

**The Ethics of Pursuing Pleas in Capital Litigation**  
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**Overview**

N.C.G.S. Sec. 15A-2001 allows prosecutors to accept guilty pleas to first-degree murder cases even if there is evidence of one or more aggravating factors. This statute, in addition to better training and supervision of capital defense attorneys since the formation of I.D.S. in 2001, has changed the face of capital litigation in North Carolina. In 2001, there were 50 capital trials in North Carolina, of which 14 resulted in death sentences. In the four years since then, from 2002 through 2005, out of 100 capital trials in North Carolina, there were 23 death verdicts combined. Thus, those of us representing defendants in first degree murder cases are not only doing a better job in reducing the number of death sentences, we are also doing a better job in negotiating pleas in very tough cases which would have resulted in death sentences in the 1990s.

The purpose of this paper is to address the ethical parameters of the plea process in capital cases. Defense counsel in a capital case has a legal and ethical duty to explore the possibility of an agreed-upon resolution less than a death sentence. This obligation is just as important as, and goes hand in hand with, all of our other legal and ethical duties to zealously advocate for our client. In extremely rare cases – 20 cases total in 2005 – a resolution short of a trial is not achieved. But even among those 20 cases tried in 2005, there were offers from the State of sentences less than death. This paper will discuss some of the obligations of defense counsel when attempting to resolve capital cases.

But first a caveat: By no means do we intend to imply that capital defense counsel should focus solely on obtaining a plea for life instead of investigating both the guilt and penalty phases of the trial, filing appropriate motions, and zealously advocating for your client. Do not make a snap judgment about the likely result in your client's case and then wait for the D.A. to agree to a deal. You must regularly visit your client, learn his story, and investigate his history. All of

this time, effort, work and dedication are an essential part of the plea process. Acceptable pleas do not just happen.

### **The Context of Capital Litigation**

Any discussion of the duties of attorneys representing those faced with a first-degree murder charge and the possibility of the death penalty must take into account the context of capital litigation. As we know, this is the most-heated, emotional, vexing and complicated litigation possible. Our clients suffer from brain injuries, mental illness, mental retardation, and other disorders. They are generally members of ethnic and racial minorities. The overwhelming majority of our clients are poor. On the rare occasion, we might represent someone who is completely innocent, or who got “the normal brain.” Most of the time, however, the clients we represent have horrendous judgment, or diminished capacities, due to their impairments or disadvantages. That horrendous judgment can also manifest itself in our clients’ dealings with us, and their behavior while awaiting trial in a confined setting.

As “attorneys for the damned,” we must also recognize such barriers to justice as racism and other prejudices. We know that we do not “play” on a level playing field. Prosecutors are able to use “death qualification” to obtain conviction-prone juries. Some prosecutors “over charge” and seek the death penalty so that a plea to some lesser charge can be achieved in a weak case, or to coerce accomplice testimony. Exaggerated publicity can sometimes bring out the worst in the best prosecutors. We see that our minority clients do not have juries of their peers, who might better understand the circumstances in which they were raised. Sometimes we see that religious fervor in the jury room can lead to intolerant results. Frequently, we see the State using bad methods of forensic science and poor methods of evidence preservation. We also see tunnel vision by investigators and prosecutors. We are the front line that protects our clients from such potential abuses.

We also know that capital litigation is hard on the defense attorneys and the entire defense team, from mitigation investigators to psychiatrists. The stress of knowing that our inadvertent mistakes could cost someone their life is many times overwhelming. This type of work, at times, can bring out the worst in the

best of us. We must function in teams so that we can alert each other to potential problems with ourselves, with our performances, or with our perspective. We must seek consultations with others outside the defense team so that we can maintain our objectivity. We must be constantly vigilant to guard against the temptation to fail to explore every option – especially a negotiated plea -- no matter how “defensible” or “hopeless” the case may seem.

However, we must act within the bounds of ethical and moral parameters in order to achieve just results for our clients. This paper attempts to address some of the ethical parameters.

### **Scope of this Paper**

First, let us note that the only certain ethical guidelines are those approved by the United States Supreme Court, the North Carolina courts and the North Carolina State Bar. This paper is the attempt of the authors to express their opinions and offer some guidance. Each attorney representing a client in a potential capital case must consult the courts’ and Bar guidelines and rules on a case-by-case basis.

Second, this paper does not attempt to address the legal issues relating to the mechanics of the plea process. For a complete discussion of the plea process, *see* “Guilty Pleas,” Chapter 21, NC Defender Manual (available online at [www.ncids.org](http://www.ncids.org)) The basic rule, of course, is that a plea cannot be accepted by the court unless the plea is made voluntarily and knowingly, and those facts are clearly reflected on the record. Boykin v. Alabama, 395 U.S. 238 (1969) (plea of guilty invalid unless record demonstrates knowing and voluntary waiver of trial rights).

Third, there are no specific North Carolina ethical guidelines relating specifically to the capital litigation plea process, other than the broad ethical rules governing criminal litigation in general and the relationship of attorneys and clients. Attached are some of the North Carolina Rules of Professional Conduct that may be relevant to the plea process. These are:

- Rule 1.2 Scope Of Representation and Allocation of Authority between Client and Lawyer

- Rule 1.3 Diligence
- Rule 1.4 Communication
- Rule 1.6 Confidentiality of Information
- Rule 1.14 Client with Diminished Capacity
- Rule 2.1 Advisor
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
- Rule 8.4 Misconduct

Fourth, the guidelines specific to capital litigation for defense attorneys are set forth in the ABA “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases” (2003), reprinted in full in 31 Hofstra L. Rev. 913 (Summer 2003). Attached hereto are copies of the guidelines relevant to the plea process, with commentaries and notes. Specifically, copies of the following are attached:

- GUIDELINE 10.5 - RELATIONSHIP WITH THE CLIENT,
- GUIDELINE 10.9.1 - THE DUTY TO SEEK AN AGREED-UPON DISPOSITION, and
- GUIDELINE 10.9.2 - ENTRY OF A PLEA OF GUILTY.

The **ABA Guidelines**, we believe, **have the force of law** in that the U. S. Supreme Court has specifically cited them as the governing standard for capital defense litigation in recent cases when ruling upon the mitigation investigation obligation of defense counsel in capital cases. For example, in Rompilla v. Beard, 125 S. Ct. 2456; 162 L. Ed. 2d 360; 2005 U.S. LEXIS 4846 (June 20, 2005), Justice Souter wrote:

[369] [2460] This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment. We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

...

[\*\*\*24]

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one [\*2466] could misunderstand in the circumstances of a case like this one:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). n6

n6 The new version of the Standards now reads that any "investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1, (3d ed. 1993). We see no material difference between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.

[\*\*\*25]

"We long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S., at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (quoting *Strickland v. Washington*, 466 U.S., at 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052), and the Commonwealth has come up with no reason to think [\*\*376] the quoted standard impertinent here. n7

n7 In 1989, shortly after Rompilla's trial, the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter ABA Guidelines or Guideline). Those Guidelines

applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4. When the United States argues that Rompilla's defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Brief for United States as *Amicus Curiae* 20-21. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. *Ibid.* But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States's brief, that requires counsel to "make efforts to secure information in the possession of the prosecution or law enforcement authorities." App. to *id.*, at 4a.

Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:

"Counsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.7, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1027 (2003) (footnotes omitted).

Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S., at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'" (quoting 1989 ABA Guideline 11.4.1.C (emphasis in original))). For reasons given in the text, no such further investigation was needed to point to the reasonable duty to look in the file in question here.

We will accept as a given that the U. S. Supreme Court recognizes the ABA Guidelines as a description of the legal and ethical obligations of capital defense counsel. This is true even though the North Carolina Rules of Professional Conduct do not specifically address capital defense obligations. But the North

Carolina rules are certainly not inconsistent with the ABA Guidelines. With this in mind, we will address some of the ethical issues relevant to the plea process.

### **Selected Ethical Issues Relevant to Plea Process**

#### **1. Is There an Ethical Duty to Seek a Plea Agreement?**

**The answer to this question is an unqualified “Yes.”** In capital cases, the defense attorney has an ethical duty to seek an agreed-upon disposition of the case (i.e., reach a plea bargain), even in the face of opposition by the prosecution and/or the client. No matter what the District Attorney says to you at the outset, no matter what the prosecutor says to the media, no matter what your client says to you at the outset, you have a DUTY TO SEEK AN AGREED-UPON DISPOSITION. Of course, the decision to accept a plea must be made by the client, and it must be knowing and voluntary. If you believe that it is in the best interests of your client to enter the plea, then you must take reasonable steps to convince him or her to accept the offer.

ABA GUIDELINE 10.9.1, entitled, “ THE DUTY TO SEEK AN AGREED-UPON DISPOSITION,” makes this clear:

**A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.**

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision.

...

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client

the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

**E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.** (emphasis added)

The Commentary to ABA Guideline 10.9.1 provides the following:

In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed in the commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.

If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client's best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).

An agreed-upon disposition, or plea agreement, must be explored in all capital cases, regardless of whether the defense is innocence, guilt of a lesser degree of crime, diminished capacity or not guilty by reason of insanity. Post-conviction claims were successful in Wiggins and Rompilla based upon the failure of defense counsel to investigate certain items or aspects of mitigation evidence. These claims were successful because defendants, in consultation with their attorneys, could not make reasonable decisions without the evidence in hand; that is, there could be no “informed” decisions without appropriate investigation. The same reasoning applies to the duty to explore agreed-upon dispositions or plea bargains in capital cases. If a life sentence option by plea is not discussed, then the client cannot make a reasoned decision whether to go forward with trial. Counsel must make a concerted effort to explore a plea with both the State and the client. If the capital defense attorneys do not explore the possibility of an agreed-upon disposition in a capital case, and the client is unfortunately

sentenced to death, then, under the reasoning of the U.S. Supreme Court in Wiggins and Rompilla, it is likely that post-conviction counsel will be able to raise a valid claim of ineffective assistance of counsel.

The Commentary to ABA Guideline 10.5 specifically states that it would be ineffective assistance of counsel to fail to explore a plea in a capital case, ***even when a client maintains that they would rather be executed than spend the rest of their lives in prison:***

### **Counsel's Duties Respecting Uncooperative Clients**

**Some clients will initially insist that they want to be executed - as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide.**<sup>n186</sup> Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.<sup>n187</sup> (emphasis added)

The NC Defender Manual, Sec. 21.2, also makes this point clear when discussing the obligation of counsel in any criminal case:

A lawyer has a duty to explore alternatives to trial, including the possibility of a plea bargain. The progress of negotiations and all plea offers must be communicated to the client. The ABA's Ethical Guidelines require an attorney to investigate the facts of the case as well as controlling law before recommending a plea to his or her

client. ABA Standards for Criminal Justice, Standard 4-6.1. **After receiving discovery, and adequately investigating the facts and any possible defenses, it is perfectly ethical and often appropriate for an attorney to attempt to persuade a client to accept a plea bargain that the attorney believes is in the client's best interest.** However, ultimately it must be the client him- or herself who makes the final decision. No plea offer should be accepted or rejected by counsel without the client's express authorization. (emphasis added)

## **2. How do the defense attorneys ethically maintain their positions as advocates for the client yet still encourage taking a reasonable plea?**

The duties of zealous advocacy and exploration of a reasonable disposition of a case are not exclusive. In fact, each duty arises from the relationship of trust that should be present in this type of serious representation. The harder the attorney works for the client by investigating and litigating motions, the more trust the client will have in the lawyer. And, based upon the hard work and zealous advocacy of the defense attorney, the prosecutor may decide that the case should be resolved short of a trial. Based on this trust developed from zealous advocacy, the lawyer will be in a position to discuss a plea with his client and the client is more likely to take advice concerning an agreed-upon disposition.

We all know that there are some situations in which the client will demand a trial and will not want to discuss a plea. This could be due to some type of diminished capacity or emotional disturbance. Or, it could be simply that the client believes that he is innocent, and wants a trial. In these situations, many attorneys find that it may be helpful to recruit other attorneys to consult with the client about a possible plea. By bringing in attorneys from outside the defense team, it is sometimes possible to achieve a reasonable resolution, or to at least preserve a good working relationship between the defense attorneys and the client in the event the case must proceed to trial. Some of the ethical aspects of this situation are discussed below.

## **3. Are there special ethical duties when dealing with mentally retarded, mentally ill or brain-damaged individuals, or other clients with poor judgment?**

Both the ABA Guidelines and the N.C. Rules of Professional Conduct recognize that clients with impaired judgment or diminished capacity must be treated differently than other clients. The ABA Guidelines, in fact, recognize that more often than not clients facing capital charges suffer from mental impairments. The Commentary ABA Guideline 10.5 discusses the situation:

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. **In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "it must be assumed that the client is emotionally and intellectually impaired."**<sup>178</sup> There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

The N. C. Rules of Professional Conduct also recognize the special obligations of counsel when representing clients with “diminished capacity.” The term “diminished capacity” as used by the Rules of Professional Conduct does not have the same technical meaning as used by criminal practitioners in asserting a mental defense on behalf of a criminal client. The ethical rules are referring to clients with mental problems affecting “a client’s capacity to make adequately considered decisions” in any type of legal situation. The definition seems to apply to most of the clients we represent who are facing the possibility of capital punishment. RPC 1.14, entitled “Client With Diminished Capacity,” provides:

(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 or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [“Confidentiality of Information”]. 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.

The remedies suggested by the ABA Guidelines and by the NC Rules include recruiting mental health professionals, social workers or mitigation specialists to facilitate discussions, or bringing in family members to help. In certain circumstances, the attorney may also move for the appointment of a guardian ad litem. We have never seen a guardian ad litem appointed for a defendant in a capital case, and this provision seems likely to only apply to a civil litigant. (We have seen capital defendants who have been declared incompetent with guardians of the person, and, once these individuals are found capable of proceeding, we believe the guardian must be part of the plea discussions with the client.)

Of course, if the capital client’s capacity to proceed is in question, you have an obligation to request an evaluation from a mental health professional. Preferably, this should first be done by a mental health professional appointed by IDS to assist the defense. The State will move for an evaluation at Dorothea Dix Hospital if the defense raises the issue. Do not forget that the test as to whether the defendant has the capacity to accept a plea or engage in plea negotiations is the same as the test for capacity to proceed to trial. Godinez v. Morgan, 509 U.S. 389 (1993).

A very difficult situation arises when you have a client who is on the fence as to whether he or she is mentally retarded. Mental Retardation (MR) is now a bar to capital punishment. But, as we have seen in a number of cases, the State

sometimes chooses to fight the MR issue if the IQ is close to 70. If it appears that the chances of success by the defense are questionable, or if a court rejects MR after a pre-trial hearing, then the defense attorneys should seek the assistance of family and/or mental health professionals or others to facilitate plea discussions.

In situations where capacity is questionable, or MR is possible, or there is a possible mental health defense, then the defense attorneys must work harder to convince the client to accept a plea which is in their best interest. Even a mentally retarded or mentally ill defendant – so long as he or she has the capacity to proceed -- must ultimately make the decision about whether to plead to an agreed-upon disposition. In many respects, these clients must be treated with respect, but also more paternalistically. The defense team has an ethical obligation to work harder to convince these impaired clients to make the right decision.

#### **4. Is It Ethical To Use Consulting Attorneys and Others to Convince Your Client to Take a Plea in a Capital Case? Is confidentiality maintained?**

It is now standard practice in North Carolina for capital defense attorneys to request the assistance of other experienced capital defenders to facilitate plea discussions with their clients who are reluctant to discuss a plea. In an ideal world, the appointed defense attorneys should be able to handle this. But we do not operate in such a world. Our clients are generally mentally or emotionally impaired. Many times, calling in attorneys from CDPL, the Office of the Capital Defender or other experienced capital litigators proves useful in helping clients understand the risks associated with rejecting a reasonable plea. The ABA Guidelines, in the Commentary to Guideline 10.5, recognize that attorneys representing “death row inmates” may need to consult with other lawyers who have worked with similarly situated clients. The same reasoning applies to clients who have not yet been convicted.

When other attorneys are called upon by the primary defense attorneys to facilitate plea negotiations, it must be made clear that the “consulting attorneys” owe their allegiance to the capital defendant, the client, and not to the attorneys who requested their assistance. The better practice would be to have a brief letter

from the primary attorneys to the consulting attorneys clarifying this relationship, and also spelling out that the purpose of the consultation is to discuss the possibility of an agreed-upon disposition. This will help insure that the discussions are protected by the attorney/client and work product privileges, as well as the statutory rules making plea negotiations inadmissible. *See* N.C.G.S. 15A-1025 and N.C. Evid. Rule 410. It should be emphasized that the “consulting attorneys” should be fully briefed on the case, and allowed to review pertinent documents or evidence so that they may exercise their own independent judgment when advising the defendant about a possible plea.

Warning: the rules may not protect plea discussions with third parties who are not members of the defense team or recruited by the defense team to aid in the plea discussion. For example, in *State v. Bostic*, 121 N.C. App. 90, 465 S.E.2d 20 (1995), *cert dismissed*, \_\_\_N.C.\_\_\_, 599 S.E.2d560 (2004), the Court held that the following statement of a defendant to a fellow inmate was ruled admissible: “Yeah, I killed the bitch. I’ve done my time. I’ll take a plea bargain and walk.” Making a comment to a fellow inmate is certainly not the same as having a discussion of a possible plea with a member of the defense team, a consulting attorney, or a family member or friend brought in to facilitate plea discussions. The problem arises if one of those people becomes a witness at trial. If a member of the defense team, such as a mitigation investigator or a defense psychologist, is going to participate in plea discussions with the client, then serious consideration should be given as to whether that individual should testify. There could certainly be an objection to the admissibility of statements to non-attorney defense team members on the basis of the work product doctrine, or on the basis that the attorneys had an ethical obligation to bring others, such as a psychologist or mitigation specialist, into the plea discussions, and that it would breach the statute and the evidence rule, as well as the federal and state constitutional guarantees of effective assistance of counsel, to pierce the veil of plea discussions. The same arguments could be made when involving non-defense team people, such as family, friends, pastors and others close to the defendant. However, there is no certainty as to how a court would rule on the admissibility of the defendant’s statements to those non-defense team witnesses. This must be

decided on a case-by-case basis, with the benefits the possibility of a negotiated plea in the face of a death sentence weighed against the admissibility of non-remorseful or angry comments made by a marginally capable capital defendant. Be certain to consult cases interpreting N. C. Evid. Rule 410 and N.C.G.S. Sec. 15A-1025 in making your decisions.

**5. Is it ever appropriate to lie to a client in order to get him to take a plea?**

**No.** It is always wrong to coerce a plea. Lying to a client in order to get her to take a plea is wrong. It could result in having the plea set aside, and then the client could be subject to a death penalty trial once again. N. C. Rule of Professional Conduct 8.4, "Misconduct," provides, "It is professional misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

It is appropriate for a defense attorney to express his or her opinion that the client should accept a plea to save his life. In fact, an attorney has a duty to express this opinion and the client has an entitlement to hear the opinion. The opinion should include "candid advice" and "an honest assessment" of the merits of a defense or the strength of the State's case. The lawyer may also suggest that the client should consider relevant "moral, economic, social, and political factors" in making the decision.

N.C. RPC Rule 2.1, "Advisor," provides: "In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." The Commentary to this Rule, however, clarifies that "honesty" is required during the discussions: "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Thus, it is ethical for the defense attorney in the capital case plea process to not only give his or her opinion about the chances of success at trial, but also to discuss and give opinions about the death penalty, the effect of an execution on the client's family, the environment of death row, the execution process itself, the chances of success on appeal or in post-conviction proceedings, and the limited chances of success during clemency, and to discuss or give opinions about life in prison. The right and duty to give opinions, however, is governed by a requirement of reasonableness.

## **EXERPTS FROM N.C. RULES OF PROFESSIONAL CONDUCT**

### **Client-Lawyer Relationship**

#### **Rule 1.2 Scope Of Representation and Allocation of Authority between Client and Lawyer**

(a) Subject to paragraphs (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.

**(1) 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.**

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) 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.

### **Client-Lawyer Relationship**

#### **Rule 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### **Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

## **Client-Lawyer Relationship**

### **Rule 1.4 Communication**

(a) 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(f), 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;

(4) promptly comply with reasonable requests for information; and

(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.

#### **Comment**

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### *Communicating with Client*

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act

without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

#### *Explaining Matters*

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

#### *Withholding Information*

[7] 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 or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

#### ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99. A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposal to both clients.

RPC 129. Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

RPC 156. An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

99 FEO 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

## CASE NOTES

Failure to Notify Client of Dates. - The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. *North Carolina State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648, *appeal dismissed*, 308 N.C. 677, 303 S.E.2d 546 (1983).

A lawyer is ethically bound to advise his client of a plea bargain offer. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

## Client-Lawyer Relationship

### Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

## **Client-Lawyer Relationship**

### **Rule 1.14 Client with Diminished Capacity**

**(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 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.**

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when

properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. 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. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

**[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.**

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

#### *Taking Protective Action*

**[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless 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, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies 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 decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.**

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

#### *Disclosure of the Client's Condition*

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. 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. The lawyer's position in such cases is an unavoidably difficult one.

#### *Emergency Legal Assistance*

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.



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## Counselor

### Rule 2.1 Advisor

**In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.**

Comment

#### *Scope of Advice*

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

#### *Offering Advice*

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

## **Law Firms and Associations**

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

#### Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(o).

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

#### ETHICS OPINION NOTES

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

RPC 29. An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

RPC 70. A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 139. An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

RPC 152. District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

RPC 176. A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

RPC 183. A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

99 FEO 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

2000 FEO 10. Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

2002 FEO 9. Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.



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## **Maintaining the Integrity of the Profession**

### **Rule 8.4 Misconduct**

#### **It is professional misconduct for a lawyer to:**

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

**AMERICAN BAR ASSOCIATION: GUIDELINES FOR  
THE APPOINTMENT AND PERFORMANCE OF  
DEFENSE COUNSEL IN DEATH PENALTY CASES**  
(2003) -- Selected Guidelines 10.5, 10.9.1 and 10.9.2 Re  
Relationship With Client,  
Seeking Agreed-Upon Disposition  
and Entry of Guilty Plea  
(Reprinted from 31 Hofstra L. Rev. 913 (Summer 2003))

**GUIDELINE 10.5 - RELATIONSHIP WITH THE CLIENT**

A. 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.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

**C. 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, such as:**

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;

**5. potential agreed-upon dispositions of the case;**

6. litigation deadlines and the projected schedule of case-related events; and

7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make

this standard apply to all stages of a capital case and note expressly counsel's obligation to discuss potential dispositions of the case with the client.

#### Related Standards

ABA Standards for Criminal Justice: Defense Function Standard 4-3.1 ("Establishment of Relationship"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Defense Function Standard 4-3.2 ("Interviewing the Client"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Defense Function Standard 4-3.8 ("Duty to Keep Client Informed"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Defense Function Standard 4-5.2 ("Control and Direction of the Case"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation, Guideline 1.3(c) (1995) ("General Duties of Defense Counsel").

Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation, Guideline 2.2 (1995) ("Initial Interview").

ABA, The Ten Principles of a Public Defense Delivery System, Principle 3 (2000) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request For Counsel") (footnote omitted).

#### Commentary

##### The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. **In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "it must be assumed that the client is emotionally and intellectually impaired."**<sup>178</sup> There will also often be significant cultural and/or

language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

#### Counsel's Duty

Although, as described supra in the text accompanying notes 103-07, ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement;<sup>n179</sup> others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

**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 present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.<sup>n180</sup> Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client.** An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not - with good reason - trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.

Often, so-called "**difficult**" clients are the consequence of bad lawyering - either in the past or present.<sup>n181</sup> Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation. <sup>n182</sup>

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,<sup>n183</sup> the lawyer must understand the client and his life history. <sup>n184</sup> To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him. <sup>n185</sup>

#### Counsel's Duties Respecting Uncooperative Clients

**Some clients will initially insist that they want to be executed - as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide.**<sup>n186</sup> Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. **One or more members of the defense team**

**should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison.** A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial. n187

Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision - fully documented, for the benefit of actors at later stages of the case - whether to assert the position that the client is not competent to waive further proceedings.n188

#### The Temporal Scope of Counsel's Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client's personal condition for potential legal consequences.n189 For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications, n190 and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.n191 In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible. n192

### **GUIDELINE 10.9.1 - THE DUTY TO SEEK AN AGREED-UPON DISPOSITION**

A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;

2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;
5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;
7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;
8. concessions that the client might offer, such as:
  - a. an agreement to waive trial and to plead guilty to particular charges;
  - b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
  - c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
  - d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
  - e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
  - f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
  - g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;
  - h. agreements such as those described in Subsections 8(a)-(g) respecting actual or potential charges in another jurisdiction;
9. benefits the client might obtain from a negotiated settlement, including:
  - a. a guarantee that the death penalty will not be imposed;
  - b. an agreement that the defendant will receive a specified sentence;
  - c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - d. an agreement that one or more of multiple charges will be reduced or dismissed;

- e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
- f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
- g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;
- h. agreements such as those described in Subsections 9(a)-(g) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

F. Counsel should not accept any agreed-upon disposition without the client's express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

#### History of Guideline

Guideline 10.9.1 is based on aspects of Guidelines 11.6.1, 11.6.2, and 11.6.3 of the original edition. New language has been added to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, not just as a substitute for proceeding to trial initially. The current version of the Guideline also requires that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences.

**This Guideline omits the requirement, which appeared in Guideline 11.6.1 of the original edition, of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. However, Guideline 10.9.2(A) does require counsel to obtain the client's consent before accepting any agreed-upon disposition.**

#### Related Standards

ABA Standards for Criminal Justice: Defense Function Standard 4-6.1 ("Duty to Explore Disposition Without Trial"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Defense Function Standard 4-6.2 ("Plea Discussions"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Pleas of Guilty Standard 14-3.2 (3d ed. 1999) ("Responsibilities of Defense Counsel").

Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation, Guideline 6.1 (1995) ("The Plea Negotiation Process and the Duties of Counsel").

Commentary

Guidelines 10.9.1-2 both deal with the subject of agreed-upon dispositions. They and their associated commentaries should be read together.

"Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a result, plea bargains in capital cases are not usually "offered" but instead must be "pursued and won."<sup>242</sup> Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case. As in other sorts of protracted litigation, circumstances change over time (e.g., through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) and as they do new possibilities arise.<sup>243</sup> Whenever they do, counsel must pursue them.

In many jurisdictions, the prosecution will consider waiving the death penalty after the defense makes a proffer of the mitigating evidence that would be presented at the penalty phase and explains why death would be legally and/or factually inappropriate. In some states and the federal government, this process is formalized and occurs before a decision is made whether to seek the death penalty.<sup>244</sup> In other jurisdictions, the process is not formalized and may occur after the prosecution has announced its intention to seek the death penalty. In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.<sup>245</sup>

**Although, for the reasons explained in the History to this Guideline, counsel does not need to have obtained client consent before entering into plea discussions, counsel does need to have thoroughly examined the quality of the prosecution's case and investigated possible first-phase defenses and mitigation, as discussed in the commentary to Guideline 10.7.** Counsel must also consider the collateral consequences of entering a plea. For example, when the resulting adjudication of guilt could be used as an aggravating circumstance in another pending case, counsel should endeavor to structure an agreement that would resolve both cases without imposition of the death penalty.

In some cases, where there is a viable first-phase defense, it may be possible to negotiate a plea to a lesser charge. And if it is trial counsel's perception that the death penalty is being sought primarily to allow selection of a death-qualified (and therefore conviction-prone) jury, counsel should seek to remedy the situation through litigation in accordance with Guideline 10.8 as well as through negotiation. In many capital cases, however, the prosecution's evidence of guilt is strong, and there is little or no chance of charge bargaining. In these cases, a guilty plea in exchange for life imprisonment is the best available outcome.

**These considerations mean that in the area of plea negotiations, as in so many others, death penalty cases are sui generis. Many bases for bargaining in non-capital cases are irrelevant or have little practical significance in a capital case,<sup>n246</sup> and some uniquely restrictive legal principles apply. <sup>n247</sup>** Emotional and political pressures, including ones from the victim's family or the media, are especially likely to limit the government's willingness to bargain. On the other hand, the complexity, expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.<sup>n248</sup>

**A very difficult but important part of capital plea negotiation is often contact with the family of the victim.<sup>n249</sup>** In some states, the prosecution is required to notify and confer with the victim's family prior to entering a plea agreement. <sup>n250</sup> Any approaches to the victim's family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim's family and the client if the client is willing and able to do so. As described supra in the text accompanying note 226, the defense team should consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims' families in the outreach effort and in crafting possible resolutions. **In any event, because the victim's family can be critical to achieving a settlement, <sup>n251</sup> defense counsel should make the decision regarding contact on a fully informed and professional basis, rather than because of nervousness over entering a situation that might be emotionally stressful or in reliance on an unsupported guess as to what the response to an approach might be.**

Except in unusual circumstances, all agreements that are made should be formally documented between the parties concerned (e.g., in a writing between the client and representatives of the victim). In any event, counsel has an obligation under Guideline 10.13 to maintain in his or her own files a complete written description of any agreement.

Agreements for action or nonaction by government actors in exchange for a plea of guilty are governed by Guideline 10.9.2(B)(2) and, for the client's future benefit, should be set forth as clearly as possible on the record.<sup>n252</sup>

**In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed [\*1043] in the commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.**

**If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client's best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).**

#### GUIDELINE 10.9.2 - ENTRY OF A PLEA OF GUILTY

- A. The informed decision whether to enter a plea of guilty lies with the client.
- B. In the event the client determines to enter a plea of guilty:
  - 1. Prior to the entry of the plea, counsel should:
    - a. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
    - b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;
    - c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.
  - 2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

#### History of Guideline

This Guideline amends Guideline 11.6.4 of the original edition to clarify that the decision regarding whether to enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

#### Related Standards

ABA Standards for Criminal Justice: Defense Function Standard 4-6.1 ("Duty to Explore Disposition Without Trial") in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Defense Function Standard 4-6.2 ("Plea Discussions") in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

ABA Standards for Criminal Justice: Pleas of Guilty Standard 14-1.4 (3d ed. 1999) ("Defendant to Be Advised").

ABA Standards for Criminal Justice: Pleas of Guilty Standard 14-1.7 (3d ed. 1999) ("Record of Proceedings").

ABA Standards for Criminal Justice: Pleas of Guilty Standard 14-3.2 (3d ed. 1999) ("Responsibilities of Defense Counsel").

Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation, Guideline 6.3 (1995) ("The Decision to Enter a Plea of Guilty").

Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation, Guideline 6.4 (1995) ("Entry of the Plea Before the Court").

#### Commentary

If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights.

The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel's advice regarding the advisability of a plea. The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible. As the commentary to Guideline 10.5 describes, a client will, quite reasonably, not accept counsel's advice about the case if the attorney has failed to conduct a meaningful investigation.<sup>n253</sup>

A competent client is ultimately entitled to make his own choice. Counsel's role is to ensure that the choice is as well considered as possible. This may require counsel to work diligently over time to overcome the client's natural resistance to the idea of standing in open court, admitting to guilt, and perhaps agreeing to permanent imprisonment. Or it may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.<sup>n254</sup>

**Because of the factors described supra in the text accompanying notes 178-92, it will often require the combined and sustained efforts of the entire defense team to dissuade the client from making a self-destructive decision. As noted there, the defense team may also need to call on family, friends, clergy, and others to provide information that assists the client in reaching an appropriate conclusion.**

#### **NOTES:**

n178. Rick Kammen & Lee Norton, Plea Agreements: Working with Capital Defendants, *The Advocate*, Mar. 2000, at 31, available at <http://www.dpa.state.ky.us/library/advocate/mar00/plea.html>; see also Lewis, *supra* note 93, at 840 (finding forty percent of death row inmates to be chronically psychotic); Dorothy Otnow Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 *Am. J. Psychiatry* 584, 586-87 (1988) (finding fifty percent of death sentenced juveniles in survey suffered from psychosis and almost all were severely abused as children).

n179. See, e.g., *Nixon v. Singletary*, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); *People v. Hattery*, 488 N.E.2d 513, 519 (Ill. 1985) (same).

n180. See ABA Standards for Criminal Justice: Defense Function Standard 4-5.2 & cmt., in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993); see also Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, *The Champion*, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, *supra* note 3, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).

n181. See White, *supra* note 3, at 338 ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients's [sic] conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.") (footnotes omitted); *infra* note 313.

n182. A lawyer can also frequently earn a client's trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him. See *id.*; Lee Norton, *Mitigation Investigation*, in Florida Public Defender Ass'n, *Defending a Capital Case in Florida* 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of relationship that will lead to a satisfactory legal outcome.

n183. One important example is the fact that the client is mentally retarded - a fact that the client may conceal with great skill, see, e.g., James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L. Rev.* 414, 430-31 (1985), but one which counsel absolutely must know. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants may not constitutionally be executed). The issue of mental illness presents a very similar set of challenges.

n184. See Goodpaster, *supra* note 3, at 321.

n185. See Norton, *supra* note 182, at 5; White, *supra* note 3, at 375 (jury will be less likely to empathize with defendant if it does "not perceive a bond between the defendant and his attorney").

n186. See *infra* Guideline 10.7(A) and accompanying commentary; Kammen & Norton, *supra* note 178.

n187. See *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981); see also *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). Moreover, if a mitigation investigator is productive, it may persuade the prosecutor to forgo the death penalty. In that event, the jury will not be "death-qualified" and the client's chances of an acquittal will be enhanced.

n188. See generally *Godinez v. Moran*, 509 U.S. 389, 396-402 (1993) (setting forth minimum competency standard that the Constitution requires).

n189. See *infra* text accompanying notes 341.

n190. Cf. *Sell v. United States*, 123 S. Ct. 2174, 2184 (2003) (holding that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"); *Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial). The Supreme Court has not addressed the application of these principles to phases of the criminal process other than the trial itself, but those cases should alert capital defense counsel to do so. See, e.g., *Rohan v. Woodford*, 334 F.3d 803, 818-19 (9th Cir. 2003) (Kozinski, J.) (holding as a matter of statutory construction that mentally incompetent federal habeas petitioner is entitled to a stay of execution and of proceedings until he recovers).

n191. See *infra* text accompanying note 341.

n192. See ABA Model Rules of Prof'l Conduct R. 1.4(a) (2002) ("A lawyer shall ... keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").

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n241. See 3 Cal. Att'ys for Crim. Justice, 3 California Death Penalty Defense Manual 4 (1993).

n242. Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, *The Champion*, Mar. 1984, at 8, 15; see also Doyle, *supra* note 180.

n243. Examples of agreed-upon dispositions after extended litigation include the cases of Calvin Burdine, see Henry Weinstein, *Inmate in Texas Sleeping-Lawyer Case Pleads Guilty*, *L.A. Times*, June 20, 2003, at 14 (client agrees to three life sentences), Michael Wayne Williams, see Jamie C. Ruff, *Williams Pleads Guilty to Murders*, *Richmond Times-Dispatch*, Mar. 25, 2003, at B1 (client waives parole eligibility and agrees to life term), Lloyd Schlup, see Tim O'Neil, *Killer Who Escaped Execution Over New "Evidence" Pleads Guilty*, *St. Louis Post-Dispatch*, Mar. 25, 1999, at A15 (client pleads guilty to second-degree murder after new evidence appeared), and Paris Carriger, see Samuel R. Gross, *Lost Lives:*

Miscarriages of Justice in Capital Cases, 61 Law & Contemp. Probs. 125, 139-40 (1998) (following affirmance of federal habeas corpus relief by *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), client pleaded guilty to lesser offense and was released). Numerous other instances are reported in Liebman et al., supra note 46, Apps. C, D.; see also James Kimberly, Inmate Swaps Death Sentence for 20 Years, Hous. Chron., Aug. 12, 2003, at 1 (Paul Colella pleads to twenty-year term "just days before a federal judge was to hear evidence on ... allegations of prosecutorial misconduct and ineffective assistance"); Lynn Thompson, Life Without Parole in Massacre: Mak Sentenced Again for 13 Wah Mee Deaths in 1983, Seattle Times, May 21, 2002, at B1 (client sentenced to 13 life terms after prosecution decides not to appeal judge's order that death penalty is unavailable).

n244. See United States Attorneys' Manual, supra note 162, 9-10.030. New York law gives the District Attorney a 120-day "deliberative period" to decide whether to file a notice of intent to seek the death penalty. See N.Y. Crim. Proc. Law 250.40(2) (McKinney 2002); *Francois v. Dolan*, 731 N.E.2d 614, 616 (N.Y. 2000). During that time, with the assistance of the Capital Defender's Office, counsel is appointed and may attempt to persuade the prosecutor not to file a notice. See N.Y. Jud. Law 35-b (McKinney 2002). The notice may also be withdrawn at any time. See N.Y. Crim. Proc. Law 250.40(4) (McKinney 2002). Between 1995 and mid-2003, District Attorneys in New York formally investigated seeking the death penalty against 780 defendants, but only filed notice that they were seeking the death penalty against forty-eight of these. See New York Capital Defender Office home page, at <http://www.nycdo.org/caseload/answers.html> (last visited June 14, 2003).

n245. See supra text accompanying note 162; *Doyle*, supra note 180; *White*, supra note 3, at 328-29.

n246. A number of concessions that the parties might exchange in the capital context appear in Subsection B.

n247. See *United States v. Jackson*, 390 U.S. 570, 583 (1968) (invalidating provision of federal statute carrying capital punishment on basis that it coerced waivers of jury trial rights); *Hynes v. Tomei*, 706 N.E.2d 1201, 1207 (N.Y. 1998) (applying *Jackson* to invalidate portion of New York death penalty statute); Comm. On Capital Punishment, Ass'n of the Bar of the City of N.Y., *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Rec. Ass'n of the Bar of City of N.Y. 129, 141-44 (2000) (describing mechanisms by which pleas in capital cases were being reached in light of *Hynes*).

n248. Plea offers are extended prior to trial in a significant proportion of cases and also commonly occur after protracted litigation, see supra note 243.

n249. See *Stetler*, supra note 226, at 42; see also Gail Gibson & Laura Willis, Tears and Remorse Precede Life Term in Dawson Deaths, *Baltimore Sun*, Aug. 28, 2003, at 1 (as part of arrangement for life sentence, Darrell L. Brooks makes emotional apology in open court to families of seven victims of his arson).

n250. See, e.g., Ala. Code 15-23-71 (1995).

n251. See supra text accompanying note 226.

n252. See *Ricketts v. Adamson*, 483 U.S. 1, 7, 10-12 (1987) (where defendant was deemed to have breached terms of plea agreement by refusing to testify against co-defendant at a retrial, double jeopardy did not preclude state from vacating defendant's plea of guilty to second degree murder, trying him for capital murder and sentencing him to death).

n253. See supra text accompanying note 180.

n254. See supra commentary to Guideline 10.5.