



North Carolina Criminal Law

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What Does it Mean for a Criminal Case if the Defendant is Legally Incompetent and Has a Court-Appointed Guardian?

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Derek was twenty years old when he suffered a stroke. He lost and then subsequently regained his ability to speak and to perform simple tasks; however, he cannot manage important matters like his medical care and finances. Derek's mom, Greta, successfully petitioned under G.S. Chapter 35A to have her son adjudicated incompetent and was appointed as Derek's guardian.

Recently, Derek was at a store and put candy he had not paid for in his pocket. When an employee intervened, Derek pushed the employee and ran home with the candy. Criminal charges were filed, and Derek was appointed counsel. This post explores difficult questions that arise when a criminal defendant is adjudicated incompetent and has a court-appointed guardian, including the effect those circumstances have on criminal case decisions, client confidentiality, and the allocation of authority between the attorney and client.

But first, a little background.

Attorney-client relationships and the allocation of authority, generally

Who makes case decisions: the attorney, or the client? The American Bar Association (ABA), in its published **Criminal Justice Standards**, suggests that clients make decisions involving substantive rights (e.g., what plea to enter, whether to waive a jury trial, and whether the defendant should testify), while attorneys make strategic and tactical decisions (e.g., how to cross-examine

witnesses, and whether to strike a potential juror). But the framework in North Carolina is somewhat different.

The North Carolina Rules of Professional Conduct (hereinafter Rules) provide that clients in North Carolina decide the goals of a case and the purposes of representation, but attorneys—in consultation with their client—determine the tactics and means for achieving those goals. Rules R. 1.2(a); -cmt. [1]. In interpreting what this means for defendants and defense counsel, our appellate courts have commented positively on the ABA's framework, but they have not adopted the approach outright, instead holding that defendants have more decision-making authority than the ABA's model suggests, including on tactical matters where the attorney and client are at an 'absolute impasse.' See, e.g., *State v. Ali*, 329 N.C. 394 (1991) (holding that because attorneys are the agent working on behalf of their client, the principal, the defendant's wishes controlled where an absolute impasse existed over jury selection); c.f. *State v. Henderson*, __ N.C. App. __ (May 7, 2025) (discussing general rule that attorneys make tactical decisions except where an absolute impasse exists, but finding disagreement about evidence was seemingly resolved and thus not an impasse).

When an absolute impasse occurs, "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404. If an absolute impasse over a tactical matter is brought to the trial court's attention, it is generally reversible error for the court to allow the attorney's decision to prevail over the defendant's wishes. *State v. Holliday*, 289 N.C. App. 667, 674 (2023); c.f. *State v. Williams*, 191 N.C. App. 96 (2008) (defendant's unlawful demands do not control despite absolute impasse, where defendant would have attorney racially discriminate during jury selection); *State v. Jones*, 220 N.C. App. 392 (2012) (rule does not require attorney to file frivolous motions or make frivolous arguments at defendant's direction); *State v. Ward*, 250 N.C. App. 254 (2016) (attorney not required to cross-examine State's expert using a theory lacking a factual basis).

Incompetency and guardianship

An incompetent adult is someone who lacks sufficient capacity to manage their affairs or to make or communicate important decisions about themselves, their family, or their property due to some cause or condition, and for whom no less restrictive alternative to guardianship would enable them to do those things. G.S. 35A-1101(7). In North Carolina, a guardian is almost always appointed to make decisions for an incompetent adult. Depending on the person's assets, liabilities,

and needs, a guardian may be appointed to make decisions related to housing, medical or other services, assets and debts, and more. See G.S. 35A-1241 (powers and duties of guardian of the person) and G.S. 35A-1251 (guardian's powers in administering the adult's estate). One purpose of guardianship is to substitute an incompetent person's decision-making authority with that of a guardian when the individual lacks capacity to make such decisions. G.S. 35A-1201(a)(3). However, guardianship also allows the individual a greater opportunity to (i) exercise rights within their comprehension and judgment and (ii) participate in decision making as fully as possible. G.S. 35A-1201(a)(5).

Ethical duties and clients with diminished capacity

Separate from the legal definition of incompetency in G.S. Chapter 35A, a client has diminished capacity when their ability to make adequately considered case decisions is lessened due to minority, mental impairment, or for some other reason. Rules R. 1.14(a). The same ethical duties apply to attorneys when representing a client with or without diminished capacity; however, some adjustments may be appropriate. See, e.g., R. 1.2(a), cmt. [4] (allocation of authority); R. 1.4, cmt. [6] (communication); R. 1.6 (confidentiality).

Rule 1.14(a) requires attorneys to maintain as normal an attorney-client relationship as possible with a client with diminished capacity. All clients must be communicated with, advised, and consulted. Clients with diminished capacity are often able to understand concepts, consider options, and draw conclusions. *Id.* at cmt. [1]. A client whose ability to participate is so impaired they are unable to assist in their representation may not have capacity to proceed, which means they cannot stand trial, and the criminal case cannot move forward. For more on capacity to proceed, see the **NC Superior Court Judges' Benchbook**. For a comparison of incompetency and capacity to proceed, including the inquiries and procedures for both, see my **previous post**.

What if an attorney 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?" Rules R. 1.14(b). The attorney may take reasonably necessary protective action – a term that is not defined in the Rules but expressly includes (i) consulting with people or agencies who can help, and (ii) seeking the appointment of a guardian for the defendant. *Id.* In doing so, an attorney may disclose otherwise confidential client information that is reasonably necessary to protect the client's interests. Rules R. 1.14(c).

Some diminished capacity clients will have also been adjudicated incompetent by the clerk and been appointed a guardian. The remainder of this post explores relevant considerations when (i) a client is incompetent and under guardianship, or (ii) an attorney believes their client is incompetent and needs a guardian but does not have one.

Common questions about incompetent defendants

1. Can an incompetent defendant be charged and/or convicted of a crime?

Let's return to Derek, who shoved a store employee and ran home with candy he had not paid for, and his mother/guardian, Greta. There is no blanket rule that simply because Derek has been adjudicated incompetent, he cannot be criminally liable. Again, the procedures, standards, and implications for a legal determination of incompetency are different from incapacity to proceed, found in G.S. Chapter 15A, Article 56. Incompetency involves a more global assessment of a person's cognitive abilities beyond the immediate proceeding.

That a criminal defendant was previously adjudicated incompetent may, however, be a red flag for the defendant's attorney to heed and to consider their client's capacity to proceed in the criminal case, including entering a plea or standing trial. It may also raise questions about the defendant's ability to form intent or to act willfully, which may be elements of the offense charged. (I **blogged** about one such example involving legally incompetent people who are later required to register as sex offenders.)

2. Who makes case decisions: the client, the attorney, or the guardian?

It is unclear that the decision-making authority of a defendant who is found capable of proceeding changes because the defendant has diminished capacity or is legally incompetent and under guardianship. On substantive decisions, the defendant's wishes presumably control. On strategy and tactical decisions, the attorney likely continues to make these decisions in consultation with the client. If the two reach an absolute impasse, the client's decision may control except that an attorney is not required to take unlawful steps or assert frivolous claims at the defendant's behest. *Williams*, 191 N.C. App. 96 (2008) (unlawful); *Jones*, 220 N.C. App. 392 (2012) (frivolous).

What about someone like Greta, an appointed guardian for a legally incompetent person? Generally, a guardian has decision-making authority affecting the

incompetent person's life and property; however, it is not clear from G.S. Chapter 35A, our criminal statutes, nor our case law that a guardian has control over matters involving the constitutional rights afforded to the accused, particularly one found capable of proceeding.

3. Can the attorney share confidential client and case information with the guardian?

"Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client." Rules R. 1.14, cmt. [2]. The attorney must strive for as normal an attorney-client relationship as possible. Rules R. 1.14(a). Applying these principles to Derek's case, the attorney should seek Derek's approval before sharing confidential client and case information with Greta.

Even without client approval, if an attorney reasonably believes that a client is (i) at risk of suffering substantial physical or financial harm and (ii) unable to act on their own, the attorney can take protective action (or consult with others who can) and can reveal information necessary to protect the client's interests. Rules R. 1.14(c). For example, if Derek's attorney had information that Derek was being financially exploited, the attorney may share those concerns with Greta so that she may take steps to protect Derek's property. The attorney could not, however, disclose confidential client information to Greta that is not reasonably necessary for protective action (e.g., that Derek used to smoke marijuana in high school).

When pursuing protective action, attorneys need to weigh the benefits and risks of involving a defendant's guardian in conversations about the case. Potential benefits include that the guardian may be able to (i) assist with obtaining housing, medication, treatment, and services for the defendant, (ii) help calm or explain issues to the defendant, (iii) share information that is useful to the defense, e.g., relating to capacity to proceed in the criminal case or mitigation of the charges or for sentencing, or (iv) protect the client from or mitigate collateral consequences related to the criminal action (e.g., if the defendant's public housing or facility placement is in jeopardy because of the criminal charges). Risks of involving the guardian include potential harm to the attorney-client relationship and the possibility the guardian may take action that the attorney disagrees with or did not foresee, e.g., by redisclosing sensitive information about Derek to law enforcement.

If it is necessary to involve others in discussions with the attorney to assist in the representation of a client with diminished capacity, doing so does not void the applicability of the attorney-client evidentiary privilege. *Id.* at cmt. [3]. Imagine that Derek's attorney determines that Greta needs to be present for a discussion with Derek about the risks of entering a plea, so that Greta can ensure Derek understands the information. In that scenario, Greta's presence would not void the attorney-client privilege between Derek and his attorney.

4. May an attorney in this situation disclose information to other third parties (e.g., treatment providers or social services)?

Yes, if reasonably necessary to take protective action; however, the same caution applies. "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." *Id.* at cmt. [8]. Also, attorneys must look to the client, and not to others, to make decisions. *Id.* at cmt. [3].

5. What if the client has not been adjudicated incompetent but the attorney is concerned the client is incompetent and needs a guardian?

An attorney is expressly authorized to seek the appointment of a guardian for a client when the conditions regarding diminished capacity and risk of harm are met. Rules R. 1.14(b). A petition for the adjudication of incompetence and appointment of a guardian may be filed by any person or agency. G.S. 35A-1105. An attorney may be one such petitioner.

Some defendants may need guardianship, which, under the right circumstances, may help stabilize a person and increase their access to services. Still, adjudicating someone incompetent and limiting their rights is significant. Even where guardianship is needed, an attorney should first consider whether there are other individuals or agencies (e.g., a responsible relative or social services) who could serve as petitioner, rather than the attorney. This may help preserve the trust between the attorney and client and prevent an adversarial attorney-client relationship.

Conclusion

Representing defendants who are incompetent or otherwise have diminished capacity presents challenges for defense attorneys. As the N.C. State Bar has noted, "[t]he lawyer's position in such cases is an unavoidably difficult one." Rules

R. 1.14, cmt. [8]. Attorneys should consider their ethical duties and the defendant's rights and should weigh the risks and benefits of potential actions. Attorneys may reach out to the State Bar for advice after consulting the Rules and any relevant opinions. If you would like to discuss your representation of a legally incompetent client, email me anytime at **Heinle@sog.unc.edu**.