify
- Whether to plead guilty
- Whether to appeal
- Whether to have a jury trial

- Strategy in negotiations, trial and sentencing
 - What arguments to pursue
 - What evidentiary objections to raise
 - What agreements to make regarding the admission of evidence

Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.

New York v. Hill, 528 U.S. 110, 114-115 (2000)

- “Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has -- and must have -- **full authority to manage the conduct of the trial.**” *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988).
- As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962)

ABA Model Rule 1.2 - Scope of Representation

A lawyer shall abide by a client's decisions concerning the objectives of representation and . . . , **shall consult with the client as to the means by which they are to be pursued.**

Client Authority & Implied Authority

- A lawyer may **take such action on behalf of the client as is impliedly authorized to carry out the representation.**
- “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 & Virginia Rule 1.2 Comment – Client Authority

ABA and VA 1.2 Comment –

Objectives

- The client has the **ultimate authority** to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

Means to Pursue the Objectives

- ABA – the lawyer **shall consult with the client** about the means (refers to Rule 1.4(a)(1) duty to communicate).
- Virginia – A client **has a right to consult** with the lawyer about the means. 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.

Objectives vs. Means

- Your client facing a capital murder trial doesn't want you to present any mitigation evidence of abuse and neglect he suffered at the hands of his parents.
- Your client doesn't want to present any evidence of an autism diagnosis in his capital murder trial.

What happens (or should happen) when a lawyer
and client disagree?

HYPO # 1

Your client pled guilty to first degree murder and a life sentence to avoid capital murder charges. The plea agreement he signed included a waiver of his right to appeal. Shortly after sentencing, your client contacts you and tells you that he wants to appeal. You inform him that he waived his right to appeal but he still insists that he wants to file an appeal.

Would you file a notice of appeal? (Yes or No)

Rule 1.2 Comment – When Attorney and Client Disagree About Means

ABA

- Clients normally defer with respect to the means to be used to accomplish their objectives, particularly with respect to **technical, legal and tactical matters**.
- Lawyers usually defer to the client regarding such questions as **the expense to be incurred and concern for third persons who might be adversely affected**.

VA

- 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**.

Virginia Comment on Rule 1.2

- Both lawyer and client have authority and responsibility in the objectives and means of representation.
- A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking.

ABA Comment on Rule 1.2

- **“This Rule does not prescribe how such disagreements are to be resolved.”**
 - The Lawyer should seek a mutually acceptable resolution
 - If no resolution:
 - And the lawyer has a fundamental disagreement, the lawyer may withdraw
 - OR the client may discharge the lawyer
- **Virginia did not adopt these comments in their Rule 1.2.**

Poll Results

Hypo #1 - Garza v. Idaho, 139 S. Ct. 738 (2019)

- Counsel for Garza did not file Notice of Appeal, counsel says appeal is “problematic”
- Idaho Sup. Court says –No Ineffective Assistance; Garza could not show deficient performance or prejudice
- Supreme Court reverses – finds Ineffective Assistance
 - Filing a notice of appeal is ministerial
 - No appeal waiver serves as an absolute bar to all appellate claims.
 - Appeal is the client’s right - direct application of *Flores-Ortega* – Presumption of prejudice

Client Autonomy to Appeal

- It is the client's decision whether to take an appeal; specific arguments on appeal are decided by counsel - (Jones v. Barnes, 463 U.S. 745 (1983))
- When an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." (Roe v. Flores-Ortega, 528 U.S. 470 (2000))
- Presumption applies regardless of whether client has signed an appeal waiver (Garza v. Idaho, 139 S. Ct. 738 (2019))

Hypo #2

Your client has served over 25 years on death row for capital felony murder. The court overturned his death sentence in light of evidence that his accomplice, not him, was the triggerman in the crime. Your client, however, wants his conviction overturned. You have serious doubts about any guilt-innocence claims. Given your client's admitted participation, you are doubtful you could establish the required showing of prejudice to overturn a felony-murder conviction. You want to negotiate a deal. Your client is overly-confident that his conviction will be overturned and says he will only accept a negotiated sentence that would give him immediate parole eligibility. You meet with the current prosecutor who offers your client a 100-year sentence with parole eligibility after 50 years. You have good reason to believe your client will be very upset with such an offer and shut down any further negotiation.

Do you convey this offer to your client?
(Yes / No)

ABA and VA Rule 1.4 - Communication

ABA Model Rule (VA adoption)

A lawyer shall:

- (1) promptly inform the client of any decision or circumstance **with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**
 - (2) **reasonably consult** with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter; **(VA)**
 - (4) promptly comply with reasonable requests for information; and **(VA)**
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent **reasonably necessary to permit the client to make informed decisions** regarding the representation. **(VA)**

- “A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”

Poll Results

ABA and Virginia Rule 1.4 – Comment - Withholding Information

- In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience.
- Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

- Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant. (*Florida v. Nixon*, 543 U.S. 175, 178 (2004))
- “This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” (*Missouri v. Frye*, 566 U.S. 134, 145 (2012))
 - Showing of prejudice required
- “Defense counsel should keep the defendant **advised of developments arising out of plea discussions** conducted with the prosecuting attorney, and should promptly communicate and **explain to the defendant all plea offers made by the prosecuting attorney**. (ABA Standard for Criminal Justice, Pleas of Guilty 14- 3.2. Responsibilities of defense counsel)

- How should a lawyer proceed in the face of persistent disagreement with a client over concession of guilt?
 - Should the attorney withdraw representation?
 - What if concession of guilt is in the client's best interest?
 - What if your client has diminished capacity?
 - What if the client wants to take the stand?
- The scenario is not uncommon. **McCoy v. Louisiana**, 584 U.S. ____ (2018) presents a salient example of the legal and ethical challenges that attorneys confront when they disagree with their clients about the objectives of representation.

McCoy v. Louisiana, 584 U.S. __ (2018)

Facts:

- McCoy was charged in Louisiana state court with three counts of first-degree murder. The evidence against McCoy at trial was overwhelming but he continually insisted on his innocence.
- His lawyer, Larry English, decided that McCoy's alibi defense would fail before a jury and that he could only hope to save McCoy's life by conceding his guilt. English believed that by conceding McCoy's guilt, he would maintain credibility with the jury, and be in a better position to plead for leniency during the capital sentencing phase to avoid a death sentence.
- McCoy vigorously objected to English's proposed tactic and moved to dismiss English two days before trial, but the judge denied his request as untimely.
- Over McCoy's repeated objection, English told the jury McCoy was the killer. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. The jury found him guilty of all three first-degree murder counts. At the penalty phase, English again conceded McCoy's guilt, but urged mercy in view of McCoy's mental and emotional issues. The jury returned three death verdicts.

■ Question Presented:

- Whether it violates a criminal defendant's Sixth Amendment right to assistance of counsel if defense counsel concedes the defendant's guilt over the defendant's express objection?

■ Ethical Dilemmas:

- Concession of guilt was the strongest defense to avoiding the death penalty and in client's best interest, but the client did not share that objective.
- Did the ABA Model Rule/Louisiana Rule of Professional Conduct's prohibition against offering false evidence necessitate English's refusal to maintain McCoy's innocence?

Virginia Rules of Professional Conduct Rule 1.2 (a)
&
ABA Model Rule 1.2 (a)

- (a) a lawyer shall abide by a client's decisions concerning the objectives of the representation.
 - Comments to the ABA and Virginia Rules explain that the client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.
 - **ABA Comment on Rule 1.2: “*This Rule does not prescribe how such disagreements are to be resolved.*”**

**Virginia Rules of Professional Conduct Rule 1.2 (d)
&
ABA Model Rule 1.2 (c)**

- **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.**

Virginia Rules of Professional Conduct Rule 1.16 (b)(3)

&

ABA Model Rule 1.16 (b)(4)

- A lawyer may withdraw from representing a client if:
 - **Virginia Rule:** a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.
 - **ABA Rule:** the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

Virginia Rules of Professional Conduct Rule 1.14 & ABA Model Rule 1.14

- (a) 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.**
- (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.

■ Historical Perspective:

- As the laws of England and the American colonies developed providing for a right to counsel, self-representation remained the norm and the right to proceed without counsel was recognized
- English common law tradition granted the client autonomy to choose the objective of his defense
- McCoy Amicus Brief by the Criminal Bar Association of England & Wales

■ Supreme Court Jurisprudence:

- ***Faretta v. California***, 422 U.S. 806 (1975):
 - “The right to defend is personal,” and a defendant's choice in exercising that right “must be honored out of that respect for the individual which is the lifeblood of the law.”
 - “Counsel is to be an assistant, not a master.”

- Client has the “[a]utonomy to decide that the objective of the defense is to assert innocence.”
- A defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.
- Violation of a client’s autonomy is a structural error requiring defendant’s conviction to be vacated.
- When client autonomy, not counsel’s competence is in issue, *Strickland* analysis does not apply.

McCoy v. Louisiana, 584 U.S. ____ (2018)

- Distinguished from *Nix v. Whiteside*, 475 U.S. 157 (1986)
 - McCoy did not convey that he intended to commit perjury and counsel had no doubt that McCoy believed what he was saying
 - McCoy's attorney simply disbelieved his client in light of the prosecution's evidence.
- Distinguished from *Florida v. Nixon*, 543 U.S. 175 (2004)
 - Nixon was unresponsive when his attorney explained that he wanted to concede guilt and present mitigating evidence as to Nixon's mental instability to avoid death sentence.
 - *Nixon* held express consent not required for counsel to concede guilt and counsel's actions are subject to *Strickland analysis*

Did *McCoy* expand Client Autonomy?

- The Louisiana Supreme Court declined to limit *McCoy*'s application to cases where a defendant is claiming innocence of any crime
 - “*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense.”
 - Defendant instructed his attorneys to make an argument for accidental killing under the negligent homicide statute; equivalent to seeking innocence of any murder charge

State v. Horn, 251 So. 3d 1069 (La. 2018)

- Counsel “must not concede the actus reus of a charged crime over their client's objection” *People v. Flores*, 34 Cal. App. 5th 270, 273 (Cal 2019)

Did *McCoy* expand Client Autonomy?

- *United States v. Read*, 918 F.3d 712 (9th Cir. 2019)
- Judge's ruling reappointing standby counsel:
 - “The Constitution permits [judges] to insist upon representation by counsel for those competent enough to stand trial[,]. . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”
 - “This standard is met where the defendant's behavior is ‘decidedly bizarre’ and his argument in defense to the charges against him are nonsensical”
 - “This anticipated defense is not a legal defense and his based on his bizarre beliefs”

Did *McCoy* expand Client Autonomy?

U.S. v. Read

- The Ninth Circuit held, in light of *McCoy*, defendant's Sixth Amendment rights were violated when the trial judge permitted counsel to present an insanity defense against defendant's clear objection.
- Defendant, competent and allowed self-representation but clearly mentally ill, "planned to eschew a plausible defense of insanity in favor of one based in delusion and certain to fail"
- Insanity defense = concession of guilt; cannot be imposed on non-consenting defendant.

Did *McCoy* expand Client Autonomy?

- *United States v. Holloway*, 939 F.3d 1088 (10th Cir. 2019) (defendant's right to **autonomy** was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal)
- *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (defendant's right to **autonomy** was not violated because he disagreed with his attorney about "which arguments to advance")
- *Thompson v. United States*, 791 F.App'x 20 (11th Cir. 2019) (defendant's right to **autonomy** is not violated because attorney conceded some, but not all, elements of a charged crime).
- *United States v. Rosemond*, 2020 U.S. App. LEXIS 14061 (2nd Cir. 2020) (defendant's right to **autonomy** is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged)

CLIENT INTERVIEW

Demanding Execution /Foregoing Appeals

- This is a particularly difficult matter for the attorney/client relationship.
- As we have seen, the client possesses the final authority to determine the objectives of litigation.
- The law is accommodating: standard to give up legal challenge to sentence is not demanding
- History shows many demands to end litigation and accept execution are false alarms.
- To ably advance the client's true interests, counsel must be resourceful and diligent in handling these requests.

Why do prisoners choose execution?

- There are many reasons:
 - Significant mental health issues
 - Despair about living in prison for decades
 - Wish to spare their own loved ones, and sometime the victim's loved ones, years more of appeals that likely will be unsuccessful anyhow
 - Cries for help (e.g., just learned wife filed for divorce; devastating loss of family member)
 - Grim conclusion after years of pondering

Determination of whether one is competent to waive appeals is governed by the standard set forth in *Rees v. Payton*, 384 U.S. 312 (1966):

- (1) Is the person suffering from a mental disease or defect?
- (2) If so, does it prevent him from understanding his legal position and the options available to him? And,
- (3) If the disease or defect does not prevent the person from understanding his legal position and available options, does it nevertheless prevent him from making a rational choice among his options?

Sample State Competency Standards

- Some states require a more demanding standard for competency than the federal standard to elect execution:
- * A defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and **to knowingly and intelligently waive any and all rights to appeal his sentence.** See, *Franz v. State*, 296 Ark. 181 (Ark. 1988); *State v. Berry*, 659 N.E.2d 796 (Ohio 1996).
- * The defendant must fully comprehend the ramifications of his decision, *Cole v. State*, 707 P.2d 545 (Nev. 1985), and must possess the “ability to reason logically,” i.e., to choose “means which relate logically to his ends.” *State v. Bailey*, 519 A.2d 132 (De. Super. 1986).

Next Friend Petitions are permitted

- *Whitmore v. Arkansas*, 495 U.S. 149 (1990)
- * Friends/family can possess standing to file to protect a condemned prisoner where the facts show the inmate is unable to do so due to mental incapacity.
- * Persuasive evidence of incompetency is required.

- ABA Performance Guidelines in Capital Cases
 - * Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client (Guideline 10.5 A)
 - * Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, [including], relevant aspects of the client's relationship with . . . government agents,(e.g., prison medical providers or state psychiatrists). (Guideline 10.5 C)

- * Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary . . . to an effective penalty phase defense.
- * Client contact must be ongoing; a client will not – with good reason – trust a lawyer who visits only a few times before trial.
- * Often, so called “difficult” clients are the consequence of bad lawyering – either in the past or present. Treating the client with respect, listening and responding to concerns, and keeping him informed about the case will often go a long way toward eliciting confidence and cooperation.
- * Overcoming barriers to communication and establishing rapport are critical to effective representation.

Specific Commentary on “Volunteers”

- Some clients will initially insist that they want to be executed; it is ineffective assistance for counsel to simply acquiesce to such wishes

- * In such instances, counsel should try to identify the source of the client’s helplessness
 - > counsel should consult with lawyers, clergy or others who have worked with similarly situated death row inmates

 - > counsel should seek to obtain treatment for client’s mental or emotional problems

 - > someone on the defense team should always be available to speak with the client

 - > family and friends should be made available

 - > inmates who have been on DR but now have received a lesser sentence, could provide useful advice

SPB Public Service Initiative



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