2.3 Deciding Whether to Question Capacity

Counsel should be aware of the potential repercussions, positive and negative, of questioning capacity and the potential options that best protect the client, such as obtaining funds for an evaluation by the defendant's own mental health expert before questioning capacity.

A. Ethical Considerations

When counsel must raise issue. There is general agreement that counsel may not allow a client to proceed if counsel believes that the client is incapable of doing so. Commentators disagree to some extent, however, on the quantum of doubt that counsel must entertain. North Carolina has not specifically addressed the issue. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.2(c) & Commentary (1989) (counsel has a duty, as an officer of the court, to raise the issue of capacity to proceed if he or she has a "good faith doubt" as to the client's capacity; counsel may so move over the client's objection), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html; Norma Schrock, Note, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639 (1996) (writer argues that counsel has duty to alert court to capacity issues, but acknowledges that duty arises only when counsel has a "reasonable doubt" as to competency); Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, *in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS at 30–47 (Rodney J. Uphoff ed., American Bar Association 1995) (writer argues that counsel may decline to raise capacity if raising issue would not be in client's best interest—for example, if counsel believes that accepting plea offer would be in client's best interest; writer hedges this advice, however, by stating that client must be "marginally competent"); *see also* North Carolina State Bar Ethics Opinion CPR 314 (1982) (opinion under former ethics code states that lawyer may not execute will for client whom lawyer knows to be incompetent; however, if reasonable people could differ about client's competency, lawyer does not necessarily act unethically by preparing will).

Impact of client wishes. As in other matters, counsel should first try to discuss with the client the issue of raising capacity and its consequences and, if possible, determine the client's wishes. N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(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."). If counsel explains to the client the need for an evaluation, the client may accede to the request.

In some instances, the client's faculties may be so impaired that he or she cannot engage in a meaningful discussion with counsel. Counsel may question capacity without the

client's assent or even over the client's objection. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(b) (lawyer may take action to protect a client "[w]hen the lawyer reasonably believes that the client . . . cannot adequately act in the client's own interest"); North Carolina State Bar Ethics Opinion RPC 157 (1993) (counsel may take protective action on behalf of an incompetent client); *United States v. Boigegrain*, 155 F.3d 1181 (10th Cir. 1998) (majority recognizes that defense counsel, as officer of court, may raise issue of incapacity despite client's wishes; dissent concurs with general principle but argues that if defendant elects to defend capacity, defendant may be entitled to assistance of new counsel to present his or her position).

Continued representation of defendant. Questioning a client's capacity without the client's consent or over the client's objection does not necessarily require counsel to withdraw. *See State v. Robinson*, 330 N.C. 1 (1991) (trial court's refusal to grant defendant's request to remove appointed counsel, who had questioned defendant's capacity without his consent, did not create conflict with defendant's fundamental rights or result in ineffective assistance of counsel). Nevertheless, if the relationship with the client breaks down as a result of such a request and new counsel would be better able to serve the client, counsel may want to request the court to allow withdrawal and appoint new counsel. *See generally* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.16(b) (grounds for requesting withdrawal).

B. Consequences of Questioning Capacity

Potential benefits. Some of the advantages of questioning capacity include:

- The examination may lead to needed treatment that the defendant could not otherwise obtain.
- A defendant found incapable of proceeding cannot be tried, precluding conviction and sentencing on the current charge. The case could be dismissed by the court or prosecutor in light of the findings of incapacity. *See generally* § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.
- Even if the defendant is found capable to proceed, the examination and hearing may generate evidence in support of a mental health defense, mitigating factors at sentencing, or a motion to suppress a confession on the ground that the defendant did not act knowingly and voluntarily. *See, e.g., State v. Bundridge*, 294 N.C. 45 (1978) (evidence of earlier incapacity to stand trial admissible to support insanity defense).
- Information about the defendant's mental condition may have a positive impact on plea discussions with the prosecutor.

Potential harms. Some of the harms that may result from questioning capacity include:

- The proceedings may result in disclosure of information damaging to the defendant, which may hurt plea negotiations, lead to further evidence, or be admissible at trial. *See infra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation. In capital cases in particular, defense lawyers have voiced concern about the dangers of state-conducted capacity evaluations. *See, e.g.,* Welsh S. White, *Government Psychiatric*

Examinations and the Death Penalty, 37 ARIZ. L. REV. 869 (1995) (analyzing reasons for defense opposition). If a state-conducted capacity evaluation is ordered, counsel may seek to minimize the risk by moving for an order limiting disclosure and use of the evaluation. *See infra* § 2.5E, Limits on Scope and Use of Examination; § 2.5F, Report of Examination.

- An evaluation of capacity to proceed before the defendant makes a motion for funds for a mental health expert of his or her own may hurt the defendant's chances of succeeding on the motion. *See infra* "Impact of capacity examination" in § 5.6A, Mental Health Experts.
- If found incapable of proceeding and involuntarily committed, the defendant could be confined for a longer period than if convicted, particularly if the underlying charge is a misdemeanor or the defendant does not have a significant criminal record.
- The defendant may be confined while awaiting a capacity evaluation or resolution of the capacity proceedings. *See generally* G.S. 15A-1002(b)(2) (court may commit defendant to state hospital for up to sixty days for evaluation, although stay is ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing).
- A finding of incapacity and subsequent involuntary commitment may stigmatize a defendant.