Ethics Opinion EF-25-03: Representing a Criminal Defendant with Diminished Capacity

On Nov. 24, 2025, the State Bar of Wisconsin Professional Ethics Committee issued Opinion EF-25-03, discussing lawyers' obligations when the competency of criminal defendants who are clients is in question. While lawyers have some special obligations to such clients, core duties under the disciplinary rules remain.

BY WISCONSIN PROFESSIONAL ETHICS COMMITTEE

Synopsis

A lawyer's responsibilities to the client presuppose a meaningful dialogue between the lawyer and client who enables the client's informed decisions regarding the objectives of the representation. A core principle of the lawyer-client relationship is that the client and not the lawyer decides what best serves the client's interests. When the client lacks a basic understanding of the proceedings, is unable to communicate their wishes or make reasoned decisions the lawyer is faced with difficult challenges. Complete deference to the client can result in significant harm to their person or property. Alternatively, even well-intentioned intervention by the lawyer or others can deprive the client of their autonomy to make important personal decisions and the confidentiality of communications between the lawyer and client.

Criminal cases present unique challenges when the client's competency is in question. Principles of basic fairness have long prohibited trying and convicting one who lacks a basic understanding of the process or the ability to meaningfully participate in their defense. Born of the common law, the bar against prosecution of the incompetent is now grounded in constitutional doctrine.

Although SCR 20:1.14 addresses lawyers' responsibilities to clients with "diminished capacity,"[1] its broad guidance must be read in concert with constitutional and state law requirements for criminal cases. In such cases these other legal requirements control.[2]

Constitutional and state law requirements in criminal cases differ from SCR 20:1.14 in three important respects.

First, when there is "reason to believe" the client is not competent, defense counsel must notify the court.[3] This contrasts with SCR 20:1.14 which gives the lawyer discretion whether and how to intervene in cases involving diminished capacity.

Second, this requirement applies even when the client objects, limiting the general rule that clients control the key objectives of the representation. SCR 20:1.2(a). However, once notice is given, the lawyer is still obliged to contest a claim of incompetency if instructed to do so by the client.

Third, defense counsel may not reveal why they are raising the issue of competency because such information is both confidential and privileged under Wisconsin case law.[4] SCR 20:1.14, on the other hand, allows counsel to disclose protected information if deemed necessary in taking protective action on behalf of the client.

This does not mean that disciplinary rules play no role in the representation of criminal defendants with diminished capacity – duties to such clients are the same owed any client. Of particular importance are the rules requiring competent representation, SCR 20:1.1, consultation with the client, SCR 20:1.4, and protecting client information. SCR 20:1.6.

Introduction

Client authority over the objectives of representation lies at the core of the lawyer-client relationship. While the lawyer is responsible for providing sufficient legal and factual information to the client, ultimately it is the client who determines the objectives of the representation. In criminal cases, decisions reserved to the client at a minimum include the plea to be entered, whether to request a jury trial, and whether to testify. SCR 20:1.2(a).

In most cases, this division of authority works well by respecting client autonomy while allowing the benefits of lawyer expertise to pursue the client's objectives. However, when the client lacks a basic understanding of the proceedings, is unable to communicate effectively or make reasoned

decisions, the lawyer is faced with difficult challenges. Failing to honor the client's wishes, particularly in criminal cases where life and liberty may be at stake, diminishes respect for the autonomy and dignity of the client. At the same time, deference to a client whose decision-making is seriously compromised disserves the interests in fairness and the integrity of the process.

Where the line is drawn between competence[5] and incompetence is as important as it is difficult.

If the client is competent, the normal lawyer-client dichotomy determines how the case will proceed. If the client is found incompetent, control over the process is transferred from the client to the court and may result in delay or dismissal of the criminal charges, civil commitment, and involuntary medication.

In Wisconsin, defense counsel has a duty to inform the court if they have "reason to doubt" that their client is competent even when the client objects.[6] And, even though defense counsel may be the best source of information regarding competency, they may not disclose their communications or impressions and opinions regarding competency, as both are confidential and privileged under Wisconsin law.[7]

Assuming there is probable cause to support the underlying criminal charges, notice to the court triggers a variety of procedures to determine whether the client is competent to proceed. While assistance from mental health experts is typically provided when competency is uncertain, the ultimate issue is a legal and not medical question.

This opinion discusses the interplay between constitutional requirements and disciplinary rules in criminal cases involving questions about the client's competency. Special attention is given to the interface between SCR 20:1.14 and constitutional and state law jurisprudence, the importance of multidisciplinary lawyer competence, SCR 20:1.1, and adequate consultation with the client, SCR 20:1.4.

Maintaining a Normal Attorney-Client Relationship

Defense counsel should always begin representation of their clients with the assumption that the normal allocation of authority between lawyer and client will apply.[8] This presupposes certain responsibilities for the lawyer.

(1) The lawyer must strive to ensure the client's understanding of the legal problem faced, the roles of the actors involved and the ability to make informed decisions about the objectives of the representation – SCR 20:1.2[9],

(2) The lawyer must spend sufficient time with the client, thoroughly interviewing the client to obtain complete and accurate information about the historical facts, the client's perception of the problem, its impact on them and their families, and their view of an appropriate outcome,

(3) The lawyer must review and explain the applicable law with respect to the underlying criminal charges, explain the client's available options, and the likely consequences of the client's choices – SCR 20:1.4, and,

(4) The lawyer must diligently and competently pursue the lawful objectives chosen by the client – SCRs 20:1.1, 20:1.2(a), 20:1.3.

A productive dialogue between lawyer and client depends on a number of factors. One is the complexity of the matter. Representing the client in complex litigation will invariably require more time with the client, more explanation, more choices, more risks, and more complex decision-making than representation on a simple matter.

All lawyer-client relationships involve challenges. There may be issues of trust, communication difficulties, and differences in education, values, life experiences and expectations that can make the creation and maintenance of a functional lawyer-client relationship difficult. This does not mean the client is not capable of meaningful participation in the lawyer-client relationship. It may mean that additional effort and different strategies are necessary to create and maintain a functional professional relationship. The lawyer should not prematurely assume competency is at issue at the first sign of difficulty in communicating.[10]

When the client has diminished capacity, SCR 20:1.14(a) requires that the lawyer make every effort and take advantage of all available resources to maintain a normal relationship with their client before raising the issue of competency. Nowhere is adequate and thorough consultation with the client more important. When it appears competency may be a concern, the lawyer should explain the standard, the lawyer's responsibilities to the court and the consequences of raising the issue. Competent representation of a criminal defendant with mental difficulties can be more complex, requiring familiarity with the substantive and procedural law regarding the criminal charges, including:[11]

(1) Awareness that the client's mental status may impact not only their competence to stand trial but also the admissibility of any inculpatory statements and the defense of not guilty due to a mental disease or defect,

(2) A command of the law regarding competency – including the legal standard, the processes to determine competency, and the consequences of a finding of incompetence,

(3) A basic understanding of relevant mental disorders, their impact on a person's cognitive functioning and treatment options and prognoses,

(4) The willingness to address difficulties in communicating with and advising such clients, and

(5) Seeking relevant background information from the client's family or others to best understand their condition.[12]

Competency to Stand Trial – The Constitutional Standard[13]

In the case of *Dusky v. United States,* the United States Supreme Court established the current standard for competence to stand trial. The Court

stated that a criminal defendant was competent if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... and ... has a rational as well as factual understanding of the proceedings against him."[14]

Fifteen years later the Court held that the *Dusky* principle was "fundamental to an adversary system of justice" such that conviction of an incompetent or the failure to have adequate procedures to determine competency violated due process.[15] The Court explained "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[16]

One author has suggested that competence be viewed as having two components – adjudicative competency and decisional competency.[17]

The former concerns whether the defendant understands the process – the jeopardy they face, the roles of system actors, the purpose of a trial, the risks they face, and their legal options – and can effectively communicate with their lawyer, both as to factual information and their choices moving forward.[18]

Decisional competency concerns whether the client is capable of making rational decisions consistent with their self-interest on matters entrusted to them.[19]

Another commentator has described competency as "the ability to understand and process information so that a decision can be made and communicated."[20] Capacity is a fluid concept depending both on the individual and the nature and complexity of the issues involved. A person may have the capacity to process certain types of information but not others or understand relatively simple matters but not those of a more complex nature.

Although different decisions often require different capacities, the Supreme Court has held that the same standard, the *Dusky* standard, applies in assessing competence to plead guilty, waive counsel, testify or waive other constitutional rights, even though the decisions involved are not identical.[21] Only if the client chooses to forego counsel entirely and self-represent may a more demanding competency standard apply.[22]

The best measure of a client's capacity will often be the lawyer's impressions following direct contact with the client. The lawyer must consider what issues are reserved for the client, their complexity, and whether it appears the client understands their options, the likely consequences of their choices, and whether their decision is a rational choice based on the client's values and the circumstances involved.

Special challenges exist in cases involving juveniles. While the Supreme Court has not articulated a separate competency standard for children, there is substantial evidence that immaturity can present the same lack of understanding and inability to assist counsel that mental illness or intellectual disabilities create in adults found incompetent.[23] Developmental limits often adversely affect the juvenile client from being able to pay attention, process and understand information, make rational decisions, and effectively communicate with their lawyers.[24] It may be particularly appropriate in this class of cases for defense counsel to seek assistance from mental health experts with experience working with this population.

Intervention By the Lawyer

The lawyer will often be the first to know when the client has difficulty engaging and must decide what response is most appropriate. Sometimes there will be little doubt about the client's incompetence. However in many, perhaps even most, cases involving clients with cognitive deficits, the client's competence is less clear. In cases of ambiguity the lawyer should proceed with caution and make every effort to maintain a functional relationship with the client until circumstances unequivocally require raising the issue with the court.[25] Stated otherwise, while the duty to inform the court is mandatory and not subject to strategic waiver, it is critical that the lawyer exhaust all means of maintaining a functional lawyer-client relationship before raising the issue.[26]

For example, after consultation, and

with the client's informed consent, the client may allow the participation of family or a trusted friend to assist them. This could involve the presence of others in meetings with the lawyer or involvement of a mental health professional who may assist the client.[27]

Of like importance, questionable decisions do not always equate with incompetence. Clients are entitled to make bad decisions. A lawyer should not assume the client lacks competence solely because of poor judgment,[28] imprudent choices,[29] or disagreement with the lawyer's assessment of their best interest.[30] "The lawyer has an absolute duty to advocate for client's desires even if, in the lawyer's opinion, those desires are against the best interests of the client."[31]

Questions about the client's competency can arise at any time, both due to the fluid nature of mental health issues, and the sequential nature of decisions as the case proceeds. The *Dusky* standards applies regardless of when the issue arises, even as its application will vary depending on the posture of the case.

However, when there remains "reason to believe" the client may not be competent after all of defense counsel's efforts, the court must be informed. *State v. Johnson,* 133 Wis. 2d 207, 395 N.W. 2d 176 (1986).[32] This differs from SCR 20:1.14, which allows, but does not require intervention by the lawyer even in the face of substantial evidence of diminished capacity.[33] As discussed later in this opinion, both communications with the client and the lawyer's impressions of their competence are confidential and privileged and may not be shared absent the client's informed consent.[34] Thus, the lawyer's notice to the court should be limited to stating there exists reason to believe the client may not be competent and nothing more. Should the court request further explanation the lawyer must decline, citing relevant legal authority.

Sometimes concerning behaviors appear in court, which can result in the issue being raised by the prosecutor or the court. While the disciplinary rules create neither a prosecutorial nor judicial duty to protect the incompetent defendant, an unstrained reading of constitutional doctrine provides ample support for the notion that both should act proactively to protect the defendant, especially in cases where counsel has not yet been appointed.[35]

Once notice is given, management of the competency issue is effectively transferred to the court.[36] At this point, the statutes provide detailed procedures for examination of the defendant,[37] preparation of a report,[38] conducting a court hearing,[39] and having a judicial determination of competence.[40] The lawyer has a continuing duty to monitor the statutory inquiry into their client's competency as the process runs its course. The statutory structure to resolve the issue renders the protective action options included in SCR 20:1.14(b) largely irrelevant.

If the client is found competent, the case will proceed as any other criminal matter. If the client is found incompetent, the examining experts must provide an opinion regarding the likelihood of the client gaining competence and whether involuntary medication may be necessary and appropriate.[41]

The client may be committed only if [the] court determines they are incompetent but likely to regain competency with appropriate treatment. Commitment may continue for 12 months or the maximum sentence for the underlying offense, whichever is longer. If [the] defendant has not regained competency after maximum length of commitment, they shall be released subject to civil commitment proceedings.[42] Counsel must remain engaged, in contact with the client, and informed to ensure competent representation during any periods of involuntary commitment.

Likewise, counsel must be prepared to effectively represent the client should the issue of involuntary medication arise during the commitment period.[43]

Strategy Disagreements

Complications arise if the lawyer and client disagree on whether the competency issue should be raised. Wisconsin law is clear that the lawyer must inform the court when there is reason to doubt the client's competency even over the client's objection.[44] Given the interests in a fair trial and systemic integrity, the issue may not be waived by the client.[45] This duty partially overrides the client's control over the objectives of the representation typically required by SCR 20:1.2(a).

Compliance with *Johnson* does not mean that the lawyer must advocate for a finding of incompetency.[46] *Johnson* requires the lawyer to inform the court that there is reason to question the client's competency and nothing more. Notice satisfies the lawyer's duty as an officer of the court.[47] Notice is not an advocacy statement that the client is in fact incompetent and does not mean the lawyer is not obliged to communicate with the client and abide by their decisions regarding the objectives of the representation in other regards to the extent the client is able to articulate them.[48]

If the client opposes a finding of incompetency, the lawyer must advocate that position to the court. SCR 20:1.2(a). The lawyer's responsibility in this situation is to assert their client's claim of competence, present available evidence, if any, in support of the claim and challenge adverse evidence. They are obliged to put the state to its proof. The lawyer following this path does not have a conflict of interest nor do they violate any other disciplinary rule.[49]

A different type of disagreement arises if the client demands the lawyer argue they are incompetent when there is no evidence to support the claim. Were the lawyer to agree to the client's request, they risk violating the rules that prohibit frivolous claims.[50] If the client persists in demanding such a claim the lawyer may appropriately seek to withdraw.[51]

If, as perhaps is likely, the court does not permit the lawyer to withdraw,[52] the

lawyer does not violate any disciplinary rule by stating the client's position, examining any state witnesses and making the best available non-frivolous case for the client's position.

In some cases, the client may seek to discharge the lawyer due to irreconcilable positions on how the case should be handled. The client may simply want a new lawyer who will follow their requests or may wish to self-represent. If the client is able to clearly articulate a wish to discharge the lawyer, the lawyer should inform the court and seek to withdraw pursuant to SCR 20:1.16(a)(3).

Confidentiality and the Attorney-Client Privilege[53]

At the core of all attorney-client relationships is the duty of confidentiality. SCR 20:1.6(a) explains:

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation …."[54]

Confidentiality issues arise in a variety of situations when clients have diminished capacity – whether information should be shared with others to help the client meaningfully participate in their representation, what information may be shared with the court if the competency issue is raised, and whether information shared with experts during the course of an examination is admissible or might otherwise be used.[55] Wisconsin law differs from SCR 20:1.14(c) and case law from other jurisdictions concerning this issue.

While there is consensus that communications between the lawyer and client are protected, many jurisdictions allow lawyers to share information about their general impressions of their client's understanding of the proceedings and ability to meaningfully participate in their defense.[56] After all, the lawyer will often know more about the issue than others.

SCR 20:1.14(c) states that "(w)hen taking protective action under par. (b),

EF-25-03 Guidance for Lawyers

Wisconsin Formal Ethics Opinion EF-25-03 provides guidance for situations when a criminal defense lawyer becomes concerned about a defendant's competency.

BY TIMOTHY J. PIERCE

Wisconsin Ethics Opinions are drafted, debated, approved, and issued by the State Bar's Standing Committee on Professional Ethics (the committee), and are the work of the entire committee rather than any individual. Opinions apply the Rules of Professional Conduct for Attorneys (the rules) and other sources of binding and persuasive authority to specific situations and general discussions of obligations under the disciplinary rules. Although not binding, these ethics opinions constitute an important source of ethics guidance for Wisconsin lawyers and represent the position of the committee on the topic addressed. The committee puts considerable time and effort into its opinions, and it is normal for a draft opinion to be reviewed and revised many times at several committee meetings over the course of a year or longer. The committee strives to produce several new and substantially revised opinions each year and has issued many opinions in recent years that address issues that commonly arise for many lawyers. Wisconsin Ethics Op. EF-25-03, as well as all other Wisconsin ethics opinions, can be found at www.wisbar.org/ethop.

Most criminal defense lawyers will come to doubt the competency of a client at some point. This can pose challenges for the lawyer because the lawyer's conduct must be guided by Wisconsin case law and statutes as well as disciplinary rules. Recently issued Wisconsin Formal Ethics Opinion EF-25-03 discusses the obligations of a criminal defense lawyer in this situation. Among the issues addressed are:

• **What should the lawyer do if the lawyer has reason to doubt the client's competency but the client forbids the lawyer from raising the issue with the court?** The opinion provides guidance with respect to how the case law requiring lawyers to raise competency in certain circumstances interacts with the lawyer's obligations to the client under the disciplinary rules.

• **What if the court or the examining doctor asks the lawyer to explain the factual basis for raising competency?** Again, Wisconsin case law imposes requirements for the lawyer in this situation, and the opinion discusses how this case law interacts with the disciplinary rules and provides guidance as to how lawyers should respond to such requests.

• **What if the examining doctor recommends the court find the client not competent to stand trial but the client demands the lawyer argue that the client is competent?** When competency is raised in a criminal matter, the lawyer continues to represent the client unless and until the court permits the lawyer to withdraw, and the lawyer must continue to abide by the client's objectives of the representation. The opinion discusses the lawyer's responsibilities to both the client and the tribunal in this situation.

These and other questions are addressed in detail in the opinion. Look for more opinions from the committee over the course of the year. **WL**

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the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

However, in *State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W. 2d 859 (2003), the court held that both communications with the client and a former lawyer's impressions of the client's conduct, behavior and competency were privileged and confidential, and thus inadmissible in court. It is thus clear that Wisconsin lawyers may not voluntarily disclose information regarding their impressions of the client's competence under SCR 20:1.14(c) or any other provision of the rules. In addition, if a court seeks to compel such information from a lawyer, the lawyer is required to object and draw the court's attention to *Meeks*.

A common situation in which confidentiality issues can arise is whether the lawyer should speak with family or third parties to facilitate the client's participation in the case. As such contacts are extra-judicial, the *Meeks* rule would appear to be inapplicable, allowing the lawyer to rely on SCR 20:1.14(c) to view disclosure as impliedly authorized.[57] A related issue can arise if the lawyer seeks to discuss the client's situation with an expert. However, in *State v. Ford*[58] the court of appeals held that the *Meeks* rule applied to (1) current as well as former counsel; and (2) extra-judicial statements, in that case, to an expert. Although *Ford* was unpublished and nonprecedential, caution suggests that the most prudent approach is not speak with others absent the client's informed consent.[59]

In addition, the lawyer must prepare the client for any interviews with the appointed experts. This may involve cautioning them to avoid discussing facts that might be adverse to the client's interests regarding competency, the underlying criminal charges, or any possible defenses.

Conclusion

Cases in which the client has decision-making deficits present some of the most difficult issues a lawyer may face. The situation is complicated when the guidance provided by ethics rules conflicts with the requirements of other law. While SCR 20:1.14 is largely supplanted by the constitutional requirements regarding client competency, the lawyer in such cases has heightened duties of competence, consultation and protecting confidential client information. **WL**

ENDNOTES

[1]Drafters of ethics rules have struggled with how to characterize the client unable to effectively participate in a lawyer-client relationship. The 1969 Model Code of Professional Responsibility referred [to] such clients as "illiterate or … incompetent", EC 7-11. The initial version of the Model Rules of Professional Conduct from 1983 was entitled, "[c]lient under a disability", and the 2002 revision referred to a "[c]lient with diminished capacity." The committee believes this characterization best captures the situations addressed by the rule. However, as this opinion focuses on criminal cases it will use the term competency to describe the client with decision-making deficits.

[2]Lawyers are generally informed both by ethics rules and the substantive law relevant to the client's legal situation. When these sources conflict, the substantive law controls. This is made clear by several rules which explicitly include exceptions when "other law" applies. For example, SCR 20:1.6(c)(5) states, "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary … to comply with other law or a court order." Similarly, SCR 20:4.1(b) states, "[n]otwithstanding par. (a), SCR 20:5.3(c)(1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities." Likewise, SCR 20:4.2(a) provides, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." *See also* SCR 20:1.4(a)(5) (client must be told what services prohibited by other law); SCR 20:1.7(b)(2) (lawyer may not represent party if prohibited by law); SCR 20:1.16(c) (lawyer seeking to withdraw must comply with local requirements); SCR 20:3.3(a)(3) (right of criminal defendant to testify overrides limits in rule); SCR 20:3.4(a) (lawyer may not unlawfully obstruct access to evidence); SCR 20:6.2 (lawyer may decline appointment if prohibited by law); 20:7.1(b) (advertising limited by other law).

[3]*State v. Johnson*, 133 Wis. 2d 207, 395 N.W. 2d 176 (1986). *See* pp. 8-9, *infra* [page cross-references are to the opinion on the website].

[4]*State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W. 2d 859 (2003). *See* pp. 11-12 *infra* [page cross-references are to the opinion on the website].

[5]As used here, the term "competent" or "competence" refers to the legal standard set forth in statutory and decisional criminal law.

[6]*See* n. 3, *supra* and pp. 8-9, *infra* [page cross-references are to the opinion on the website].

[7]*See* n. 4, *supra* and pp. 11-12 *infra* [page cross-references are to the opinion on the website].

[8]Even if the client has diminished capacity, SCR 20:1.14(a) requires the lawyer to "maintain a normal client-lawyer relationship … as far as reasonably possible …."

[9]Several rules require the lawyer to obtain the informed consent of the client prior to taking or forgoing a particular action. *See e.g.* SCR 20:1.6(a) (disclosure of client information); SCR 20:1.2(c) (agreeing to limited representation); SCRs 20:1.7(b)(4), 20:1.8(f)(1), (g), 20:1.9(a) (conflict related consent).

[10]SCRs 20:1.1, 20:1.3.

[11]Wisconsin State Public Defender appointments of counsel are presumed to continue until the case is resolved at the trial court level, including inquiries into competency. This underscores the lawyer's need to be well versed in multiple areas of the law.

[12]*See* SCR 20:1.1, ABA Criminal Justice Standards on Mental Health §7-1.4 (2016).

[13]SCR 20:1.14 uses the terminology "diminished capacity" to describe the client with decision-making deficits which permit interventions in the lawyer-client relationship that otherwise would not be permitted. Although the rule does not define the term, the comment to the rule provides:

[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.

Because case law establishes the applicable constitutional standard for criminal cases, the disciplinary rule formulation does not apply. The same is true in other situations where statutes or case law provide the applicable standard. For example, Wis. Stat. § 54.10(3)(a) addresses guardianship proceedings, allowing for the appointment of a guardian if the court finds that the person "is unable effectively to receive and evaluate information or to make or communicate decisions …."

[14]*Dusky v. United States*, 362 U.S. 402 (1960). Wisconsin has codified the *Dusky* standard in Wis. Stat. § 971.13. The requirement that a defendant be competent has been extended to appeals, *State v. Debra A. E.*, 188 Wis. 2d 111, 523 N.W. 2d 727 (1994), and revocation of probation proceedings, *State ex rel. Venerbeke v. Endicott*, 210 Wis. 2d 503, 563 N.W. 2d 883 (1997), but not chapter 980 commitments, which have been viewed as non-punitive and civil in nature, *In re Commitment of Luttrell*, 2008 WI 93, 312 Wis. 2d 695, 754 N.W. 2d 249 (2008).

[15]*Drope v. Missouri*, 420 U.S. 162, 172 (1975).

[16]*Id.* at 171.

[17]Bonnie, *Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence*, 20 Ohio St. J. of Crim. Law 231 (2023).

[18]In some cases the client may suffer from amnesia. This alone does not render the client incompetent even if it impairs their ability to share factual information about past occurrences. The Wisconsin Court of Appeals has articulated a six-part test to evaluate how a claim of amnesia bears on a defendant's competence. *See State v. McIntosh*, 137 Wis. 2d 339, 404 N.W. 2d 557 (Ct. App. 1987); *State v. King*, 187 Wis. 2d 548, 523 N.W. 2d 159 (Ct. App. 1994).

[19]*Id.* at 239-241. [Bonnie, *supra* note 17, at 239-41.]

[20]Brown, *Determining Clients' Legal Capacity,* 4 Elder Law Rep. 1 (1993). Similarly, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, stated in their seminal 1982 report, "[d]ecision making capacity requires, to greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices."

[21]*Godinez v. Moran*, 509 U.S. 389 (1993).

[22]*Indiana v. Edwards*, 554 U.S. 164 (2008).

[23]Scott & Steinberg, *Rethinking Juvenile Justice* 151-152 (2008).

[24]*Id.* at 158-160.

[25]*See Kentucky Ethics Op. E-440* (2016) (lawyer should consider possibility of detrimental impact on client prior to raising competency issue with court); *Utah Ethics Op. 17-03* (2017) (lawyer should pursue less restrictive options before raising competency issue with the court). Note that once the lawyer believes the client does not meet the legal standard of competence, Wisconsin law requires the lawyer to raise the issue with the court.

[26]ABA Rule 1.14, identical to SCR 20:1.14, likewise favors the least restrictive interventions with clients with diminished capacity. Cmt. ¶5.

[27]While involvement of family or a trusted associate may be helpful to the client with decision-making deficits, the lawyer should always provide the client with the option of private communications with the lawyer and be mindful of the possible effects on the lawyer-client privilege and potential for conflict if the charges involve a family member or third party [whose] interests are adverse to the client.

[28]Colorado Ethics Op. 126 (2015).

[29]Connecticut Informal Ethics Op. 05-12 (2005), New Hampshire Ethics Op. 2014-15/5.

[30]ABA Formal Ethics Op. 96-404 (1996).

[31]Alaska Bar Assoc. Ethics Op. 94-3, Conn. Ethics Op. 96-404.

[32]The *Johnson* rule is consistent with a substantial body of authority. *See Robidoux v. O'Brien,* 643 F.3d 334 (1st Cir. 2011); *United States v. Boigegrain*, 155 F.3d 1181 (10th Cir. 1998); *Red Dog v. State*, 625 A.2d 245 (Del. 1993); *see also Vogt v. U.S.,* 88 F.3d 587 (8th Cir. 1996); *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

[33]Section 7-4.3(c) of the ABA Criminal Justice Mental Health Standards align[s] with SCR 20:1.14 in permitting, but not requiring, notice to the court when there is evidence of the client's incompetence.

[34]See *infra*, pp. 12-13 [page cross-references are to the opinion on the website].

[35]See n. 9, 10, *supra*. In some cases, an indigent mentally ill person is arrested and criminally charged but remains unrepresented for a significant period due to a chronic lack of available lawyers willing and qualified to accept an appointment, especially in smaller communities. This is particularly problematic if the accused remains in custody unrepresented and untreated. While no disciplinary rules address this situation, Standard 7-1.5 of the ABA Criminal Justice Standards on Mental Health recommends that system actors collaborate to provide necessary services to this population. The defense bar has much to contribute to such an effort.

[36]A finding of probable cause on the underlying charges is a prerequisite to further inquiry into the defendant's competency. Wis. Stat. § 971.14(1r)(c).

[37]The court may choose to have the client examined in an in- or outpatient setting, Wis. Stat. § 971.14(2)(a), (b), and may appoint one or more examiners with specialized knowledge. Wis. Stat. § 971.14(2)(a). If the examination is in-patient, it must be completed within 15 days subject to one extension. Wis. Stat. § 971.14(2)(am), (c).

[38]The report must include a description of the nature of the examination, the person(s) interviewed, the diagnostic tools used and the tests administered to the defendant. It must also include the clinical findings of the examiner, including their opinion whether [the] defendant is presently competent and the facts upon which the opinion is based. Wis. Stat. § 971.14(3).

[39]Wis. Stat. § 971.14(4).

[40]Wis. Stat. § 971.14(4)(b), (5).

[41]Wis. Stat. Wis. Stat. § 971.14(3).

[42]Wis. Stat. § 971.14(5), (6).

[43]*See* WJI SM-50 at 14-15 for a helpful overview of the issues involved in involuntary medication of an incompetent client.

[44]*See* n. 25, *supra.*

[45]*See Pate v. Robinson*, 383 U.S. 375, 378 (1966).

[46]If the lawyer actively argues the client is incompetent over their objection, and provides evidence to support their view, there would be a nonwaivable conflict of interest as the lawyer would be failing to abide by the client's objectives for the representation. SCRs 20:1.2(a), 20:1.7. The fact that the lawyer does not agree with the client does not mean they cannot competently pursue the client's chosen objectives; in fact this scenario can arise in any practice setting. *See* 20:1.2(b).

[47]Wisconsin Rules of Professional Conduct for Attorneys, Preamble ¶1.

[48]SCR 20:1.7(a).

[49]Of course, if there is overwhelming evidence of incompetence and none to support a claim of competence, the lawyer could not advance a meritless position. SCR 20:3.1(a)(1).

[50]SCRs 20:1.2(d), 20:3.1(a)(1), 20:3.3(a).

[51]SCR 20:1.16(a)(1). For additional discussion of the challenges in withdrawal from representation of the client with cognitive deficits, *see* ABA Formal Opinion 96-404 at 3-4. Note that the rules do not prohibit a lawyer from seeking to withdraw from representing a client with diminished capacity as long as grounds exist under SCR 20:1.16.

[52]SCR 20:1.16(c) requires lawyers to abide by courts' decisions regarding withdrawal motions.

[53]Wis. Stat. § 905.03.

[54]SCR 20:1.6(b), (c) include exceptions to the duty of confidentiality not relevant to this opinion. *See also* SCR 20:3.3(b), (c).

[55]Wisconsin statutes are not clear on the use of information provided by the client in the course of a competency examination. In contrast, the federal rule prohibits use of such testimony at a trial on the merits. 18 U.S.C. 4241(f).

[56]See *Darrow v. Gunn*, 594 F.2d 767 (9th Cir. 1979); *Clanton v. United States*, 488 F.2d 1069 (5th Cir. 1974); *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964); *Bishop v. Superior Court*, 724 P.2d 23 (Ariz. 1986). See ABA Criminal Justice Mental Health Standard 7-4.4.9(b) (court may inquire about lawyer-client relationship and client's ability to communicate effectively with counsel, but may not seek disclosure of communications between the lawyer and client).

[57]Should the lawyer wish to rely on SCR 20:1.14(b), interventions including speaking with family or other third parties is permissible only if the lawyer "reasonably believes" the client has diminished capacity, is at risk of substantial "physical, financial or other harm" and cannot adequately act in their own interest. Conviction or commitment could arguably satisfy the harm requirement of the rule. On the other hand, obtaining the client's informed consent would avoid violating the disciplinary rule or, as noted above, the *Meeks* rule.

[58]Nos. 2022 AP187-CR, 2022 AB188-CR (October 31, 2023).

[59]SCRs 20:1.6(a), 20:1.0(f). It may be the case that a client whose competency is in doubt may not be capable of providing informed consent. **WL**