12.8 Attorney-Client Relationship

A. Control and Direction of Case

The ABA Standards for the Defense Function state that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2(a) (3d ed. 1993). The decisions reserved for the client, with the advice of counsel, are: (i) what plea to enter; (ii) whether to accept a plea bargain; (iii) whether to waive jury trial; (iv) whether to testify; and (v) whether to appeal. (Under North Carolina law, a defendant may not waive the right to a jury trial in superior court, and a defendant who is sentenced to death may not waive the right to direct appeal.)

According to the ABA standards, strategic or tactical decisions—such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence to introduce—are the province of counsel. *See* ABA Standard 4-5.2(b); *see also State v. Luker*, 65 N.C. App. 644 (1983) (citing standards on this issue), *aff'd in part, rev'd in part*, 311 N.C. 301 (1984). The standards further provide that where feasible and appropriate, the attorney should consult with the client about such decisions. *See* ABA Standard 4-5.2(b); *see also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.2, 1.4 (attorney should reasonably consult with client about means by which client's objectives are to be accomplished, keep client reasonably informed about status of matter, and promptly comply with reasonable requests for information); *Gov't of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3d Cir. 1996) (relying on *Strickland v. Washington*, court states that important strategic and tactical decisions should be made only after lawyer consults with client).

The N.C. Supreme Court has cited the ABA standards with approval but, based on its view that the attorney-client relationship is one of principal-agent, has taken the position that ultimately the attorney must carry out the client's wishes. Thus, although tactical decisions normally are for the attorney to make, "when counsel and a fully informed defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control." *State v. Ali*, 329 N.C. 394, 404 (1991) (choice of juror); *accord State v. Brown*, 339 N.C. 426 (1994) (trial strategy); *State v. Freeman*, 202 N.C. App. 740 (2010) (exercise of peremptory strike). *But see State v. Jones*, ___N.C. App. ___, 725 S.E.2d 415 (2012) (attorney need not comply with client's wishes to assert frivolous or unsupported claims); *State v. Williams*, 191 N.C. App. 96 (2008) (where defendant and counsel had not reached final decision about particular trial tactics, there was not absolute impasse).

The *Ali* opinion advises that where there is an absolute impasse over strategy between the attorney and client, the attorney "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. 394, 404; *see also* ABA Standard 4-5.2(c) & Commentary (advising that record should be made in manner that protects client confidentiality, such

as memorializing matter in file). If the client's wishes are completely irrational, counsel may want to consider moving for a capacity evaluation since one component of capacity to stand trial is the ability to assist rationally in the defense. *See supra* Ch. 2, Capacity to Proceed.

Practice note: In some circumstances, if counsel reaches an absolute impasse with a client, he or she may wish to make a motion to withdraw. This manual does not address the circumstances in which a motion to withdraw may be appropriate. However, the court may not be able to require a defendant to forgo counsel as a condition of proceeding with his or her preferred course of action. In *State v. Colson*, 186 N.C. App. 281 (2007), the defendant wanted to testify on his own behalf against the advice of his lawyer, who had concerns about the truthfulness of the testimony. The court held that the trial judge erred by requiring the defendant to choose between testifying without counsel and continuing to be represented by counsel but foregoing testifying. While the case involved a choice between constitutional rights, the reasoning may apply to other trial decisions a defendant wishes to make. Absent a knowing and voluntary waiver of counsel, a trial court may not be able to require a defendant to proceed without counsel on the ground that counsel and the defendant disagree over the course of action to take. *Cf. State v. Chappelle*, 193 N.C. App. 313 (2008) (no error where defendant and trial counsel disagreed over trial tactics and defendant chose to waive counsel).

The North Carolina appellate courts have not considered the impact of *Indiana v. Edwards*, 554 U.S. 164 (2008), on *Ali's* agency theory of representation. *Edwards* recognized that a defendant may be capable of proceeding to trial but incapable of representing himself or herself. If a trial judge finds a defendant capable of standing trial but refuses to accept the defendant's waiver of counsel because the defendant is incapable of self-representation, must the attorney still follow the defendant's wishes? The issue is unsettled. If counsel and a defendant reach an absolute impasse and counsel believes the defendant's requested action is unwise, counsel should bring the matter to the court's attention and obtain a ruling on the appropriate way to proceed. For a further discussion of *Indiana v. Edwards*, see *supra* § 12.6C, Capacity to Waive Counsel.

B. Special Needs Clients

North Carolina's Revised Rules of Professional Conduct and the pertinent ABA Standards state that, to the extent possible, an attorney should seek to give mentally impaired or juvenile clients the same control over their case as fully functional adults. *See* N. C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14 (clients with diminished capacity); ABA STANDARDS FOR JUVENILE JUSTICE, Standard 3.1 (1980). The North Carolina rules state that if the lawyer believes that a client is too young or too impaired to make informed choices in his or her best interest, the lawyer may take reasonably necessary protective action, including seeking appointment of a guardian ad litem. *See* REV'D RULE OF PROF'L CONDUCT 1.14(b) & cmt. 7 (rule authorizes attorney to seek guardian ad litem but comment recognizes that in many circumstances such an appointment may be more expensive or traumatic for client than warranted); ABA Standard for Juvenile Justice 3.1(b)(ii)(c); *cf.* North Carolina State Bar, 2004 Formal

Ethics Opinion 11 (2005) (recognizing that a lawyer appointed to serve as both guardian ad litem and counsel for a parent with diminished capacity in a termination of parental rights proceeding must keep all communications confidential). The ABA juvenile justice standards recommend that, if appointment of a guardian is not possible, the lawyer should take the course of action that "a careful and competent person in the juvenile's position" would likely decide to take. ABA Standard for Juvenile Justice, Standard 3.1(b)(ii)(c)[3]; *see also* REV'D RULE OF PROF'L CONDUCT 1.14 cmt. 7 (in considering alternatives for client with diminished capacity, lawyer should be aware of any law that requires lawyer to advocate for least restrictive action on behalf of client).

Counsel should make accommodations to overcome communication barriers created by youth or mental or physical disability. Such accommodations may include seeking the assistance of an expert. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-3.1 Commentary (3d ed. 1993) (establishment of attorney-client relationship with client with mental disability).

One component of capacity to stand trial is the ability of the defendant to assist in his or her defense. Consequently, in appropriate circumstances, counsel should consider seeking a capacity determination. *See supra* Ch. 2, Capacity to Proceed.