

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2006-2**

**Responsibilities of A Lawyer to Honor Client's Instructions on Means of
Representation in Criminal Cases**

Question Presented

The Committee has been asked how a criminal defense lawyer should proceed in representing a client on an application for post conviction relief when the client insists that the lawyer not place his mental health into issue, when the defense lawyer believes that the best chance of success is in arguing that the client lacked mental competence to assist his trial counsel.

Conclusion

The Committee concludes that the lawyer need not, as an ethical matter, follow his client's instruction with regard to raising mental health issues. However, the lawyer must consult with the client on the issue. Further, the lawyer would not act unethically, if following discussion, the lawyer chose to follow the client's instruction and not pursue the avenue that the lawyer believes offers the client the best chance of success.

Analysis

Rule 1.2 of the Alaska Rules of Professional Conduct, Scope of Representation and Allocation of Authority Between Client and Lawyer, requires a lawyer to abide by a client's decisions concerning the objectives of representation and to consult with the client as to the means by which they are to be pursued.¹ In the situation presented by this question, the objectives of the client and lawyer are the same, to obtain post conviction relief. However, the client and the lawyer differ on the means to achieve this objective. The lawyer believes that the best argument to obtain post conviction relief is to allege that the client was mentally incompetent to assist his own counsel at trial. In order to make that argument, the lawyer must necessarily reveal the nature and extent of the client's mental health problems. The client is adamantly opposed to this tactic.

¹ ARPC 1.2(a) provides in pertinent part:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation,...and shall consult with the client as to the means by which they are to pursued. A lawyer shall abide by the client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

Legal theories and the type of evidence to be offered in support of those legal theories are typically the technical and legal tactical issues left to the lawyer's determination. See Comment, Rule 1.2 ARPC. Moreover, the Alaska Court of Appeals has held that a lawyer for a criminal defendant does not render constitutionally ineffective assistance of counsel by failing to heed a client's wishes on tactical matters other than those specifically listed in ARCP 1.2(a). In Simeon v. State, 90 P. 3d 181,184 (Alaska App. 2004), the defendant's lawyer did not request jury instructions on lesser included offenses. Simeon contended that he, not his lawyer was required to make the decision whether to request such instructions, and the lawyer's usurpation of Simeon's prerogative amounted to constitutionally ineffective assistance of counsel. The Court of Appeals disagreed and held that ARCP 1.2(a) sets the standard for constitutionally effective representation in criminal cases and that it does not require the lawyer to give up decision-making on those decisions not specifically set out in the rule as committed solely to the client's discretion: what plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal. The court stated:

[ARCP 1.2(a)] specifies clearly those decisions over which the client has the ultimate authority. Since the rule limits the client's authority to those decisions, it follows that the lawyer has the ultimate authority to make other decisions governing trial tactics....

Simeon, 90 P. 3d at184. See also; Monroe v. State, 752 P.2d 1017, 1020 (Alaska App. 1988) (differences over strategy and tactics with client does not render counsel's performance constitutionally substandard; "the state and federal constitutions do not guarantee a 'meaningful relationship' between client and his appointed counsel.")

Like the jury instruction issue in Simeon, the issue before the Committee is whether the client in a criminal case should have the ultimate decision-making authority as to a matter not specifically listed in ARCP 1.2(a). The Committee believes the better view is to follow the holding of the Alaska Court of Appeals. Otherwise, a lawyer rendering constitutionally effective representation in making certain tactical decisions might be considered to be acting unethically for making the same decisions. Criminal defense lawyers should not be subject to differing standards when faced with the same issue.

Even though the lawyer may have the ultimate authority to make technical legal and tactical decisions, the client has the right to consult with the lawyer about those decisions. ARCP 1.2(a). Careful consultation is particularly important when, as here, the decision involves a matter of substantial personal importance. Decisions about whether to reveal mental health information may well have an impact on family members or other third persons. The ARPC recognize that, at least in civil matters, decisions involving

concern for third persons who might be adversely affected are generally left to the client. See ARPC 1.2 cmt. (“[T]he lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be affected.”) A lawyer representing a client in a criminal matter should be mindful of the importance of these matters to the client when exercising the lawyer’s decision-making authority.

However, the lawyer would not act unethically if, after discussing the issues with the client, the lawyer chose to follow the client’s wishes. As the Alaska Court of Appeals stated in Valcarcel v. State, 2003 WL 22351613 (unpublished):

Although counsel is responsible for giving competent advice and is ultimately responsible for the tactical and strategic decisions which they control, many courts have concluded that an attorney does not provide ineffective assistance of counsel when, after advising the client of what the attorney believes to be the best legal tactic, the attorney acquiesces in the client’s desire to proceed in a different manner.

Citations omitted.

The question posed here raises the additional issue of whether the client is mentally competent to make the decision about revealing his mental health history. When confronted with a client under a disability, such as a mental health impairment, a lawyer is required, as far as reasonably possible, to maintain a normal client/lawyer relationship with the client. Rule 1.14, Alaska Rules of Professional Conduct. This would include consulting with the client as to the means of the representation and following the client’s instructions insofar as they are lawful and conform to the lawyer’s other ethical obligations. When, however, the lawyer reasonably believes that the client cannot adequately act in the client’s own interest, the lawyer may take additional steps including, if necessary, seeking the appointment of a guardian. Id. ABA Ethics Opinion 96-404 (1996), stresses that when a client can no longer act in his or her own interest, the lawyer should take the action that is least restrictive under the circumstances, stating that “[t]he appointment of a guardian is a serious deprivation of the client’s rights and ought not to be undertaken if other, less drastic, solutions are available.” Other less drastic solutions may be to seek the assistance of counselors, clergy or mental health professionals in assisting the client to understand what may be in his best interest.

A criminal defense lawyer who doubts a client’s competence may be obliged to disclose those doubts to the court, even though it might be to the client’s disadvantage and contravene the client’s wishes. See ABA Annotated

Rules of Professional Conduct, Rule 1.14, Legal Background at 216. Some practical guidance for the lawyer trying to assess a criminal defendant's competence may be found in Uphoff, *The Rule of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant, Zealous Advocate or Officer of the Court?* 1988 Wis. L. Rev. 65, 99-108 (offering step-by-step analysis of degree of client's impairment, importance of decision being considered, type of case, and costs and benefits to client of alternative courses of action, in suggesting questions to ask client, similar to those used by mental health experts in forming competency opinions).

Approved by the Alaska Bar Association Ethics Committee on April 6, 2006.

Adopted by the Board of Governors on April 25, 2006.