Many lawyers are faced with dealing with incompetent clients. Rules 1.02(a3) and 1.05(c4) deal with some of those issues. As we know from the Supreme Court’s *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the client is the final decision-maker on most issues. Many times, there is not a perfect answer that guides the lawyer on what to do when you have a client who is not playing with a full deck. This article deals with some of the answers from our Ethics Committee that may guide you in the ethical route that is in the best interest of your client.

**LAWYER QUESTION**

Client had competency eval (POM < 2oz. case)?Doctor says incompetent but could regain. State agrees not competent. I also believe she is not competent (I raised the issue in the first place). State wants her to go to a State Hospital if found incompetent. Client says she wants a jury trial over whether she is incompetent. Am I required to request a jury trial?

Thank you for everyone’s responses. I told the Judge that my client has requested a jury trial, so we are set for a jury trial. So now I feel like I’ve got other issues:

1. My client wants to be found competent and believes she is competent?must I advocate that she is competent?
2. On the same note, if she wants to testify, but I think it’s going to cause her to be found incompetent, am I required to let her testify?

You need to try Westlaw or Lexis for more info to answer your own questions. But remember you are your client’s only advocate so you speak for her, as to that client’s very wishes. But you or the State will have evidence to present regarding the current incompetency of client. You need to get the court to appoint another defense attorney to aid you by interviewing your client in your presence. And then at jury trial, you or the State can call that second attorney to testify about client’s mental and competency conditions.

Maybe applying to ?Your Duty to Advocate as Client Wants You? is *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)(allowing defense counsel to concede guilt, at the guilt and sentencing phases of a capital trial, violated the Sixth Amendment and warranted a new trial because it constituted structural error since counsel’s admission blocked the defendant’s Sixth Amendment right to make fundamental choices about his own defense).
Q. Client says she wants a jury trial over whether she is incompetent. Am I required to request a jury trial?
A. Yes. Read Texas Rules of Disciplinary Conduct Rules 1.02(a)(2) and 1.15 and its comment 6.

Joseph A. Connors III

No clear answer.

From my Ethics paper a year ago:

The Special Case of the Incompetent Client

In terms of the criminal defense attorney abiding by a client’s decisions, a particularly special case is presented when the client suffers from a mental condition or disease that affects their ability to remain competent to stand trial. The Disciplinary Rules do little to assist or provide guidance in these situations; Rule 1.02 (g) prescribes that the attorney should take action to secure the appointment of a guardian or other legal representative for the client. Of course, no such procedure exists or, to my knowledge, has ever been used in Texas in a criminal case. The American Bar Association Standards for Criminal Justice only suggest that attorneys seek an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable, where the attorney has a good faith doubt regarding the client’s competence.

I recommend that any criminal defense attorney faced with a situation like this read the law review article by Rodney J. Uphoff, “The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?” 1988 Wis. L. Rev. 65 (1988), which can be found at [http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1387&con...

I agree with Brent’s sentiments. However, do not think your client is taking away anybody’s hospital bed. There are plenty of beds. It is a pure management issue, not some shortage of beds.

I think a case can be made that the attorney can ignore a client who is asserting a right reserved for competent clients. This is different than a mentally ill, but presumably competent, client. The client is so mentally ill that he lacks a rational or factual understanding of the proceedings. Nevertheless, you can go ahead and afford him his jury trial in short order. I would tell the State and the judge your dilemma, grab friends and lawyers prosecutors to comprise a jury, present the opinions of the experts, then get him to the hospital.

Keith S. Hampton
This is for a class B POM. Your client is incompetent? She might be a genius.

It is abhorrent that a DA wants to prosecute this woman for something that even the Texas GOP wants to legalize. To send her off to a state hospital to take a spot from someone charged with a much more serious crime is absurd and a total waste of resources.

So, yes. Advocate for her. Argue to a jury that the trial is a total waste of resources, and unless they want to waste more state resources, they should find her competent. Then, when they find her competent, set the case for trial and make the same argument. Once a jury finds her not guilty, then there?s no harm and no foul. You can even argue that if they do find her guilty, there?s going to be an appeal, the case is going to get overturned (because of the evidence of incompetence), and they?ll have to send it back to be tried all over again, creating a vicious cycle.

Best part: No one will accuse you of doing anything unethical, including your ?incompetent? client.

1. The lawyer?s opinion is not supposed to be argued to the jury in any case. You can tell the jury she wants to be found competent because she feels she is competent without expressing your opinion.
2. Whether to testify is the option for the accused to make, after advice from counsel. I would suggest you have a private meeting with her?with a witness who is working for you and therefore covered by the attorney-client privilege taking copious notes that your advice is that she not testify?and explain all the reasons why. If she elects to testify, you will have a memo to the record about what your advice was, and a place where she signs that she has been advised not to testify but exercises her right to testify anyway. If the experts say she is not competent and there is no compelling contrary evidence, she will probably be found incompetent. That is what you think is in her best interest, isn?t it?

?Jack Zimmermann

One of us had a recent case where client had been deemed insane at time of offense. The client had been in jail two years. We presented all options to client and family and advised if we proceeded with the insanity request, we would win the case, but young man would then be put in a mental institution for indefinite time. Rather than that, prosecutor agreed to let client plead guilty to robbery and get a two-year sentence, with the understanding the family would provide for the young man?s mental treatment.

This young man has done well so in the end by ignoring the insanity defense, justice was served. Each case is different, and yes, your job is to represent client, but it is the belief of most that the lawyer must follow client?s wishes. In this case, let the client go to trial and advocate for your client?s wishes.

Special thanks to Joe Connors, Keith Hampton, Brent Mayr, and Jack Zimmermann.

. © Copyright by Texas Criminal Defense Lawyers Association
  Web hosting and design by ChiliPepperWeb.net


Links: