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DOCTORS, LAWYERS, AND THE UNABOMBER

Joel S. Newman*

I. INTRODUCTION

My brother and I were watching the television show *ER*.¹ A woman, brought in to the hospital's emergency room, appeared to the doctors to have a life threatening illness. This particular illness is often accompanied by temporary insanity. To save her life, immediate surgery was necessary. She refused, however, to give her consent.

The hospital's lawyer cautioned that, unless she could be certified incompetent, the surgery could not be performed without the patient's consent. Accordingly, the psychiatric intern on duty was summoned. He gave the patient a short test, which she passed. He declared her competent. Vindicated, the patient left.

The emergency room doctor ran out of the hospital, grabbed the patient, and forcibly returned her to the hospital. The surgery was performed without her consent. Her life was saved.

My brother, a doctor, declared that the *ER* doctor was a hero, and the hospital's lawyer was an idiot. I, a lawyer, reached a somewhat different conclusion.

Perhaps our differing views have something to do with the different perspectives of doctors and lawyers. I think that they have more to do, however, with a different balancing of autonomy and risk. Some people, in order to avoid the risk of death from an unlikely medical condition, would be willing to risk: (1) surgery without their consent—perhaps, surgery which they do not need; and (2) a somewhat casual determination that they are incompetent, when, perhaps, they are not. I, on the other hand, would prefer to risk death.

I am guessing that Theodore Kaczynski felt the way I do. His lawyers wanted to argue that he was mentally ill.

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1. *ER* (NBC television broadcast, Jan. 1, 1998).

Kaczynski preferred to risk death.

Kaczynski committed a series of heinous crimes. The nature of the crimes themselves, plus Kaczynski's success in evading capture for more than a decade, evidenced a highly intelligent person, fully capable of functioning in the real world. Yet, there was substantial evidence of mental illness.

His lawyers, Quin Denvir, Judy Clarke and Gary Sowards, knew that it would be extremely difficult to convince a jury that Kaczynski was not guilty by reason of insanity.² Rather, they felt that his strongest defense would be to allege that his mental status was impaired. Proof of impaired mental status would have negated the element of *mens rea* in the guilt phase of his trial.³ Further, should he have been found guilty, his impaired mental status could have been used as a mitigating factor in the penalty phase.

Kaczynski, however, considered himself sane. He hoped that the trial would be a public forum for an exposition of his anti-technology views.⁴ For him, an examination by a mental health professional would be a totally unacceptable invasion of his privacy. Moreover, the possibility that such a wrongheaded mental health professional might actually find him mentally ill—a “sickie,” as he put it,⁵ was more than he could bear.

2. See David S. Jackson, *At His Own Request: Is Kaczynski's Rejection of His Best Chance for a Defense a Result of Paranoid Schizophrenia?* TIME, Jan. 12, 1998, at 40: Insanity, the most obvious defense, was never an option because it would have required Kaczynski's lawyers to argue that he either did not know what he was doing or did not know it was wrong. And unfortunately for them, the coolly calculating diary entries and the Unabomber's ability to evade detection and taunt authorities for so many years effectively ruled that out.

See also Michael Higgins, *Crazy Talk: Diverse Views of Jurors, Shrinks May Hamper Kaczynski Defense*, 83 A.B.A. J. 34 (1997).

3. See *United States v. Pohlott*, 827 F.2d 889 (3d Cir. 1987); Insanity Defense Reform Act, 18 U.S.C.A. § 17 (1984); Government's Trial Brief, *United States v. Kaczynski*, Part V, Defense Case, <<http://www.unabombertrial.com/documents/trialbrief7.html>>. Most internet references are to the web page of the SACRAMENTO BEE newspaper. For other internet materials on Kaczynski, see <<http://www.courtvt.com/trials/unabomber/>>. See also the unabomb-trans database on Westlaw.

4. See <<http://www.unabombertrial.com/manifesto/index.html>>. As pointed out by Judge Burrell, Kaczynski needed to be considered sane, if he wanted his anti-technology views taken seriously. See *Order, United States v. Kaczynski*, 1998 WL 226796, at *9 (E.D. Cal. May 4, 1998). For another, similar trial, see *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986). For more on the Silo Pruning Hooks trials, see Richard Pollak, *Witnessing for Peace; Silo Pruning Hooks; Missile Protesters*, 244 NATION 567 (May 2, 1987).

5. See Daniel Klaidman & Patricia King, *Suicide Mission*, NEWSWEEK, Jan. 19, 1998, at 22. See also Cynthia Hubert & Denny Walsh, *Kaczynski Gives Lawyers Little Help Saving His Life*, SACRAMENTO BEE, Nov. 23, 1997, available through the Internet at

Presumably, Kaczynski accepted the judgment of his lawyers that the mental status defense was his best defense. Even so, he preferred to risk losing in court, even if it meant the death sentence, rather than submit to a humiliating public examination of his mental health.

Thus, Kaczynski's lawyers were faced with a dilemma. They could violate their obligation of loyalty to their client. Alternatively, they could maintain their loyalty to their client, but abandon what they considered the one best chance to defend him effectively.

To think through the dilemma, one must reason from the perspective of both the client and the lawyer. We lawyers, however, tend to see things only from the lawyer's point of view. After some years in the practice of law, it can become a difficult mental leap to see things from the other side.

It is in this regard that the *ER* episode is instructive. Perhaps we lawyers have not been clients very often, but we surely all have been patients. If thinking like a client is at first difficult, we can always start by thinking like a patient. Once we are comfortable with that, then we can ease into thinking like a client.

When I first thought about Kaczynski's dilemma, I thought from the perspective of his lawyers. I reasoned that, had his lawyers presented the mental status defense, he would have been better off. Therefore, his lawyers should have been allowed to force him to accept what they knew was best for him. However, having rethought Kaczynski's dilemma in light of the *ER* episode, I have changed my mind.

I believe that the judge, the prosecution team, and the defense team in the Unabomber case did a magnificent job of lawyering, under very trying conditions. The ultimate result of the case was, I believe, fair and just under the circumstances.⁶ Viewed somewhat more abstractly, however, the Unabomber

<<http://www.unabombertrial.com/archive/1997/112397.html>> (quoting from Kaczynski's journals). See also Ellen Goodman, *The Kaczynski Conundrum*, BOSTON GLOBE, Jan. 8, 1998, at A17.

6. I reach this conclusion because I believe that Judge Burrell properly denied Kaczynski's motion to represent himself, based, *inter alia*, on questions of timeliness. See <<http://www.unabombertrial.com/transcripts/012298kz.html>> at 12, and *infra* note 46 and accompanying text. However, any finding that someone who is arguably suffering from some form of mental disability should have done something sooner, or must have understood something as of a certain date, is problematic. I would be especially troubled by any move to apply the same analysis on what a criminal defendant "should have known," to someone less intelligent than Kaczynski.

case raises significant issues in professional responsibility. First, who controls the defense—lawyer or client? Second, if the decisions are the client's to make, how does the lawyer determine whether or not the client is sufficiently competent to make them? Finally, what are we to make of the defense team's claim that it would have been a violation of their professional oath to defend their client without using what they considered to be their only effective defense? This article addresses these three issues.

II. THE RELEVANT FACTS

Theodore Kaczynski resigned from his position on the mathematics faculty at Berkeley, and ultimately settled in 1971 in a one room cabin in rural Montana.⁷ He became convinced that technology was ruining civilization, and ultimately struck back with a series of bombs from 1978 to 1995, which allegedly killed three and wounded twenty-three.⁸

While in Montana, Kaczynski suffered from severe insomnia and depression. He also lacked social skills, and was socially isolated.⁹ He attempted to obtain counseling for his problems through the mail, in light of the prohibitive expense of a trip to a clinic in Helena, Montana, but was unsuccessful.¹⁰

Ultimately, he did see two mental health professionals face to face. One was David V. Foster, M.D.¹¹ According to Dr. Foster:

His paranoia about psychiatrists made it very difficult to broach his psychiatric symptoms with him in a direct way. In fact, early on in our sessions, he looked me in the face and said, "You are the

7. For a summary of his life, see Robert D. McFadden, *Prisoner of Rage—A Special Report: From a Child of Promise to the Unabomber Suspect*, N.Y. TIMES, May 26, 1996, § 1, at 1.

8. For a time line, see <http://www.unabombertrial.com/timeline/timeline_main.html>.

9. See Declaration of David V. Foster, M. D. <<http://unabombertrial.com/documents/dvfoster111797.html>>.

10. See Excerpts from Letters Written by Theodore Kaczynski, <<http://unabombertrial.com/documents/letters111497.html>>.

11. See Declaration of David V. Foster, M.D. <<http://unabombertrial.com/documents/dvfoster111797.html>>. Unfortunately, Dr. Foster's declaration does not give the date of the consultation. However, Dr. Foster states that the reasons for the consultation were "his over sensitivity to sound, his sleep disturbance, and his fear that his heart might burst from the anxiety of going through his trial." Therefore, it must be assumed that Dr. Foster consulted with Kaczynski after the latter's arrest in April, 1996.

enemy.” As I have previously indicated, after significant efforts to build a relationship with Mr. Kaczynski, when I finally addressed his symptoms with any degree of specificity, he refused to see me further.¹²

He also consulted with Karen Bronk Froming, Ph.D., a clinical psychologist.¹³ She reported, in part:

My own testing was authorized by Mr. Kaczynski only because he believed that it would prove that he did not suffer from any neurological deficit impairing his social functioning. He was surprised and dismayed when this examiner provided him with the test results which showed that neurological impairments affected his ability to recognize and interpret the meaning of non-verbal social communication. Mr. Kaczynski stated that he had been hopeful to use my data to support his assertions that he was neurologically intact, and instead, I had offered contrary conclusions. He informed me in writing the very next day that he would no longer need my professional services.¹⁴

These two experts, plus the doctor who later examined Mr. Kaczynski in January of 1998, agreed that he suffered from paranoid schizophrenia.¹⁵ Dr. Froming commented:

Individuals suffering from pervasive paranoid ideation view the world as a threatening place, and any difference of opinion that is offered, including that the individual might be ill, is viewed as further evidence that the outside world is a dangerous and untrustworthy place. Frequently, it is my experience that patients are unable to acknowledge the most severe aspects of the illness, but may recognize discrete symptoms such as insomnia and depression.¹⁶

Dr. Xavier Amador, another clinical psychologist who consulted with Kaczynski’s defense team, agreed:

Many people suffering from schizophrenia do not believe they have an illness and are unaware of the specific deficits caused by the

12. *Id.*

13. See Declaration of Karen Bronk Froming, Ph.D. <<http://www.unabombertrial.com/documents/froming111797.html>>. Again, the statement does not reveal the dates of the consultations. However, one might infer from her statement, “I was asked by the attorneys for Theodore J. Kaczynski to evaluate” that her consultations were after his arrest in April of 1996.

14. *Id.*

15. See Cynthia Hubert & Denny Walsh, *Kaczynski Competent, Doctor Says*, SACRAMENTO BEE, Jan. 21, 1998, reprinted at <<http://www.unabombertrial.com/archive/012198.02.html>>.

16. Declaration of Karen Bronk Froming, Ph.D. <<http://www.unabombertrial.com/documents/froming111797.html>>.

disorder. Indeed, many of these individuals feel that the only thing they really suffer from is pressure from relatives, friends, doctors and courts to accept evaluation and treatment. Lack of insight frequently obstructs treatment, as disagreement that treatment is even necessary leads to patients feeling coerced to accept care for an illness they don't believe they have. Large scale studies have suggested that from fifty percent to more than eighty percent of all patients with schizophrenia do not believe they have an illness. These are not people who would be expected to agree to an insanity defense.¹⁷

Kaczynski was arrested in April of 1996,¹⁸ and indicted in June.¹⁹ A plea bargain was offered by Kaczynski's lawyers. Pursuant to the plea bargain, Kaczynski would plead guilty, provided that he would not receive the death sentence. Further, he would not be committed to a prison psychiatric facility, and he would retain the right to appeal any government search of his cabin.²⁰ The government rejected the plea, and served notice that it would seek the death penalty.²¹

Kaczynski's counsel served notice that they would allege a mental status defense, and would offer expert testimony to back it up.²² The government requested an opportunity to have Kaczynski examined by their experts, and the court so ordered. However, Kaczynski refused to submit to another mental examination.²³

17. Declaration of Xavier F. Amador, Ph.D. <<http://www.unabombertrial.com/documents/amador111697.html>>.

18. See Warrant for Arrest, April 4, 1996. <<http://www.unabombertrial.com/documents/warrant.html>>.

19. See <http://www.unabombertrial.com/timeline/timeline_main.html>.

20. See Tamala M. Edwards, *Crazy is as Crazy Does*, TIME, Feb. 2, 1998, at 66. It has been alleged that Kaczynski's defense team intentionally kept him ignorant of their plans for a mental status defense. As part of the smokescreen, they built up his hopes for a successful attack on the validity of the FBI search warrant for his cabin. See William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52, 57. This manipulation of the client, if true, would have been totally inappropriate, and would have been a violation of the duty to communicate with clients, as set forth in MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1997).

21. See Notice of Intent to Seek the Death Penalty, May 15, 1997 <http://www.unabombertrial.com/documents/death_penalty.html>.

22. See FED. R. CRIM. P. 12.2(b).

23. See Cynthia Hubert and Denny Walsh, *Kaczynski Balks at Court-Ordered Psychiatric Exam*, SACRAMENTO BEE, Oct. 25, 1997, available through the Internet at <<http://www.unabombertrial.com/archive/1997/102597.html>>. In the Nov. 21, 1997 hearing, there is reference to a brief filed by Kaczynski on Nov. 20, 1997, in which he "personally declined to endure the Government's examination." See United States v. Kaczynski, Hearing Transcripts, Nov. 21, 1997 <<http://www.unabombertrial.com/transcripts/112197.html>>. See Victoria Slind-Flor, *Unabomber Case Begins*, NATIONAL LAW JOURNAL, Nov. 24, 1997, at A1. See also ABA CRIMINAL JUSTICE MENTAL HEALTH

There were briefs²⁴ and arguments²⁵ about the appropriate penalty for Kaczynski's refusal to submit to the court-ordered examination. As a result of these hearings, it became clear to Kaczynski, or, according to Judge Burrell, it should have become clear,²⁶ that Kaczynski's lawyers would present evidence of impaired mental status at the penalty phase of the proceedings.

On January 5, 1998, Kaczynski appeared at the court hearing. He indicated difficulties of communication with his current counsel, and asked that they be replaced with Tony Serra.²⁷ Apparently, Mr. Serra was willing to present Mr. Kaczynski's defense the way Kaczynski wanted it—with no mention of mental status, and with emphasis on his anti-technology philosophy.²⁸ Perceiving a conflict between the defendant and his then counsel, Judge Burrell appointed Kevin Clymo as Kaczynski's attorney for purposes of the conflict.²⁹

On January 7, 1998, Kaczynski withdrew his request for a change of counsel. Apparently, Clymo had persuaded Kaczynski that any lawyer representing him would insist upon presenting the mental status defense. Kaczynski said:

Your Honor, it appears that I don't have much choice as to what I want to do. Mr. Clymo has agreed with you that other counsel would probably do the same thing as my present counsel and, consequently, it seems that I have no other alternatives, and so far I may as well go ahead with the present counsel, not because I

STANDARDS § 7-3.4 (1989).

24. See *United States v. Kaczynski, Defendant's Opposition to Motion to Preclude Expert Mental Health Testimony at the Guilt Phase and to Require Defendant to Undergo a Mental Examination Before Sentencing* <<http://unabombertrial.com/documents/psyche1113.html>>.

25. See *United States v. Kaczynski, Hearing Transcripts Nov. 21, 1997 and Dec. 23, 1997* <<http://www.unabombertrial.com/transcripts/112197 and 122397.html>>.

26. See *United States v. Kaczynski, Hearings Transcripts, Jan. 22 1998* <<http://www.unabombertrial.com/transcripts/012298kz.html>>. Ruling of Judge Burrell at page 10: "Whatever ambiguity existed as to the guilt phase portion of the December 22, 1997 agreement, there can be no mistake that Kaczynski knew and agreed that evidence of his mental status could be presented in the penalty phase."

27. For a profile of Tony Serra, see Ron DeLacy, *Tony Serra: A Poor Lawyer in Dollars Only*, MODESTO BEE, Sept. 19, 1993, reprinted at <<http://unabombertrial.com/archive/1998/010898.04.html>>.

28. See William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52, 56; Kevin Fagan, *Kaczynski Writing New Treatise in Jail; Followers Want to Read Unabomber's Every Word*, SAN FRANCISCO CHRONICLE, Jan. 30, 1998, at A1.

29. See *United States v. Kaczynski, Hearings Transcripts, Jan. 5, 1998* <<http://www.unabombertrial.com/transcripts/0105cham.html>>. The Court appointed Mr. Clymo under the rationale of *Mason v. Vasquez*, 5 F.3d 1220 (9th Cir. 1993), and *United States v. Gonzalez*, 113 F.3d 1026 (9th Cir. 1997).

want to but simply there are no better alternatives.³⁰

The court asked if he had considered representing himself. Kaczynski answered:

Your Honor, if this had happened a year and half ago, I would probably have elected to represent myself. Now, after a year and a half with this, I'm too tired, and I really don't want to take on such a difficult task. So far I don't feel I'm up to taking that challenge at this moment, so I'm not going to elect to represent myself.³¹

At that hearing, the court and the Defendant had the following conversation:

The Court:

Mr. Kaczynski, are you satisfied with your current counsel?

The Defendant:

I think it should be clear by now, your Honor, that I'm not satisfied with my current counsel for the reasons that I have already explained, but that I am willing to accept representation by them for want of a better alternative. [Redaction for attorney-client privilege and representation matters]

The Court:

Have you reached agreement with counsel concerning major strategic decisions?

The Defendant:

Your Honor, as you know, I do not agree with counsel concerning major strategic decisions, but I've become aware that legally I have to accept those decisions whether I like them or not. So I guess I just have to accept them.

The Court:

We were both using "decisions" in its plural form, but is it not true that your problem is with the assertion of the mental status defense?

The Defendant:

Yes, your Honor, that's the problem.

The Court:

You don't have problems in other areas, do you?

The Defendant:

30. United States v. Kaczynski, Hearing Transcript, January 7, 1998 <<http://www.unabombertrial.com/transcripts/0107cham.html>> at 2-3.

31. *Id.* at 3.

No, your Honor. That's the only one.

....

The Court:

Okay. Are you willing to defer to counsel's day-to-day trial decisions?

The Defendant:

Yes, your Honor.³²

Judge Burrell also made the following observation on January 7:

I find him [Kaczynski] to be lucid, calm. He presents himself in an intelligent manner. In my opinion, he has a keen understanding of the issues. He has always seemed focused on the issues in his contact with me. His mannerisms and his eye contact have been appropriate. I know there's a conflict in the medical evidence as to whether his conduct, at least in the past, has been controlled by any or some mental ailment, but I've seen nothing during my contact with him that appears to be a manifestation of any such ailment. If anything is present, I cannot detect it.³³

Apparently, that very evening, Kaczynski attempted suicide.³⁴

On the next day, Kaczynski changed his mind. He requested, through counsel, that he be allowed to represent himself. Defense attorney Judy Clarke commented to the court:

This is a very difficult position for him. He believes that he has no choice but to go forward as his own lawyer. It is a very heartfelt reaction, I believe, to the presentation of a mental status defense, a situation in which he simply cannot endure.³⁵

The court identified two issues. The first was the issue of who controls the defense. It seemed clear that the only reason

32. *Id.* at 5-6.

33. *Id.* at 4.

34. See United States v. Kaczynski, Hearing Transcript, Jan. 8, 1998 <<http://www.unabombertrial.com/transcripts/010898kz.html>> at 3; Cynthia Hubert & Denny Walsh, *Kaczynski Reportedly Tries to Take Own Life*, SACRAMENTO BEE, Jan. 9, 1998, available through the Internet at <<http://www.unabombertrial.com/archive/1998/010998.01.html>>.

35. United States v. Kaczynski, Hearing Transcript, Jan. 8, 1998 <<http://www.unabombertrial.com/transcripts/010898kz.html>> at 1. In light of the expressed concern about delay, Mr. Kaczynski communicated through his lawyers that he was willing to begin the trial that day, with no further preparation. Judge Burrell now believes that Kaczynski requested self-representation because he believed that it would improve his settlement posture. See Order, United States v. Kaczynski, 1998 WL 226796, at *14 (E.D. Cal. May 4, 1998).

that Kaczynski wanted to represent himself was because the court had indicated that the lawyer, not the client, controlled the issue of whether or not to present the mental status defense. Therefore, the only way that Kaczynski could prevent the mental status defense from being raised was to become his own lawyer, so that he could make the call.

The Court:

What the government, in essence, argues is that the law is unclear as to who controls the mental status defense. I think I'm probably correct in the way I coined the issue. I think the crux of the question centers on who controls that defense. And I believe that Mr. Kaczynski has expressed the interest of representing himself because I told him he doesn't control that defense. The Government's research to date reflects what I found to date, and that's that the law is not clear on this precise question. I think the law is somewhat clear as to who controls the insanity defense. But that defense involves a plea and it's pretty clear that a criminal defendant decides what to plead. The Government argues that I should revisit that issue, make a determination that the defense is controlled by the client and that the client's counsels have to yield to his desires. That's the question What's the defense's response?

Ms. Clarke:

Your Honor, I think that the Court is focused on the issue precisely and accurately. And I think the issue of who controls the defense was resolved yesterday, and we believe that the Court is correct, that it is the lawyer's professional obligation to make strategic decisions and present the case in the way that the lawyer professionally believes is accurate and appropriate. And I think to say otherwise to counsel would pit a lawyer against his or her oath, professional oath. And I understand that there's litigation over that, but I think the Court, for purposes of this case, has resolved that question Mr. Kaczynski . . . feels he has no choice. His present counsel intend to present him in a light of mental illness and intend to present to the jury his case in a way that he has had for his entire life a deep and abiding fear that he would be presented . The Court has evidence in the record already over the past several months of that problem. The Court knows the intensity of Mr. Kaczynski's feelings that that is not the way in which he wants to be presented.³⁶

Judge Burrell was concerned about being reversed:

The Court:

36. See *Order, United States v. Kaczynski*, 1998 WL 226796, at *10.

I just had a flash on—the point that I tried to make earlier, I'm not sure I made it clearly. It involves a possible error. Mr. Kaczynski could argue that he is being forced to represent himself, he really doesn't want to represent himself, that he's being forced to represent himself because of my ruling on the mental status issue, and that if I had made what he considers to be a correct ruling on the mental status issue, meaning that he is in control of that issue, not his counsel, he wouldn't be asking to represent himself, so this is a forced decision.³⁷

Judge Burrell and defense counsel had the following colloquy:

The Court:

[I]f I ultimately decide [Kaczynski is competent to stand trial] knowing that he only wants to represent himself because of his dispute with trial counsel over the assertion of the mental status defense—knowing that, I would probably have to allow him to do that, if he's competent. Knowing that he would prefer to be represented by present trial counsel without assertion of that defense, it seems that the Government's position is persuasive. I'm just saying that because you should think about that as trial counsel, because it seems to me that if I find he is competent—and I've already stated that at this very moment I believe he's competent to stand trial—given the scenario I just related, it would seem to me that his present trial counsel should represent him, if that is his desire, without assertion of the defense.

Mr. Denvir:

Your Honor, you're talking about the Government's suggestion is that the Court would order us . . . that we could not present the defense that we feel is called for in a capital case and would have to accede to the Defendant's wish not to present that defense? Is that the suggestion?

The Court:

Yes.

Mr. Denvir:

Then we would have to deal with that.

The Court:

Okay.³⁸

The second issue was Kaczynski's competence to make

37. *Id.* at *8. However, in the only instance in which this type of argument was made, it failed. See *State v. Poindexter*, 318 S.E.2d 329 (N.C. Ct. App. 1984), described at *infra* note 67 and accompanying text.

38. See *Order, United States v. Kaczynski*, 1998 WL 226796, at *14.

decisions about his defense. The United States Supreme Court in *Faretta v. California*³⁹ held that criminal defendants have a constitutional right to represent themselves, but only if they knowingly and intelligently decide to do so:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."⁴⁰

It was agreed that Mr. Kaczynski would have to have a *Faretta* hearing, to determine whether or not he could knowingly and intelligently make the choice to represent himself. Mr. Clymo was brought back to advise Mr. Kaczynski on questions relating to the *Faretta* hearing.

Defense counsel took the position that Kaczynski's inability to endure presentation of the mental status defense was prima facie evidence of his incompetence. Therefore, they argued that any *Faretta* hearing would have to include a psychiatric examination to determine Kaczynski's competence to choose to represent himself.⁴¹ The government responded:

The government has . . . seen no evidence, no facts which would suggest that the defendant is incompetent. However, based on the representation by counsel today that Mr. Kaczynski cannot bear for the defense counsel to present the defense, coupled with the declarations that have been filed previously by the defense experts in this case, I think that the state of the record is as follows: That the defense counsel and their expert's position is that as a result of a mental defect, the defendant is unable to rationally choose between his defenses, his choices, his strategic choices at trial.

That inability is affecting his capacity to keep his present

39. 422 U.S. 806 (1975).

40. *Id.* at 835 (citations omitted). See also ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.3 (1989).

41. *United States v. Kaczynski*, Hearing Transcript, Jan. 8, 1998 <<http://www.unabombertrial.com/transcripts/010898kz.html>> at 11. Judge Burrell disputes defense counsel's position in *Order, United States v. Kaczynski*, 1998 WL 226796, at *9 (E.D. Cal. May 4, 1998). At an earlier point, before the disagreements surfaced, defense counsel thought their client was competent. See *United States v. Kaczynski*, Hearing Transcript, Nov. 21, 1997 <<http://www.unabombertrial.com/transcripts/112197.html>> at 1.

lawyers, which we all recognize would be the best thing for him to do, keep his current lawyers. Given that that's the state of the record, it's the government's view that the safest course is for the court to order the competency hearing based on the representations made by defense counsel today and the declarations that have been previously filed.⁴²

Kaczynski, through Clymo, also objected to defense counsel's characterization of him as incompetent. However, he agreed to a psychiatric examination, as long as it was done locally.⁴³ Presumably, Kaczynski agreed because he knew that it was the only way that he would be allowed to choose to represent himself.

Kaczynski was examined in California by Dr. Sally Johnson. She reported that he was competent. However, she also diagnosed him as suffering from paranoid schizophrenia.⁴⁴ On the basis of Dr. Johnson's report, Kaczynski's defense team stipulated that he was competent to stand trial.⁴⁵

On January 22, Judge Burrell denied Kaczynski's motion to fire his counsel and to represent himself. The court ruled first that the motion was not timely, as it had been made after the jury had impaneled. Second, the court ruled that the motion was not made in good faith, but rather as a tactic to secure delay. Finally, the court refused to exercise its discretion to allow Kaczynski's motion anyway, as to do so "would in effect allow him to use 'the system of criminal justice . . . as an instrument of self-destruction.'"⁴⁶ Later that day, Kaczynski changed his plea to guilty, pursuant to a plea bargain that provided that he would be sentenced to a mandatory term of life imprisonment without possibility of release.⁴⁷ He was sentenced on May 4, 1998.⁴⁸

Note that the court was leaning toward ordering the defense

42. United States v. Kaczynski, Hearing Transcript, Jan. 8, 1998 <<http://www.unabombertrial.com/transcripts/010898kz.html>> at 18.

43. *Id.* at 18, 19.

44. Cynthia Hubert & Denny Walsh, *Kaczynski Competent, Doctor Says*, SACRAMENTO BEE, Jan. 21, 1998, reprinted at <<http://www.unabombertrial.com/archive/012198.02html>>.

45. United States v. Kaczynski, Hearing Transcript, Jan. 20, 1998 <<http://www.unabombertrial.com/transcripts/012098kz.html>> at 1.

46. United States v. Kaczynski, Hearing Transcript, Jan. 22, 1998 <<http://www.unabombertrial.com/transcripts/012298kz.html>> at 12 (citations omitted).

47. *See id.* at 16-38.

48. *See* Amended Judgment in a Criminal Case, United States v. Kaczynski, 1998 WL 226801 (E.D. Cal. May 4, 1998).

to accede to Kaczynski's wishes, to defend him without using the mental status defense.⁴⁹ However, it never got there. Apparently, Dr. Johnson's report convinced the government that obtaining a death penalty would be highly unlikely.⁵⁰ Therefore, they agreed substantially to the same plea bargain which they had rejected before.

What would have happened—what should have happened—had there been no plea bargain? Should the defense team have been ordered to accede to their client's wishes and abandon their best defense? Did the client have the right, or the competence, to make this choice? Did the lawyers have a right to refuse, on the grounds that it would violate their professional oaths to obey?

III. WHO CONTROLS THE DEFENSE?

A. Case Law

The issue of who controls the defense is one of legal ethics. Yet, the cases rarely mention this body of law. Most of the cases involve serious crimes, often capital crimes. These defendants are not terribly concerned with their lawyers' ethics. Rather, they want to get off. Therefore, the litigated cases usually involve claims of ineffective assistance of counsel, rather than violations of the legal ethics laws. Yet, these cases can offer some guidance.

1. Lawyer Accedes to Client's Wishes

In most of the reported cases, the lawyer, although disagreeing in varying amounts of intensity with the client's wishes, ultimately accedes to them. When the lawyer does exactly what the client asks, courts rarely find ineffective assistance of counsel. This result holds whether the client wants to argue in favor of the death penalty,⁵¹ wants to plead

49. It is not clear whether the court would have had authority to make such an order. One would think that, if the court thought that defense counsel were violating applicable rules of professional responsibility, the proper response would have been to report them to the state disciplinary board.

50. See Tamala M. Edwards, *Crazy is as Crazy Does*, TIME, Feb. 2, 1998, at 66; Gordon Witkin & Ilan Greenberg, *End of the Line for the Unabomber*, U.S. NEWS AND WORLD REPORT, Feb. 2, 1998, at 34; Daniel Klaidman & Patricia King, *Suicide Mission*, NEWSWEEK, Jan. 19, 1998, at 22.

51. See *People v. Bloom*, 774 P.2d 698 (Cal. 1989); *People v. Guzman*, 755 P.2d 917

guilty,⁵² wants to reject any plea of not guilty by reason of insanity,⁵³ prefers an all-or-nothing verdict to any compromise,⁵⁴ wants to accept a juror whom his lawyer would peremptorily challenge,⁵⁵ or wants to reject any presentation of mitigating evidence of mental status or family or social history, whether during the guilt phase or the penalty phase.⁵⁶ Moreover, the

(Cal. 1988). In *Gilmore v. Utah*, 429 U.S. 1012 (1976), the defendant was held competent to waive all rights to appeal. No ineffective assistance of counsel claims were considered in this opinion. For a detailed account, see Norman Mailer, *THE EXECUTIONER'S SONG* (1979).

52. See *Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991).

53. See *United States v. Moody*, 763 F. Supp. 589 (M.D. Ga. 1991); *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987); *Foster v. Strickland*, 707 F.2d 1339 (11th Cir. 1983).

54. See *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987).

55. See *State v. Ali*, 407 S.E.2d 183 (N.C. 1991).

56. See *Landford v. Day*, 110 F.3d 1380 (9th Cir. 1996); *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1992); *State v. Tyler*, 553 N.E.2d 576 (Ohio 1990); *Treece v. State*, 547 A.2d 1054 (Md. Ct. App. 1988) (finding defendant was rational in rejecting mental defect defense. Psychiatric evidence that defendant was paranoid, and claimed that he was being watched by the FBI and CIA, and that he had caught an FBI agent in his attic by nailing the attic shut did not mean that he was incompetent to reject a mental defect defense.); *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984).

In *People v. Deere*, 808 P.2d 1181 (Cal. 1991) [*Deere II*]; 710 P.2d 925 (Cal. 1985) [*Deere I*], a lawyer went to heroic lengths to carry out the wishes of his client. Ronald Deere was accused of murdering three people. At first, he pled not guilty, but then changed to a guilty plea. After a psychiatric examination confirmed his competence, the court accepted his plea. He was found guilty of first degree murder in one death, and second degree murder in two others. Deere then waived a jury on the penalty issue. His lawyer refused to call mitigating witnesses, because his client believed that to do so would "cheapen" his relationship with his family and remove "the last vestige of dignity that he has." *Deere II* at 1185. Deere was sentenced to death. The California Supreme Court affirmed his conviction, but reversed the death penalty, due to the lawyer's failure to present mitigating evidence [*Deere I*].

On remand, the lawyer again refused to present mitigating evidence, again at his client's insistence. The trial court held the lawyer in contempt. It sentenced Deere to death. However, it later stayed the death sentence and reversed the contempt order, and appointed an independent investigator and attorney to investigate and present a case of mitigation. Upon hearing that evidence, the court re-sentenced Deere to death. On appeal [*Deere II*], the California Supreme Court rejected the defendant's claim that the lawyer's refusal, on the client's instructions, to present mitigating evidence was ineffective assistance of counsel.

Deere II pointed out that intervening California decisions had already repudiated *Deere I* on the power to impose a presentation of mitigating evidence on an unwilling defendant. See *People v. Bloom*, 774 P.2d 698 (1989); *People v. Lang*, 782 P.2d 627 (1989). In fact, *People v. Lang* made a rare reference to the Rules of Professional Conduct, commenting that such an imposition would violate the lawyer's duty of loyalty to the client.

For commentary on Deere, see Richard A. Zitrin, *Who Really Spoke for Ted Kaczynski?* CONNECTICUT LAW TRIBUNE, Feb. 9, 1998. See generally Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988); Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present*

cases make it clear that all of these choices can be perfectly rational.⁵⁷

It is necessary, however, for the lawyer to investigate the facts. Even in the face of client resistance,⁵⁸ the lawyer must still determine whether or not an insanity plea, or an offer of mental status or family or social history evidence, might be effective.⁵⁹ Having made this determination for herself, the lawyer must then communicate with her client to ensure that the client has the benefit of the lawyer's best advice. In fact, this advice, and especially any disagreement between lawyer and client on such decisions, should be a matter of record.⁶⁰ Moreover, if there is any doubt about the client's competence to make these decisions, then the client's competency must be examined.⁶¹

Mitigating Evidence When the Defendant Advocates Death, 55 TENN. L. REV. 95 (1987).

57. See *Weekley v. Jones*, 76 F.3d 1459 (8th Cir. 1996); *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1992); *United States v. Moody*, 763 F. Supp. 589 (M.D. Ga. 1991); *People v. Bloom*, 774 P.2d 698 (Cal. 1989); *People v. Guzman*, 755 P.2d 917 (Cal. 1988); *Treece v. State*, 547 A.2d 1054 (Ct. App. Md. 1988). *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987); *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987); *Autry v. McCaskle*, 727 F.2d 358 (5th Cir. 1984).

58. See *People v. Perez*, 592 N.E.2d 984 (Ill. 1992). The court cited Andrew Lyon, an expert on death penalty litigation, to the effect that:

[I]t is a very common problem in death penalty cases to have an uncooperative client. Some clients refuse to talk to their attorneys because they are afraid; others refuse to talk in order to protect family or friends.

Id. at 991. See also *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985); *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984). See also Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987); Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988).

59. See *People v. Perez*, 592 N.E.2d 984 (Ill. 1992). In *Perez*, the court found ineffective assistance of counsel for failure to investigate client's mental history and background. Despite defendant's refusal to cooperate, counsel had some information, and could have found more. See also *Brennan v. Blankenship*, 472 F. Supp. 149 (W.D. Va. 1979). However, the client's refusal to cooperate is sometimes taken into account. See *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984).

60. See *Foster v. Strickland*, 707 F.2d 1339, 1344 n.4 (11th Cir. 1983); *Brennan v. Blankenship*, 472 F. Supp. 149 (W.D. Va. 1979). See generally Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323; Gregory G Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Incompetency, Insanity, and Related Issues*, 17 A.L.R.4TH 575 (1981).

61. Compare *Felde v. Blackburn*, 795 F.2d 400 (5th Cir. 1986) with *Mason v. Vasquez*, 5 F.3d 1220 (9th Cir. 1993); *Autry v. McCaskle*, 727 F.2d 358 (5th Cir. 1984); and *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir. 1979). See generally, Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988).

2. *Lawyer Refuses to Accede to Client's Wishes*

Lawyers do not always accede to their clients' wishes. Sometimes, in spite of their clients, the lawyers do what they think is best. A number of these cases involve the decision to enter a plea of not guilty by reason of insanity. As to this issue, the result is relatively clear. As to other issues, it is not.

3. *Not Guilty By Reason of Insanity*

The imposition of a not guilty by reason of insanity plea upon an unwilling defendant is grounds for reversal.⁶² Even the District of Columbia Circuit, which for a while allowed the court to impose such a plea on a defendant, appears to have come into line with other circuits.⁶³ However, the onus is on the defendant to make his objection known.⁶⁴

4. *Other Issues*

a. *Lawyer Wins*

In lawyer-client disagreements on matters other than the plea of not guilty by reason of insanity, the lawyer usually wins, but not always. When the matter in dispute is characterized as tactical or strategic, then the lawyer can have his way.⁶⁵ Courts are especially likely to let the lawyer decide if they suspect that the client intends to commit perjury.⁶⁶

In *State v. Poindexter*,⁶⁷ the client wanted to argue self-defense. His lawyer, however, insisted that challenging the state's identification evidence was a better tactical choice. The client moved for permission to remove his lawyer, and represent

62. See *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994); *Treece v. State*, 547 A.2d 1054 (Ct. App. Md. 1988); *State v. Jones*, 664 P.2d 1216 (Wash. 1983).

63. See *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991); See also Note, *The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection*, 65 MINN. L. REV. 927 (1981); Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980).

64. See *Dean v. Superintendent, Clinton Correctional Facility*, 93 F.3d 58, 62 (2d Cir. 1996).

65. See *Jones v. Barnes*, 463 U.S. 745, 753 (1983) (rejecting rule that appellate counsel must raise all non-frivolous issues requested by client and citing Model Rules 1.2(a)). See also *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980).

66. See *United States v. Attar*, 38 F.3d 727 (4th Cir. 1994); *People v. Guzman*, 755 P.2d 917, 933 (Cal. 1988); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986); *Mulligan v. Kemp*, 771 F.2d 1436, 1444 (11th Cir. 1985).

67. 318 S.E.2d 329, 330-33 (Ct. App. N.C. 1984).

himself pro se. His motion was granted. He was convicted of second degree murder.

On appeal, he claimed that the court had erred by not ordering his lawyer to present the self-defense argument as he requested. As a result, he argued, he was forced to represent himself in order to conduct his defense the way he wanted. Therefore, he was denied effective assistance of counsel. The appellate court disagreed, and commented that the lawyer had the right to make tactical decisions.

Two other cases in which either the court, or the lawyer, overrode the client's wishes both involve interpretations of particular state death penalty statutes. In both *State v. Hightower*,⁶⁸ and *Judy v. State*,⁶⁹ the state statutes mandated automatic review of all death penalties. These statutes were interpreted to preclude a defendant from waiving that review, or from refusing to present evidence in mitigation at the penalty phase.

In *People v. Guzman*,⁷⁰ it is difficult to tell who won the argument—the lawyer or the client. Facing the possible imposition of the death penalty, the lawyer prepared mitigating evidence for the penalty phase, which Guzman refused to let him present.⁷¹ The lawyer tried to withdraw from the case, but the court would not allow him. The lawyer still refused, for moral reasons, to help his client argue in favor of his own death. Guzman insisted on the right to testify on his own behalf. Accordingly, the lawyer had him testify in narrative form. Guzman was sentenced to death.⁷²

Guzman appealed, claiming that the failure of his lawyer to present mitigating evidence, albeit at his insistence, was ineffective assistance of counsel.⁷³ The court disagreed. It noted that, during the defendant's narrative testimony, he had in fact

68. 518 A.2d 482 (Super. Ct. N.J. 1986).

69. 416 N.E.2d 95 (Ind. 1981). In *Judy*, the client notified his appointed counsel to terminate his appeal and cease all efforts. On the other hand, the Indiana statute provided for automatic review of death penalties by the state supreme court pursuant to IND. CODE. § 35-50-2-9(h) (1979). "Counsel asserted in their verified petition that conflicting duties, created by the Code of Professional Responsibility adopted by this Court and the nature of the sentence imposed here, placed them in an 'intolerable dilemma.'" *Id.* at 96.

70. 755 P.2d 917 (Cal. 1988).

71. *See id.* at 924.

72. *See id.* at 921.

73. *See id.* at 945.

mentioned a number of potentially mitigating factors.⁷⁴

b. Client Wins

In only two cases did the client clearly win the argument with the lawyer. In one, *Trimble v. State*,⁷⁵ it was less a matter of the relative authority of client vs. lawyer, and more a matter of lawyer incompetence. In *Trimble*, the client's mother and grandmother observed a conversation in the hallway outside the courtroom during a recess.⁷⁶ In that conversation, the mother of one of the murder victims was seen to give money to one of the state's chief witnesses. The client's trial counsel ignored the conversation, despite his client's requests. On appeal, there was a finding of ineffective assistance of counsel.⁷⁷

*People v. Frierson*⁷⁸ is, perhaps, more interesting. In *Frierson*, the first trial counsel failed to investigate or present a diminished-capacity defense. The conviction was reversed on this ground.⁷⁹

On remand, *Frierson* wanted to present a diminished capacity defense at the guilt/special circumstances phase of his trial. The new lawyer, however, felt that it would be more effectively presented at the penalty phase. The trial court ruled that it was the lawyer's decision. On appeal, the court assumed that the decision to withhold this evidence until the guilt phase was "within the range of conduct that competent counsel might reasonably employ."⁸⁰ However:

Defendant's claim is that even if that is so, the decision whether to present any defense at all at the guilt/special circumstance phase of a capital case is so fundamental, and has such serious consequences for a defendant, that it is one that cannot properly be taken from him by his counsel.⁸¹

The court agreed, and reversed the special circumstances finding and the resultant penalty judgment.⁸²

74. *See id.*

75. 693 S.W.2d 267 (Mo. Ct. App. 1985).

76. *Id.* at 269.

77. *See id.* at 273.

78. 705 P.2d 396 (Cal. 1985).

79. *See People v. Frierson*, 599 P.2d 587 (Cal. 1979).

80. *Frierson*, 705 P.2d at 401.

81. *Id.*

82. *See id.* at 405.

B. Case Law Conclusions

The case law is not totally consistent. However, there is at least substantial authority that deciding whether or not to plead not guilty by reason of insanity is up to the client, while tactical decisions are up to the lawyer. Apparently, it is pretty hard to show ineffective assistance of counsel when the lawyer does what the client asks. For that matter, it is pretty hard to show ineffective assistance even if the lawyer does not do what the client asks. This lack of clear guidance in the case law leaves a fair amount of leeway for the professional responsibility rules and commentators.

C. Model Rules of Professional Conduct

Model Rule 1.2(a) provides, in pertinent part:

A lawyer shall abide by a client's decisions concerning the objectives of the representation . . . and shall consult with the client as to the means by which they are to be pursued In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.⁸³

The first two comments provide:

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1997). See ALSO CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.3 (1986); RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 32-34 (Proposed Final Draft No. 1, 1996). ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Defense Function Standard 4-5.2 (1992) provides:

Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, with the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as to the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.⁸⁴

Clients control the ends of the representation; lawyers control the means. In the case of criminal trials, we know that deciding whether to enter a plea is in the realm of ends, hence within the client's control. Therefore, Judge Burrell was correct when he commented that Kaczynski had the right to decide whether or not to plead not guilty by reason of insanity.⁸⁵ However, outside of a few such specific items, even the Comment to the Model Rules concedes that it can be difficult to tell means from ends, as well it should.

Imagine a confrontation between two control freaks, Andrew and Albert. Each wants to make all the decisions. Finally, they compromise. Andrew will decide on the ends; Albert will determine the means.

"Fine," says Andrew. "I want to travel from New York to Los Angeles."

"That's great," says Albert. "Now I get to decide whether you take a plane, train, bus, or car. I get to decide when you leave, and how much it will cost you. Also . . ."

"Wait a minute," says Andrew. "I think I want to refine my objective. I want to travel from New York to Los Angeles in such a way that I really get to see the country. On my trip, I want to have lots of opportunities to meet new and interesting people . . ."

84. *Id.*, comments 1 and 2.

85. *See supra* note 35 and accompanying text.

"Now we're down to a bus or a train," mutters Albert.

"But that's not all," Andrew continues. "I want to travel to Los Angeles in such a way that I get to visit my elderly aunt in Cleveland. She's in a nursing home, and the only available visiting hours are on Sundays from 2:00 to 4:30 p.m. Also, I insist that any money paid for my transportation be paid to a company whose name begins with 'G.'"

"I think," says Albert, "that you slipped away from defining the ends and got into determining the means."

Surely, Albert is correct. But when did Andrew cross the line?

Perhaps some progress can be made by going behind the rules and speculating as to their rationale. It would appear that, in giving the client control over ends and the lawyer control over means, each party is being given control over what she knows best. If I tell my travel agent that I want to go to New York, the travel agent has no business telling me that I really want to go to Boston. I know where I want to go; the travel agent does not. Since I know my objectives best, I should decide where I'm going.

However, once I have stated where I am going, it hardly makes sense for me to argue with my travel agent about which airfares are the cheapest, or which airlines have the best on-time and safety records on their New York routes. One would hope that the travel agent knows these things better than I. Therefore, in my relationship with the travel agent, I am the expert in the ends—I know where I want to go. The agent is the expert in the means—how best to get there. Accordingly, each should control what she knows best.

From the lawyer's perspective, one would think that the ends of criminal defense representation are to obtain the lightest possible punishment, once the client has decided what to plead. Viewed this way, once Kaczynski pleaded not guilty, it was then up to his lawyers to do what was necessary to get him acquitted, or, short of that, to get him the lightest possible sentence. These matters were clearly within the lawyer's expertise, not the client's. Therefore, the choice of whether or not to present the mental status defense was for his lawyers to make.

Kaczynski, however, would have argued that the ends of the representation could not be stated so simply. Presumably for him, the object of the representation was to obtain the broadest possible exposure for his anti-technology views. Further, the object of the representation was to get him the lightest possible

sentence—preferably something other than the death penalty—without violating the very core of his autonomy by the humiliation of a public psychological examination.

Perhaps his lawyers had far more expertise about how best to get Kaczynski the lightest possible sentence. However, it would seem that Kaczynski would know far better (1) the ins and outs of his anti-technology philosophy, and (2) exactly how unendurable it would be to him, were the mental status defense to be explored in public.⁸⁶

Clearly, to say that the client controls the ends and the lawyer the means is not enough. Moreover, to say that lawyer and client should each control those decisions lying within her expertise is not much better. Areas of expertise can be manipulated as well.

Consider one more travel analogy:

Client:

I want to go to Fantasy Island.

Travel Agent:

To get there, you'll have to take a six-seater, propeller driven airplane. That's the only available service to the island.

Client:

What I really want is a relaxing vacation. Those small propeller planes scare me to death. If I have to fly on them, my vacation will be ruined. If that's the only way to get to Fantasy Island, then I won't go. I'll go to Honolulu instead.

In the client's original formulation, the objective was to go to Fantasy Island, a matter for the client to decide. The propeller plane was in the category of means—within the travel agent's authority and expertise. However, the means were so repugnant to client that they would have destroyed the ends. Accordingly, the client changed her ends.

This story suggests another way to distinguish ends and means. When the means are so repugnant to the client that she is willing to change the ends rather than put up with those means, then it should be her decision to reject those means. In

86. Granted, this argument proves too much. In every conflict, the client always has the option of saying that the option preferred by the lawyer would cause the client emotional distress, and only the client is capable of weighing that distress against other factors. I think, however, that in this case, the nature of Kaczynski's distress could have been buttressed somewhat by the testimony of the mental health professionals. Further, the fact that he was willing to undergo a heightened risk of the death penalty in order to avoid this distress might have given some measurable idea of how much he cared.

effect, those means become ends.

In Kaczynski's case, he wanted to use his trial as a forum for his anti-technology views, and he wanted to live. When confronted with his lawyers' determination to use the mental status defense, he was willing to accept a substantially higher risk of the death penalty in order to avoid that humiliation. I submit that if Kaczynski's statements are believable, they served to re-define his ends to include total avoidance of the mental status defense.

Professor David Luban's article, *Paternalism and the Legal Profession*,⁸⁷ provides further grounds for giving Kaczynski the choice on the mental status defense. Luban defines the terms "values," "wants," and "interests."⁸⁸ "Values" are "those reasons with which the agent most closely identifies—those that form the core of who he is."⁸⁹ They are "definitive of the person who holds them."⁹⁰ "Interests," in contrast, are such things as freedom, money, and health. They are "generalized means to any ultimate ends."⁹¹ Luban states categorically that one cannot justify overriding a person's values in the name of his interests.⁹²

Not being labeled a "sickie" went to the core of who Kaczynski was:

Everyone has a point of pride, a trait held paramount in defining oneself. Some might have looks or will; Ted Kaczynski prized his brilliance. So it was in a sort of self-defense that he refused to allow his mind to be called into question.⁹³

Therefore, for Kaczynski, the rejection of the mental status defense was in the realm of his values. The defense team wanted to override these values in the name of his freedom—his "interests." This, according to Professor Luban, we cannot do.

In this light, the words of the Frierson court resonate. Given who he was and what he valued, the decision on the mental status defense was "so fundamental, and has such serious consequences [for Kaczynski],"⁹⁴ that it had to be his to

87. 1981 WIS. L. REV. 454.

88. *Id.* at 467-472.

89. *Id.* at 470 (citation omitted).

90. *Id.* at 471.

91. *Id.* at 471.

92. *See id.* at 474.

93. Tamala M. Edwards, *Crazy is as Crazy Does*, TIME, Feb. 2, 1998, at 66.

94. *People v. Frierson*, 705 P.2d 396, 401 (Cal. 1985).

make. Had Kaczynski only made the choice early enough, it should have been his choice.

IV. WAS KACZYNSKI COMPETENT TO CHOOSE?

Suppose that it is conceded that the decision on the mental status defense should have been Kaczynski's to make. That concession leads nowhere unless Kaczynski was competent to make the decision. Remember the second comment to Model Rule 1.2:

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14 [Client Under a Disability].⁹⁵

Of course, the galling problem in the Kaczynski case is that, if his wishes had been obeyed and he had never been examined by a mental health professional, then (1) it would have been impossible to present a mental status defense, and (2) it would have been equally impossible ever to determine whether or not he was competent to make that call in the first place.

Rule 1.14 provides:

(a) 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.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.⁹⁶

The comments provide, in part:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions

95. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 2 (1997).

96. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1997). *See also*, Charles W. Wolfram, MODERN LEGAL ETHICS § 4.4 (1986); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 35 (Proposed Final Draft No. 1, 1996).

about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.⁹⁷

Rule 1.14, as others have noted, is not terribly helpful.⁹⁸ However, it does suggest which way to lean. The entire thrust of the Rule is to mandate a normal lawyer-client relationship, even with a disabled client, "as far as reasonably possible." Comment 1 emphasizes that disability is rarely an all or nothing phenomenon, and, to the extent that the client is capable, the client should still be afforded the power to make decisions. Comment 2 re-reemphasizes that the client must still be treated with dignity and respect, and must be treated as a client as much as possible. Comments 3 and 5 mention other aspects relevant to Kaczynski's case—that appointment of a legal representative may be traumatic for the client,⁹⁹ and that

97. *Id.* Comments 1, 2, 3 and 5.

98. See generally Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101 (1994); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *UTAH L. REV.* 515.

99. Much of Rule 1.14 suggests the appointment of a guardian to protect the interests of a totally or partially disabled client. The appointment of Kevin Clymo was

disclosure of the client's disability can adversely affect the client's interests.

Informed by the guidance of the Model Rules, such as it is, it is time to review the evidence. What was the evidence that Kaczynski was incompetent? There was the testimony of the doctors who examined him,¹⁰⁰ plus the letters he wrote to medical facilities in Montana,¹⁰¹ plus the results of a personality test administered while he was an undergraduate student, which showed a predisposition to schizophrenia.¹⁰² There was also the series of crimes themselves.¹⁰³ Then there is the possibility that Kaczynski attempted suicide while in the holding cell.¹⁰⁴

Finally, there is the very fact of his inability to endure a psychological examination, or the raising of a mental status defense. That fact alone, according to his defense team, proved his incompetence.¹⁰⁵ However, this argument takes the form (1) you don't agree with us, (2) we are not crazy, therefore (3) you must be crazy. All definitions of incompetence suffer from circularity; this one is worse than most.¹⁰⁶

On the other hand, there was substantial evidence that Kaczynski was competent. For starters, we have his appearance in the courtroom, as described by Judge Burrell.¹⁰⁷ In addition, we have the very fact of his successful commission of a series of crimes, and his evasion of detection for over a decade.

not, by its terms, pursuant to the Rules of Professional Conduct. Rather, the appointment was made in light of the apparent conflict between the client and his current defense team, and the consequent inability of that defense team to give the client independent advice on issues of representation. Yet, one would think that Mr. Clymo was still performing many of the functions that a guardian or best friend might have performed.

100. See *supra* notes 11-14, 17, 44 and accompanying text.

101. See *supra* note 10 and accompanying text.

102. See Declaration of Karen Bronk Froming, Ph.D. <<http://www.unabombertrial.com/documents/froming111797.html>>.

103. Of course, our entire concept of guilt would fall apart if the commission of crimes, with nothing more, were proof of insanity.

104. See *supra* note 34 and accompanying text. Dr. Johnson, who examined Kaczynski in January, felt that the suicide attempt resulted from a rational preference for death over life in prison. As such, she felt that it was not evidence of incompetence. See Order, United States v. Kaczynski, 1998 WL 226796, at *9 (E.D. Cal. May 4, 1998). Judge Burrell, on the other hand, felt that the suicide attempt was a rational ploy to delay the trial, and, as such, was not evidence of incompetence. *Id.* at *12.

105. See *supra* note 41 and accompanying text.

106. As to the circularity of all tests for incompetency, see Rein, *supra* note 98, at 1118-1132; Luban, *supra* note 87, at 466.

107. See *supra* note 33 and accompanying text.

In addition, there is a definition suggested by Professor David Luban: "All we can reasonably require is that the person be connecting beliefs to real facts by *some* recognizable inferential process—then the mind is not 'diseased in that respect.'"¹⁰⁸ Kaczynski passes this test. He is not the only one who has a profound mistrust of government. In fact, Kaczynski, who was a student during the Vietnam era, probably shares this view with many of his classmates.¹⁰⁹ He is not the only one who fears that technology has gone too far. Consider the environmental movement. Finally, he is far from the only one who has less than complete trust in the medical profession, especially for those in the mental health field. Put these together, and consider that the government, which he did not trust, wanted him to be examined by a psychiatrist or psychologist, whom he did not trust, as part of a process which they hoped would end in his death.¹¹⁰ It should not be surprising that he was somewhat reluctant.

One final aspect of Kaczynski's disability needs to be considered. In the *ER* episode, the woman was suffering from a temporary condition. When she recovered from surgery, she also regained her sanity. Presumably, by then, she was grateful that the surgery was performed.¹¹¹

Kaczynski's case, however, is different. With our current medical knowledge, paranoid schizophrenia is incurable.¹¹² Therefore, if Kaczynski had been forced to submit to a public examination of his mental status in order to keep him out of

108. Luban, *supra* note 87, at 479 (citation omitted). See also Rein, *supra* note 98, at 1141-1142.

109. See William J. Broad, *Campus Turmoil of 60's Reveals Themes Echoed in Unabom Manifesto*, N. Y. TIMES, June 1, 1996, § 1, at 8.

110. The death penalty lurked in the minds of the judge and the lawyers, as well as in the mind of the client. In a discussion about attorney-client privilege matters, Judge Burrell said: "Well, here's the problem I think the defense has. Statements made by Mr. Kaczynski during the proceeding could be used by the Government in its attempt to kill him." *United States v. Kaczynski*, Hearing Transcript, January 20, 1998 <<http://www.unabombertrial.com/transcripts/0120898kz.html>> at 12.

111. Similarly, the philosopher Spinoza, in the heat of the moment, wanted to confront a mob, who had already killed two people. His landlord restrained him, saving his life. After he had calmed down, one would hope that Spinoza would have thanked his landlord. See Luban, *supra* note 87, at 461.

112. Paranoid schizophrenia may be controllable, but it is not curable. See, e.g., *Weekley v. Jones*, 76 F.3d 1459, 1468 (8th Cir. 1996); *United States v. Gallo*, 20 F.3d 7, 9 (1st Cir. 1994); *Johnson v. United States*, 409 F. Supp. 1283, 1294 (M.D. Fla. 1976); David S. Jackson, *Man Behind the Mask*, TIME, Nov. 17, 1997, at 52. See generally Dan Hurley, *Imminent Danger: Schizophrenia*, 27 PSYCHOLOGY TODAY 54 (July 1, 1994), available in 1994 WL 13539775.

prison, there would never have been a time when he would have been thankful. Whatever there was about him that made such a public examination unendurable, that condition will always be there. He will never “get over it.”¹¹³

Kaczynski may have been impaired, but he was perfectly capable of doing many difficult things. The Model Rules clearly contemplate situations in which the client is competent to make some decisions and not others. It advises that we lean over backwards to give the client as much autonomy as we possibly can, even if he is incompetent in some respects. Recent scholarship agrees, and recommends a “client centered” approach.¹¹⁴ All doubts should have been resolved in favor of Kaczynski’s competence to make his own choice about the mental status defense. Happily, they were.

V. DID THE DEFENSE TEAM’S OWN ETHICAL OBLIGATIONS PREVENT THEM FROM DOING WHAT THEIR CLIENT ASKED?

Recall Judy Clarke’s comment to Judge Burrell:

[I]t is the lawyer’s professional obligation to make strategic decisions and present the case in the way that the lawyer professionally believes is accurate and appropriate. And I think to say otherwise to counsel would pit a lawyer against his or her oath, professional oath.¹¹⁵

Within the meaning of the Model Rules, it is assumed that she meant that trying the case without making what she thought was her only decent argument on her client’s behalf would have violated Rule 1.1 on competence, and Rule 1.3 on zeal. Moreover, the disagreement between lawyer and client

113. Luban recognizes this problem, and deals with it, to his own satisfaction. See Luban, *supra* note 87, at 463.

114. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447-1498 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Carl J. Hosticka, *We Don’t Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS 599-610 (1979). See generally DAVID BINDER ET. AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (West 1991).

115. United States v. Kaczynski, Hearing Transcript, January 8, 1998 <<http://www.unabombertrial.com/transcripts/010898kz.html>> at 10. See Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Emperical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1 (1998). See Editorial, *What Competence Must Mean*, WASHINGTON POST, Jan. 21, 1998, at A20.

was so fundamental as to create a conflict within the meaning of Rule 1.7, and a right to withdraw under Rule 1.16. Was she correct?

Assume first that Ms. Clarke was defining the objectives of the representation in terms of an ordinary criminal defense—to get her client off. Seen in this light, how can you defend your client competently when you abandon your best defense before you start? Similarly, how can you represent your client zealously—going all out—if you start the fight with one hand tied behind your back?

It must be remembered, however, that it is the client, not the lawyer, who defines the objectives.¹¹⁶ Clearly, Kaczynski did not want merely to get off. He wanted to live, and he wanted to use the trial as a public forum for his anti-technology views.

If competence is viewed in light of Kaczynski's objectives, the dilemma is redefined. Issues of competence can still be raised. Few law schools teach courses in how to defend criminal cases after the client's best defense has been abandoned. Even fewer provide instruction in how to try political cases, in which the verdict is less important than the public forum. Of course, according to the Model Rules:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.¹¹⁷

One might well ask, study what?¹¹⁸

There is also the question of zeal. Apparently, zeal is less important than it used to be. Under the old Model Code, there was an entire canon entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."¹¹⁹ The following Disciplinary Rule 7-101 was entitled "Representing a

116. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1997). See discussion *supra* at Part III.

117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 2 (1997). There is one case in which a lawyer argued that he could not accept appointment in a case because to do so would violate his obligation to do a competent job. In the particular case, the lawyer's argument was that he would not have enough time to prepare, given the lateness of the appointment. He lost, and was held in contempt. See *United States v. Accetturo*, 842 F.2d 1408 (3d Cir. 1988).

118. It does seem possible that, if the lawyer could not understand the Unabomber Manifesto, she would not be competent to help Kaczynski present his anti-technology views.

119. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981).

Client Zealously.”¹²⁰ Ethical Consideration 7-1 begins “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”¹²¹

In contrast, in the newer Model Rules, zeal moves to the background. It is found, not in the rules themselves, but in the comments. Comment 1 to Rule 1.3, on the subject of diligence, merely provides: “A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”¹²²

Even given the reduced role of zeal in the more recent formulations, it still appears that the defense lawyers’ problem with Kaczynski had more to do with zeal than with competence. The problem was not that the lawyers were not competent to do what Kaczynski requested. Rather, they were not comfortable. Presumably, in their view, standing by and letting their client self-destruct was not what they were trained to do; it was not why they chose to practice law.

Perhaps, it was not so much a violation of our oath; it was a violation of our craft. It was as if one went to a master carpenter, gave him rotten wood, and asked him to build a beautiful table.¹²³ When faced with such a task, zeal is not the emotion that comes to mind.¹²⁴ These concerns, however, do not rise to the level of ethical violations.

The other ethical concerns, it seems, also go to the lawyers’ comfort level. If the lawyers were sufficiently uncomfortable in doing what Kaczynski wanted them to do, then they should have

120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981).

121. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981).

122. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1997).

123. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 1, 117 (1979) for a discussion of the lawyer’s interest in craft.

124. For a similar, frustrating experience for a lawyer, consider the Silo Pruning Hooks case: *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), in which four anti-nuclear activists were given long prison terms for renting jack hammers and doing minimal damage to the concrete caps of missile silos. The defendants declined legal counsel, although they did allow lawyer Henry Stoever to be their advisor. They did not strike anyone from the list of prospective jurors, because, as one of the defendants put it, “All of the potential jurors are our brothers and sisters in Christ, and therefore our peers. We have nothing against them.” Gret Hitt, *Jury Selected in Nuclear Weapons Protest Trial*, UPI, Feb. 19, 1985. Some of the defendants refused to testify in the trial because they considered the judicial process immoral. See *Priest Says Silo Attackers Intended to Disarm Missile*, OMAHA WORLD-HERALD, Feb. 22, 1985, available in 1985 WL 3791722. Yet, in spite of the frustrations, many lawyers were eager to take on Kaczynski’s case. See Richard Price, *Lawyers Eager to Defend Suspect*, USA TODAY, Apr. 9, 1996, available in 1996 WL 2052391.

declined the representation in the first place; or, having mistakenly accepted it, they should have withdrawn.

As to declining the representation in the first place, the Model Rules put very few restrictions on the right of the lawyer to accept or reject clients as she chooses. Things are relatively explicit in the case of appointed counsel. Rule 6.2 provides:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.¹²⁵

Surely, a lawyer who felt uncomfortable about representing Kaczynski could find grounds in Rule 6.2(c) for refusing the appointment.

If the lawyer had already accepted the appointment but later realized her discomfort, she could have cited either Rule 1.7 or 1.16. Model Rule 1.7(b) provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless . . ."¹²⁶ Here, one might argue that a client like Kaczynski was asking the lawyer to do something which was so fundamentally alien to her role as a lawyer that it is materially limited by the lawyer's own self-interest. Comment 2 makes it clear that if a conflict arises, the lawyer must withdraw, and references Rule 1.16.

Of course, one could go directly to Rule 1.16. Rule 1.16(b)(3) provides: "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."¹²⁷

125. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1997). Similarly, EC 2-30 of the Model Code provides in part: "[A] lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client." For arguments for and against the lawyer's obligation to take on unpopular clients and causes, compare Joel Newman, *Representing the Repugnant Client*, 86 CASE AND COMMENT No. 6, 22 (1981), with Duncan Kennedy, *The Responsibility of Lawyers for the Justice of their Causes*, 18 TEXAS TECH. L. REV. 1157 (1987).

126. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997).

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1997).

Given that the objective is defined by Kaczynski, not by the lawyer, it would not have been difficult for the lawyer to assert an imprudent objective under Rule 1.16(b)(3). Note, moreover, that, pursuant to the disjunctive “or” in Rule 1.16(b), they could have withdrawn even if the withdrawal would have had a material adverse effect on the interests of the client. However, Rule 1.16(d) would have required them to make every reasonable effort to mitigate the harm.

The problem, however, is Rule 1.16(c). It points out that, even if the lawyers have good cause for withdrawal, they may not withdraw if the court orders them to continue. Therein lies the dilemma. Kaczynski’s lawyers thought that their client’s objectives were imprudent. However, it was far too late in the proceedings to back out. Judge Burrell’s rulings denying permission to change counsel or to allow self-representation made that clear. If the judge had ordered the lawyers to continue, there would have been no other out.

Acceding to Kaczynski’s wishes would not have violated defense counsel’s professional oath. They would not have been incompetent to do what Kaczynski asked—just uncomfortable. Had they thought of it early enough, they could have declined the representation. Even if they had thought of it just a tad later, they probably could have withdrawn—getting out while the getting was good. However, there was no provision in the Model Rules that would have prohibited them from doing what their client asked.

VI. CONCLUSION

In the real case, Kaczynski’s request to represent himself was denied, *inter alia*, as untimely. Ultimately, a plea bargain was reached. What if Kaczynski had realized his conflict with his lawyers earlier?

Had Kaczynski realized earlier—say, in 1996, that his defense lawyers were determined to raise a mental status defense which he found untenable, he could have fired them. At that point, he should have hired someone, like Tony Serra, who would have been willing to try the case as his client saw fit.

Even in 1996, there was enough evidence to give any lawyer pause about Kaczynski’s competence to make these decisions about his defense. Whatever lawyer Kaczynski retained should have refused to represent him unless Kaczynski submitted to an examination by a mental health professional. Hopefully, that examination would have resolved any doubts about Kaczynski’s

competence to choose his defense. One would hope that Kaczynski, faced with the refusal of most, if not all, lawyers to represent him as he saw fit without such a mental health examination, would have submitted to the examination.

Having certified his competency to choose his defense, Kaczynski, and his chosen lawyer, should have been allowed to conduct the trial as they wished. To the extent that the judge allowed it, the trial should have been a public forum on Kaczynski's anti-technology views. Moreover, there should have been no mental status defense raised, either during the guilt phase or the penalty phase.¹²⁸

There was no way of conducting this trial that would have left all of the parties and commentators completely satisfied. However, faced with a panoply of less than perfect options, conducting the trial as Kaczynski wished was by far the best alternative, in light of three incontrovertible facts:

- (1) It was Kaczynski's crime.
- (2) It was Kaczynski's trial.
- (3) It was Kaczynski's life.

128. See Michael Mello, *Unabom Defense Should Assist and Not Resist*, NATIONAL LAW JOURNAL, Jan. 26, 1998, at A21.