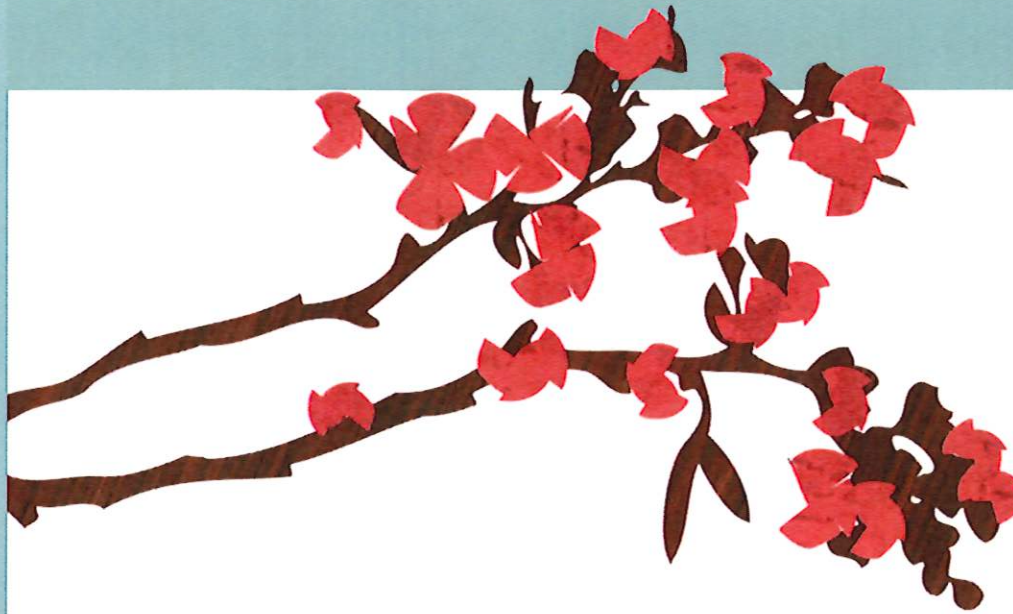




2025

MENTAL HEALTH & ETHICS

A DETAILED CRIMINAL ANALYSIS

10/21/25

3P-5P

VBJDR 7

Annette Miller, Sr. Trial Attorney- Virginia Beach Public Defender's Office
Katharine D. Aicher, Assistant VB Commonwealth Attorney

2.0 Ethics MCLE Pending

FOR MORE INFORMATION CONTACT: [HTTPS://WWW.VBBARASSOC.COM/EVENTS/](https://www.vbbarassoc.com/events/)

A. Miller

I am a Senior Trial Attorney with the City of Virginia Beach specializing in mental health law. I have been a public defender from 1995 to the present. My undergraduate is from Va. Tech. with a double major in English and Political Science (1979-83). I have a master's in English from Syracuse University and taught English at Syracuse while completing my degree requirements (1983-5). My law degree is from the University of Richmond (1988).

I was the first law clerk for the Virginia Beach Circuit Court judges (1989-91). I worked for Parker Pollard & Brown from 1991-5 specializing in worker's compensation and personal injury.

I was awarded a Virginia Beach Human Rights Award for mental health education and advocacy in 2000.

I was published in the American Bar Association's Criminal Litigation Magazine, Winter 2010, Volume 10, Number 2. The Article is entitled "The Post-Adjudication 'Not Guilty by Reason of Insanity' Process in the State of Virginia." Dr. Jeffrey Aaron and I cowrote the Chapter "Mental Health Defenses in Criminal Cases" for the 2025 Defending Criminal Cases in Virginia CLE publication.

I have lectured extensively in the field, including, but not limited to, the Virginia State Bar's 42nd Annual Criminal Law Seminar, 2008 Regional Judge's Conference, 2012 Virginia Beach Bar Association's Seminar entitled "Representing a Client With Mental Health Issues", 2016 Indigent Defense Commission's Late Day Lecture Series on Mental Health Ethics, 2017 Virginia CLE Mental Health Ethics 101 in the Criminal Justice System, 2019 Virginia Beach Bar Association Everything Criminal Defense Attorneys Need to Know About Mental Health Ethics, 2020 Virginia Beach Bar Association's JDR Committee Dealing with a Mentally Ill Defendant, 2021 Virginia CLE – Ethical Representation of Mentally Ill Defendants in Criminal Cases, 2021 Virginia Association of Criminal Defense Lawyers, Surf's Up – New Tools and Techniques for Riding the Wave of Criminal Justice, 2022 Virginia CLE Criminal Law Update; and 2024 Virginia CLE Inaugural Criminal Law Behavioral Health Symposium.

Katharine Aicher

Virginia Beach Commonwealth Attorney

Crime Solver Awards

Mental Health Ethics 101 in the Criminal Justice System: A Primer for Handling Your Mentally Ill Client

Annette Miller

Hypotheticals and Analyses

1. You get a new file. You recognize the name. You've had him as a client before. You know he is schizophrenic and psychotic. You go and see him. He thinks that you are the devil. He is violent, psychotic, and off his meds. He is charged with malicious wounding. You know you need to evaluate him. You find out that your client was brought from the Norfolk jail. You discover that he plead guilty to robbery in Norfolk Circuit Court two days before you saw him. He accepted a plea of, among other terms and conditions, three years in the Virginia State Penitentiary. You find out he's been off his medications for two months. You have him evaluated. He's incompetent and likely insane at the time of the offense. Until his robbery conviction, he never had a felony conviction. You know there was no way he was competent when he pled in Norfolk. He may also have been insane at the time of the offense.
 - a. What do you do about the Norfolk conviction? Do you contact his attorney? Do you tell the client once he is medicated and competent? Do you tell the client's family?
 - b. If the attorney in Norfolk refuses to do anything, do you have any further responsibility? Assume the client is still incompetent and has no family (or refuses to tell you the names and phone numbers of his family members). Can or should you file any pleadings? A habeas?
 - c. Does it matter if the attorney is a member of the Norfolk Public Defender's Office or private counsel? What if the robbery conviction was here and the attorney is a member of this office?
 - d. Does it help to know that a robbery conviction would limit housing and program opportunities?
 - e. That it makes the defendant category one if he is not insane at the time of the offense?
 - f. What if both the Norfolk and Virginia Beach cases were nonviolent felonies?
 - g. What if the defendant had prior felonies?

- h. What if the defendant was not evaluated prior to his Norfolk conviction, but that conviction was two months ago – right when he stopped taking his medication?

ANSWER: COMPETENCY. DILIGENCE. RULES 1.1, 1.3; IT IS YOUR RESPONSIBILITY TO NOTIFY THE ATTORNEY IN ORDER THAT HE CAN SEEK CORRECTIVE ACTION; IF HE REFUSES TO DO SO THAN YOU NEED TO DETERMINE WHETHER OR NOT CORRECTIVE ACTION WOULD BENEFIT THE CLIENT OR DETRIMENTALLY AFFECT HIS CURRENT STATUS.

2. You were in general district court. Your client was psychotic and sent to the hospital under an emergency treatment order. She's back-- clinging to competency by her fingernails. You have a deal for a misdemeanor and time served. You're driving home down Princess Anne Road around 5:30 and see your client, in fifty degree weather, wearing a short sleeve shirt and shorts, weaving back and forth from the side of the road to the road itself. She is clapping her hands and singing to herself. You know that she meets commitment criteria. Emergency Services was supposed to have civilly committed her before she left the jail.

- a. Do you call the police?
- b. Do you call emergency services?
- c. Do you stop and pick her up?
- d. Do you do nothing and hope she doesn't get killed?
- e. Does it change any of your opinion to know that she is violent when challenged?

ANSWER: UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HER WISHES AND DESIRES ARE PARAMOUNT.

3. Your client was sentenced to nine months in jail on January 10, 2004. He was competent then but has since gone off his medication. You saw him the day before his release date. He now meets civil commitment criteria.

- a. Do you inform the jail?
- b. The CSB?
- c. Anyone?
- d. Does it matter if he is psychotic?

ANSWER: UNDER RULE 1.2A, THE CLIENT'S WISHES ARE PARAMOUNT.

4. Your client is charged with trespassing. He is manic depressive, off his medication – but not psychotic. You receive the file October 1, 2021. His next court date is November 15, 2021. You do not believe that he is competent. Your client is incarcerated. On a class one misdemeanor, the most he can be sentenced to is twelve months. The most he can serve is six months of actual jail time.

- a. Do you get him evaluated knowing that, if you do, he may be found incompetent, sent to the hospital, and spend months being both evaluated and in the restoration process.
- b. What if your client thinks he is Robin Hood and that his mission in life is to steal from the rich and give to the poor?
- c. What if he is violent, paranoid, and believes that he must rid the world of all of King John's men because they are trying to kill him?
- d. What if his family wants him home?
- e. What if he is homeless?
- f. Does it matter in your consideration if it is summer or winter?

ANSWER: THERE IS AN INHERENT CONFLICT BETWEEN RULE 1.2 (A) THAT A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION AND (B) RULE 1.14 CLIENT UNDER A DISABILITY: WHEN A CLIENT'S ABILITY TO MAKE ADEQUATELY CONSIDERED DECISIONS IN CONNECTION WITH THE REPRESENTATION IS IMPAIRED, WHETHER BECAUSE OF MINORITY, MENTAL DISABILITY OR FOR SOME OTHER REASON, THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT.

- A. THE CLIENT WANTS TO GET OUT OF CUSTODY. IT IS NO FRAUD ON THE COURT TO TRY & SQUEEZE THE CLIENT PAST THE COURT & GET HIM OUT OF JAIL. THE ATTORNEY'S DECISION MATCHES THE CLIENT'S DESIRES IN THIS INSTANCE.
- B. NO CHANGE FROM A ABOVE
- C. RULE 1.6, CONFIDENTIALITY OF INFORMATION COMES INTO PLAY IN THIS INSTANCE. THE CLIENT IS VIOLENT & A DANGER TO HIMSELF OR OTHERS. HE IS A POTENTIAL THREAT. AS LONG AS HE STAYS IN CUSTODY, VIOLATING HIS CONFIDENTIALITY AS TO FUTURE THREATS IS NOT AN ISSUE. IN THIS INSTANCE, ALTHOUGH THE CLIENT WANTS OUT OF JAIL, HE NEEDS TO BE EVALUATED. THE LAWYER NEEDS TO BALANCE THE CLIENT'S DESIRES VERSUS THE EXTENT AND NATURE OF THE DISABILITY.
- D. DOESN'T CHANGE EITHER A OR C ABOVE.
- E. DOESN'T CHANGE EITHER A OR C ABOVE.
- F. DOESN'T CHANGE C; MAY CHANGE A. MENTAL CLIENTS OFTEN TRY TO GET ARRESTED IN THE WINTER MONTHS TO GET A ROOF OVER THEIR HEAD AND "THREE HOTS & A COT."

5. Your client wants to take a deal in order to get out of custod
y. His family wants him to stay in custody until they have a placement ready in a group home. He has a history of being noncompliant with medication once released from jail.
- a. Do you try to get a deal for time served?
 - b. Do you argue against supervised probation
Knowing that he will probably violate?
 - c. Do you make a deal including placement in a home although your client will remain in custody longer?
 - d. Does it change your decision if it is a robbery conviction with 20 years of good behavior or petit larceny third offense charge with 2 years of suspended time?

ANSWER: UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HIS WISHES AND DESIRES ARE PARAMOUNT. HIS FAMILY'S DESIRES DO NOT ENTER INTO YOUR DECISION. THE ANSWER TO A. IS THEREFORE YES. UNDER B., IF YOU FEEL THAT YOUR CLIENT CAN SURVIVE WITHOUT HELP, THE ANSWER IS YES. IF NOT, THEN RULE 1.14 COMES INTO PLAY. C. AGAIN DEPENDS ON THE DEFENDANT'S MENTAL STATUS. A CLIENT CAN BE DELUSIONAL BUT COMPETENT.

6. Your client's family wants to discuss your client's case. Your client orders you not to have anything to do with his family. What do you do?
- a. If your client is incompetent?
 - b. If your client is competent?
 - c. Is his competency status relevant?

ANSWER: THE ANSWER IS THAT YOU CAN LISTEN TO WHAT THE FAMILY SAYS BUT MAKE NO COMMENTS ABOUT YOUR CLIENT EXCEPT WHAT IS PUBLIC RECORD. HIS COMPETENCY STATUS DOES NOT MATTER. UNDER RULE 1.6., THE CLIENT'S CONFIDENTIALITY MUST BE MAINTAINED. THE ABOVE REQUEST DOES NOT FALL UNDER ANY EXCEPTIONS LISTED IN THE RULE. AS A PRACTICAL MATTER, GET THE JAIL TO HAVE YOUR CLIENT SIGN MULTIPLE RELEASES OF INFORMATION FOR BOTH THEM & YOU.

7. Your client was charged with murder. Your psychologist determined that the defendant was insane at the time of the offense. Your client does not want to plead not guilty by reason of insanity (NGRI). You feel there is no other option inasmuch as there is a witness, a confession, and physical evidence proving his guilt. He doesn't want to plead NGRI because he isn't sick and knows it means a prolonged stay at the hospital.
- a. Can you plead him NGRI regardless of his wishes?
 - b. Does it change your mind if the charge is grand larceny?
 - c. If your client is likely to re-offend, does it affect your choice? (i.e. – does not take his medication?)

ANSWER: I ACTUALLY CALLED THE VIRGINIA STATE BAR'S ETHIC'S DEPARTMENT CONCERNING THIS SCENARIO INASMUCH AS I HAD A CLIENT WHO WAS INSANE, CHARGED WITH MALICIOUS WOUNDING, AND DID NOT WANT TO PLEAD NGRI. THE BAR NOTED THAT RULE 1.2 & 1.14 CAN COEXIST TO AN EXTENT IN THIS SITUATION. IT IS THE DEFENSE COUNSEL'S RIGHT TO DETERMINE WHAT WITNESSES TO CALL & WHAT DEFENSES TO USE. NGRI IS A DEFENSE. A DEFENSE ATTORNEY HAS THE RIGHT TO USE THIS DEFENSE WHEN HE OR SHE DESIRES. BE VERY, VERY CAREFUL. ONCE FOUND NGRI, ON A VIOLENT OFFENSE, THE CLIENT GOES TO THE HOSPITAL FOR AN EXTREMELY LONG TIME. YOU CAN ASK FOR THE APPOINTMENT OF A GUARDIAN AD LITEM UNDER 1.14 (B) BUT THE VIRGINIA SUPREME COURT WILL NOT PAY FOR THE GAL'S SERVICES BECAUSE SUCH AN APPOINTMENT IS NOT UNDER THEIR LIST OF ALLOWANCES.

8. Your client's family calls you. Two weeks ago your client, while out on bond and living with his parents, threatened to kill his father. His family wants him in the hospital. He is not currently violent, suicidal, or unable to care for himself. His family calls you and asks what to do. They have not yet called emergency services. They are new to the commitment process. They are desperate. Do you
- a. tell them to lie to emergency services and state he is presently violent or suicidal;
 - b. call the police; or
 - c. Do nothing?

ANSWER: AS MUCH AS YOU MAY WANT TO, UNDER 1.2 (C), YOU CAN NOT ADVISE THE CLIENT'S FAMILY TO LIE. THE RULE IS CERTAINLY EXTENDED TO THE FAMILY AS WELL AS THE CLIENT.

9. Your client believes that the jail psychiatrist is the Devil and Haldol is poison. He refuses to take his medication. His charge is malicious wounding. He is violent in a jail setting. He is incompetent.
- a. Do you enter an order for restoration knowing that he is likely to be force medicated?
 - b. Can he be force medicated under current law?
 - c. Does it change your answers to a or b above if his crime is petit larceny 3rd offense and he is nonviolent in the jail?

ANSWER: THIS IS MORE MORAL & LEGAL THAN ETHICAL & WILL BE DISCUSSED UNDER THE SECTION FOR RESTORATION NOTED IN THE COURSE OUTLINE ABOVE. THE UPSHOT IS THAT THE HOSPITAL WILL RESTORE UNDER A SERIES OF LOOPHOLES UNDER CURRENT CASE LAW IF

A RESTORATION ORDER IS ENTERED. THEY PROVIDE MEDICATION UNDER THE TREATMENT RATHER THAN RESTORATION LABEL.

10. You see your client in your office. He is a paranoid schizophrenic. It is obvious that he is not taking his medication. He is incompetent. He is supposed to take his medication in order to remain out on bond in hopes that restoration can occur outpatient. He is also on a waiting list for the hospital. Court is two months away. He talks about the voices across the street that come at night to beat him up. He wants a gun to take care of the voices. Suicide or homicide. It doesn't much matter. You know he means it. The prosecutor does not know how bad off your client is. He lives alone. What do you do?

- a. Tell the prosecutor?
- b. Call emergency services?
- c. Call the Court?
- d. Talk to your client about taking his medication?
- e. Do nothing?
- f. Eliminate potential violence. Does it change your decision?
- g. If you do a, b, or c, does a conflict exist as to continued representation?

ANSWER: YOU CAN NOT DO ANYTHING. UNDER 1.6 (C) (1) YOU HAVE TO DO WHAT IS NECESSARY TO PREVENT YOUR CLIENT FROM COMMITTING A CRIME. DO THE LEAST INVASIVE STEP YOU CAN TO PROTECT YOUR CLIENT & SOCIETY FROM THE RISK OF FUTURE HARM. IF POTENTIAL VIOLENCE IS ELIMINATED, THEN CONFIDENTIALITY IS PARAMOUNT & YOU DO NOTHING. IF YOU HAVE TO COMPLETE A, B OR C THEN MAINTAINING REPRESENTATION DEPENDS ON THE EXTENT OF THE BREACH. IF THE ATTORNEY-CLIENT RELATIONSHIP IS DESTROYED BASED ON THE CLIENT'S PERCEPTIONS, THE LAWYER SHOULD WITHDRAW.

11. Your client has a longstanding mental health history. He is schizophrenic. He believes that it is the end of days and he must purify the unholy. He set his high risk Department of Human Services housing on Fire in order to cleanse the residents of sin. He is charged with arson and six counts of attempted murder. When you meet your client he tells you that he is the Archangel Gabriel. He then quotes Revelations. He answers every question with a quote from the Bible. You tell him a Doctor will talk to him.

- a. He tells you I AM NOT CRAZY!!!! I DO NOT WANT TO TALK TO A DOCTOR... You believe that he is both incompetent and insane at the time of the offense. Do you request a competency evaluation, a sanity evaluation, or both?
- b. You want an evaluation but don't want your client to know you requested it so as not to disturb your attorney/ client relationship. Do you tell the Commonwealth or Court what is going on so they can independently request the competency/sanity evaluations.

- c. You want the Court and Commonwealth to figure it out for themselves. Do you file a motion – bond, suppression, etc. – and put your client on to testify. One question – please state your name for the Court – should be all you need – Especially when your client states he is the Archangel Gabriel.
- d. You do the evaluation. Your client is a paranoid schizophrenic and decidedly incompetent. He goes to the hospital for restoration. He comes back in less than two weeks. The report states that your client is aware of the charges against him, can cooperate with his lawyer, and knows the role of court personnel. His real name is actually Gabriel. You see him; tell him you need to talk about his charges. He responds I AM THE ARCHANGEL GABRIEL AND THE LORD, MY GOD, SHALL SAVE ME. Well, on the one hand, you think he's not unlike your clients who tell you that they'll take a jury because God won't let them be found guilty. On the other hand, he earnestly believes that he is the Archangel Gabriel. You contact Central State Hospital. They tell you he meets competency criteria, that a person can be both competent and have a fixed delusion. You are doing a jury. Your client wants to testify. What do you do?
- e. You have a sanity issue. Do you really care? Crazy but competent works well for an insanity finding in front of a jury – if he doesn't scare them into a life sentence.
- f. Your client doesn't want a sanity defense. He is competent. You respect his wishes. Are you walking a fine line when you let the Archangel Gabriel testify?
- g. Once your client opens his mouth the judge will think you are crazy; what do you do?
- h. A month after you meet Gabriel you get another client – Michael. Michael is in custody for grand larceny. He knows he is facing several years with his record. He has information on Gabriel. Michael tells you that Gabriel plays poker in the block and laughs about how the doctors, judges and lawyers believe he's crazy. Crazy as a fox Michael tells you. Michael tells you that Gabriel was told to leave residential housing because he threatened to beat up another resident over a disputed poker pot. He didn't think it was fair that he was kicked out of housing when it was the other guy who stole his money. Michael wants to testify against Gabriel. So what now?
- i. Gabriel was mentally ill before the crime ever occurred. He was in the Department of Human Services High Risk Residential Housing. The mentally ill often do not believe they are ill. His crime meets the definition of paranoid schizophrenia. It bothers you that he is using his real name in jail and playing the Archangel when he talks to you. Who do you get out of – Michael? Gabriel? Both?
- j. Are his presentations both in the jail and in the attorney panel entirely inconsistent? The mentally ill often do not believe they are ill. Do you tell the doctor? The Commonwealth? The Court?
- k. Assume that Gabriel had no history of mental illness and just lived in an apartment complex. Based on his presentation and age the doctor believes it is his first psychotic break. He is no longer taking any medication and doesn't present with any mental illness symptoms in the jail. You pull him down for an attorney visit after speaking with Michael. He says you're my attorney – right. You can't tell anyone what I tell you, right. Then he goes on to say yes, he is faking. Your doctor already deemed Gabriel insane at the time of the offense.

- l. The Commonwealth is not contesting an ngri defense. Do you have any obligation to the Court to advise them of Gabriel's play acting?
- m. The Commonwealth, instead, is fighting the ngri determination. You will have a jury trial. Can you put your client on to testify?
- n. Can you put the ngri defense on if you keep your client off the stand but put the doctor on?
- o. Is putting the doctor and not the client on a fraud on the court?
- p. Do you believe the doctor's claim of first psychotic break or Gabriel?

ANSWER: THERE IS AN INHERENT CONFLICT BETWEEN RULE 1.2 (A) THAT A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION AND (B) RULE 1.14 CLIENT UNDER A DISABILITY: WHEN A CLIENT'S ABILITY TO MAKE ADEQUATELY CONSIDERED DECISIONS IN CONNECTION WITH THE REPRESENTATION IS IMPAIRED, WHETHER BECAUSE OF MINORITY, MENTAL DISABILITY OR FOR SOME OTHER REASON, THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT. THE CLIENT'S WISHES ARE THEREFORE PARAMOUNT ONCE COMPETENT.

RULE 1.2 & 1.14 CAN COEXIST TO AN EXTENT IN THIS SITUATION. IT IS THE DEFENSE COUNSEL'S RIGHT TO DETERMINE WHAT WITNESSES TO CALL & WHAT DEFENSES TO USE. NGRI IS A DEFENSE. A DEFENSE ATTORNEY HAS THE RIGHT TO USE THIS DEFENSE WHEN HE OR SHE DESIRES.

AS TO MICHAEL'S DESIRE TO TESTIFY – YOU NOW HAVE A CONFLICT OF INTEREST IN YOUR REPRESENTATION OF MICHAEL.

12. Your client, Cleopatra, is 26, schizophrenic, charged with malicious wounding, out on bond, and not taking her medication. She has two children, a 10 month old son and a three year old daughter. Her family is calling you and states that they are worried about the children. The kids are fed, clean, and well dressed. Things have gotten worse since social services visited and put her on a plan but didn't remove the children. You speak to your client today. Three more weeks of not taking her medication. She is clearly delusional and raving about the end of the world. You make inferences that an end is near. There are, however, no clear, overt threats. You are worried. What do you do?
 - a. Tell the Commonwealth? Have her bond revoked? Taking her medication was a condition of bond.
 - b. Call social services?
 - c. Tell the family you can't get involved nor can you give them any advice. Can you live with whatever happens to the children if the family doesn't move quickly enough?

ANSWER: YOU CAN ADVISE THE FAMILY THAT THEY CAN CONTACT EMERGENCY SERVICES IF THEY FEEL THAT SHE NEEDS IMMEDIATE MENTAL HEALTH TREATMENT. YOU NEED TO MAINTAIN CONFIDENTIALITY EVEN IN THE FACE OF YOUR CLIENT'S DETERIORATING MENTAL HEALTH CONDITION UNLESS SHE HAS MADE A SPECIFIC REPORTABLE THREAT. UNDER 1.6 (C) (1) YOU HAVE TO DO WHAT IS NECESSARY TO PREVENT YOUR CLIENT FROM COMMITTING A CRIME. DO THE LEAST INVASIVE STEP YOU CAN TO PROTECT YOUR CLIENT & SOCIETY FROM THE RISK OF FUTURE HARM. IF POTENTIAL VIOLENCE IS ELIMINATED, THEN CONFIDENTIALITY IS PARAMOUNT & YOU DO NOTHING.

13. You represent Jane, a heroin addict, with a dual diagnosis history of both drug abuse and mental health issues. Her father refuses to bond her; her boyfriend breaks up with her. You have her evaluated. She is both competent and sane at the time of the offense. You see her several times. She has become harder to work for and with upon successive visits. She refuses to see you in the jail the day prior to court. On the day of court, you go over the plea questionnaire with her in lockup. Although she is extremely difficult to deal with, she responds appropriately to your questions (both as to the guilty plea form and as to her charges, defenses, and roles of court personnel; she is oriented to both time and place).

Her deal is for three years in the Virginia State Penitentiary with all active time suspended and NO supervised probation. She is caught in a house where an attempt capital murder shootout occurs between her roommate and a police officer. She is lucky to only be getting a possession charge. The drugs are found on her during an officer safety pat down for weapons after the shootout.

Her attorney asks her repeatedly in lockup if she wants to proceed. They can do another evaluation, continue it; etc. The client wants to go forward.

She looks unkempt on the day of court. She acts up in the courtroom. Once again she appears to be difficult but responds appropriately to all questions. The Court accepts the plea and sentences the client pursuant to the plea agreement.

She gets out of jail. Her father is waiting for her. She acts up in the car. He gets a police officer to arrest her for disturbing the peace. She is put back in custody. It is 11:45 a.m. on the same day as court.

The next morning the jail social workers support a civil temporary detention order (unable to care for self/danger to self and others). Her attorney appears at the arraignment and gets the court to provide a personal recognizance bond upon her civil commitment.

Her attorney talks to the prosecutor. She will not initiate a revocation hearing if your client is convicted of the disturbing the peace charge.

a. Should Jane's attorney have gone forward with the plea once Jane became difficult in court? If she recognized that Jane might be sinking deeper into her mental illness?

b. The plea allowed Jane to get out of jail that day. What if the plea called for another six months to serve?

- c. Jane had someone willing to pick her up and take her home. Does it matter if she had nowhere to go and nobody who cared?
- d. By the next day the jail's social worker is supporting a civil commitment. Do you take the case back in front of the sentencing judge and ask to withdraw the plea?
- e. Apparently she was not competent the next morning. If the plea is withdrawn she goes back to jail on both the felony and misdemeanor. Does it influence your decision that the prosecutor is willing to not violate your client if convicted of the misdemeanor? What if she didn't agree?
- f. Your client wanted to proceed. Not proceeding meant a longer jail stay – whether for reevaluation or waiting for hospitalization. Do you substitute your judgment for hers?
- g. Your client is extremely paranoid. She exhibits violent tendencies. She is not threatening any one particular individual but is wrapped up in her paranoid delusions to the extent that she presents a real danger to her family, coworkers, etc. Her father sees her acting difficult in court. He later blames you for the incident outside of the jail. What if she killed someone? What is the line between attorney and social worker? Attorney and social conscience. Is there a duty to warn where there is no specific threat? Is there a duty to warn for a bad feeling from observed behavior? What if she went out and killed several people? Is it your responsibility? The jail's? The court's? Her family's?

ANSWER: UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HER WISHES AND DESIRES ARE PARAMOUNT.

- 14. Your client is listening to the voice of God. He tells you that he follows all of God's instructions. He is currently competent – or so the psychologist tells you. You can have a fixed delusion and still be competent. You believe that a not guilty by reason of insanity plea is a good resolution to his case. The prosecution agrees. You tell him that God told you to have him plead NGRI. Ethical? Ever? Can you try to control your client through involvement in his delusion(s)? Is this technique any different than convincing a "normal" client to do what you consider appropriate through a psychological assessment of what makes him "tick?"

ANSWER: ETHICAL? NO. SEND HIM BACK TO THE HOSPITAL UNDER A NEW RESTORATION ORDER. DO NOT FEEL THAT YOU CAN'T CHALLENGE A DETERMINATION OF COMPETENCY.

- 15. **Headline: Mom pleads guilty in cult starvation death.** The prosecutor made a deal "if the child is resurrected, her plea will be withdrawn." Ramkissoo's attorney, Steven Silverman, said Ramkissoo believes that the resurrection will occur. The prosecutor drew up the plea. The defense attorney proposed it to his client. Is any part of this ethical?

ANSWER: NO! THERE IS NOTHING ETHICAL ABOUT ALLOWING A
DEFENDANT TO ENTER A PLEA THAT FEEDS ON THE DELUSIONAL BASIS
OF THE CRIME.

16. Under Virginia Code Section 19.2-303.6 the court can, if an individual has been diagnosed by a clinical psychologist or psychiatrist with (1) an autism spectrum disorder or an intellectual disability, and the court finds by clear and convincing evidence that the criminal conduct was caused by or had a direct and substantial relationship to the person's disorder or disability....and with the consent of the accused....may enter a deferred disposition in a criminal case.

A. The court can ascribe whatever terms and conditions it wants in a deferred finding. Does it serve the client to be on what amounts to probation if he is on the severe end of the autism or intellectual disability range. Would it be preferable to see if you can get a time served misdemeanor disposition with no attached conditions?

B. What does the consent of the accused entail if he has been appointed a guardian because he lacks capacity to conduct his affairs?

ANSWER: UNDER RULE 1.2A, THE CLIENT HAS THE ABILITY TO CONSENT EVEN IF HE LACKS CAPACITY TO CONDUCT HIS DAILEY AFFAIRS. A DEFENDANT CAN BE COMPETENT BUT LACK CAPACITY. THE DEFENSE ATTORNEY SHOULD, AT ALL TIMES, INTERACT WITH THE GUARDIAN TO DETERMINE THE DEFENDANT'S ABILITY TO COMPLY WITH ANY COURT ORDERED TERMS AND CONDITIONS ASSOCIATED WITH THE DEFERRED FINDING. IT WILL HAVE TO BE A CASE ORIENTATED, FACT BASED DETERMINATION IF A MISDEMEANOR DISPOSITION WOULD BE BETTER THAN A DEFERRED FINDING. A DEFERRED FINDING IS CERTAINLY BETTER THAN ANY FELONY OFFER BUT A DISCUSSION BETWEEN THE DEFENSE ATTORNEY, FAMILY, AND GUARDIAN IS ESSENTIAL IN A DETERMINATION OF THE CORRECT PATH TO FOLLOW.

HYPOTHETICAL

You have a mother, Michelle, who contacts you and tells you that she wishes to retain your services for her son, Michael, who is charged with assault and battery of a law enforcement officer and assault and battery of a family member, third offense. Michael is currently in jail. Michelle is the victim of the current assault and battery of a family member as well as both prior charges. She contacted the police in order to get him help. Michael is diagnosed as schizophrenic. He is also on the spectrum. He is not taking his psychotropic medications. He is self-medicating with marijuana and cocaine. The extent of what, if anything, he was using that night is unclear.

Michelle just wants her son to get help. She was beaten fairly severely and taken to the hospital. Michael's behavior patterns and her injuries have become more severe with each incident. She wants you to get him home. She is paying you a sizeable fee in order to do so.

You go and see Michael. You let him know that his mother has retained your services. He tells you that he doesn't have a mother – that she is an alien, an imposter who has replaced his mother and that he wants you to have nothing to do with her. He tells you that he is not mentally ill.

You speak with his attorney who handled both of his prior assault on a family member charges. The attorney tells you that he was able to get his client a deal with either minimal or no jail time. The client didn't want either a sanity or competency evaluation because he was not ill. The client also said at the time that his mother was an alien. Michael's attorney on the misdemeanor charges felt that he was marginally competent and decided not to request an evaluation. Michael understood what he was charged with, his legal choices, and the courtroom players. Whether or not he could cooperate in his own defense was somewhat problematic but nothing his attorney wanted to look at too closely.

Michael's prior misdemeanor attorney found the quickest way of getting his client his and the mother's desired result – to get him out of jail and home – was to enter a guilty plea. At the time, each charge was a misdemeanor. An evaluation would delay court by at least a month. If Michael wasn't competent, he would need to be restored. Depending on the severity of the illness, restoration could be done in the jail on an outpatient basis or inpatient at a state hospital. Restoration could take anywhere from a week or so to more than several months. Michael's attorney decided to go forward without any evaluation.

It is now a difficult and more complicated picture. There are two victim's – Michelle and the police officer. Although Michelle is willing to work out a deal to get Michael out of jail and back home, the officer is not willing. He has been to the house multiple times and believes that Michael will ultimately kill his mother if things remain the way they are. The officer, also, was punched by Michael as Michael screamed that the officer was an alien, just like his mother, and was on earth to steal his body. The officer was the

same officer who had been at the house a total of five times prior to the current offense. The officer, when he was punched, fell and hit his head. He sustained a serious concussion and his ability to return to work is still questionable.

You try and get the prosecutor to reduce the charges to misdemeanors since Michael was clearly mentally ill at the time. The prosecutor states that she is unwilling to do so. She lets you know that considering both the officer and Michelle's injuries, malicious wounding is potentially a possibility on both charges.

You tell both your client and his mother that the only way out is a mental health defense. Neither wants it but there is no alternative defense. Michelle, sixty-five years old and one hundred pounds soaking wet, is badly beaten. She calls 911 and tells the operator that her son is beating her and she thinks he means to kill her. The operator hears both Michelle and Michael screaming when the phone suddenly disconnects. Michael is thirty-five, six feet five, and approximately two hundred and fifty pounds. The officer's assault is on body camera. His body camera also picks up part of Michael's assault on Michelle.

You believe that you need to get a competency, sanity, and intent evaluation done.

You have the following defenses: (1) a regular defense that does not include a mental health rationale; (2) a not guilty by reason of insanity defense pursuant to Chapter Eleven of the Virginia Code; (3) a deferred disposition in a criminal case (persons with autism or intellectual disabilities) under Virginia Code Section 19.2-303.6; (4) an analysis of the defendant's mental condition at trial under Virginia Code Section 19.2-271.6.; and (5) a possible inclusion in a mental health court. Defenses two thru five are possible for the same defendant.

A defense for a client with mental health issues has become highly complicated. Insanity involves a finding of not guilty but can lead to an indeterminate commitment that can hospitalize an acquittee for years. A deferred disposition can lead to either a dismissal or a reduction – assuming, that is, that you think the defendant can do everything required under the plea's requirements. An intent analysis involves bringing a mental health explanation to intent based crimes. A mental health court is a method of getting a client stability through court-based supervision for those with serious mental health disorders.

We will explore the suitability for the application of the above defenses to Michael's fact pattern.

ETHICS

1. You have never handled a client with serious mental health issues. Can you represent him? Should you?

Rule 1.1, competence, defines the parameters for your decision. As noted in the Rule, competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. You need to determine your comfort level in proceeding. If you go forward, have a mentor who can shepherd you through the involved and complicated mental defense process,

2. You are aware that the client and the client's mother both don't want a mental health defense. Whose choice is it? On Intent? Insanity?

Under Rule 1.2, in a criminal case, a lawyer "shall abide by the client's decision, after consultation with the lawyer, as a plea to be entered, whether to waive a jury trial, and whether the client will testify. Your defense strategies are your choice.

3. The mother is paying your fee. She doesn't want a mental health defense of any kind. Who do you listen to?

Simply put, the client – in other words, the criminal defendant. The source of the funds may impact your continued representation if you are fired. A disclaimer in your representation agreement as to your client being the decision maker, rather than the mother, so that there are no misunderstandings is a good idea.

4. You believe that your client is competent. He understands his charges and his legal choices. He still, though, believes his mother is an alien, a body snatcher, and that the officer is an alien as well. Can you proceed without a competency evaluation? Should you? Regardless of the desires of your client and/or his mother.

No. Considering his fixed delusion, you need, at a minimum, to have your client evaluated. See Rule 1.14.

5. Your client has a fixed delusion concerning his mother not being his mother that he has had for over a decade. His fixed delusion about the officer only occurred during this most recent arrest. Can a person be competent if he is suffering from a fixed delusion? Can a fixed delusion impact a person's ability to effectively assist his attorney in his own defense?

A person can be competent if suffering from a fixed delusion. See Rule 1.14. The question will be whether or not that the client can effectively assist you in his own defense. Imagine a scenario where the client wants a trial, gets on the stand, and tells the court that it was self-defense to attempt to kill the aliens. Imagine the judge putting a pause to the proceeding and stating counsel please approach the bench.

6. You have your client evaluated. He is found incompetent and sent to the state hospital for restoration. He is returned on medication. When asked about his defense, he is still telling you that he wants the court to know that the body he was hitting was that of an alien and not his mother. What do you do? Have him reevaluated? Send him back to the hospital?

See 5 above.

7. Does it matter if you have worked out a resolution and your client wants to accept a plea deal? Since the hospital sent a report stating that the defendant is competent?

See Rules 1.2 (a) and 1.14. If the client has been restored to competency his wishes are paramount. If you have a plea deal, you can probably get the client through court. The question that you have to think about, however, is what if he is placed on five years, with all but the mandatory six months on the assault of a law enforcement officer charge, five years good behavior, and released that day to his mother who comes to pick him up at the jail. What if he starts beating his mother the alien and never makes it out of the parking lot before he gets a new charge and violates his good behavior?

8. You have to decide the defense that best suits your case. Can you proceed with an insanity defense if your client is against it? Should you even if you can? Your client can be committed at his temporary custody hearing. The commitment is indeterminate and can keep your client in the hospital for years. With a potential for 10 years at most, is a sanity defense appropriate? What if your client is charged with two counts of malicious wounding which totals a possibility of forty years? What if your client refuses to cooperate with his evaluation?

You have the right, as noted above, to decide your defense strategy. Doing so, and your client being committed at the temporary custody hearing, is a disaster waiting to happen. Felonies that carry five years should generally not be part of a not guilty by reason of insanity defense strategy. Ten years later, and your client still in the hospital, you realize that you picked the wrong defense road. He has been incarcerated in the state-run hospital for twice the amount of time he would have served on a straight up plea to the entire possible charges exposure.

9. Is a deferred finding a viable option if you believe your client is still unstable? And the only placement you have is for your client to return to is his mother's?

Just no. You'll find yourself before the court, dealing with a violation of either probation or community corrections, and asking for your client to be reevaluated in order to hit the reset button on the deferred finding.

10. What if you have it all worked out? And your client is still talking about his mother the alien? And he is going back to the house to “save” his mother? What is your responsibility?

Under Rule 1.6 (7) you must advise the mother if you believe that disclosure of the information is to prevent reasonably certain death or substantial bodily harm.”

11. You find out from your client that he is not taking his medicine. His mother is willing to allow him to return home only if he is on his medication. The plea agreement states, in part, that he is to continue taking his medication. Do you have an obligation to tell his mother? The courts? He hasn’t made any threats to you about saving his mother from the alien in this scenario and appears remarkably well behaved.

No. See Rule 1.6 – confidentiality of information. The plea simply states that he is to continue taking his medication. You have no responsibility to tell his mother or the courts and Rule 1.6 prohibits disclosure of same.

12. What if your client wants a trial and has not refused to allow for a mental health defense. Is it your responsibility to look into every possible mental health scenario – and the incarceration/commitment potential consequences for your client?

You have to look into every possible mental health defense that could benefit your client. Although it is a lawyer’s right to determine the defense; to the extent possible you need to give your client all applicable choices. Imagine the scenario where you don’t do an insanity defense but do go forward on intent and lose. At sentencing the court states on the record that he would have considered insanity but had no evidence to do so. He gives your client the full ten years available, in the state penitentiary system, because he feels that a mentally ill defendant is dangerous, even though he has no statistics to back up his statement.

13. What happens if one of the charges is aggravated sexual battery and registration is an issue? If the client is unrestorable?

Under a not guilty by reason of insanity finding, the defendant is required to register if he would otherwise have to register on the charged offense. If he is deemed unrestoreable, with an aggravated sexual battery charge, than an evaluation has to be done under the violent sexual predator Virginia Code Section

14. Your client tells you that he doesn’t want you to discuss his case with his mother (even though she is paying your fee). What are your ethical obligations? Does his competency status make a difference.

You can listen to what his mother has to say but make no comments about your client except what is public record. His competency status does not matter. Under Rule 1.6, the client’s confidentiality must be maintained.

15. The prior misdemeanor attorney didn't get his client evaluated on either misdemeanor charge. It is certainly well established that on assault on assault and battery of a family member, three strikes and you are out. Knowing that your client was exhibiting substantial mental health issues, should you have gotten an evaluation done?

Rule 1.2 and Rule 1.14 have a substantial interplay. How long was it going to take to have your client evaluated? How long was it going to take for your client to be restored if competent? Your client wants out. His wishes are paramount inasmuch as there have been no findings of incompetency.