



**New York State Bar Association  
Committee on Professional Ethics**

Opinion 1106 (10/14/16)

**Topic:** Advice on non-legal issues; allocation of authority

**Digest:** An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before asking the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

**Rules:** 1.1(a), 1.2(a), 1.4(a) & (b), 1.6, 2.1

**FACTS**

1. The inquirer is a criminal defense attorney whose clients sometimes have underlying substance abuse issues. The inquirer is concerned that a failure to address the client's substance abuse issues could result in recidivism, or even the client's death.
2. The client may be eligible to participate in a court-sponsored diversion program. In an effort to break the cycle of addiction, criminal activity and recidivism, New York State has instituted judicial diversion programs and has set up drug courts to address the issues emanating from drug abuse.<sup>1</sup> The mission of drug courts is to end the abuse of alcohol and other drugs and related criminal activity. *See* Problem Solving Courts – Drug Treatment Courts – Overview, available at [http://www.nycourts.gov/courts/problem\\_solving/drugcourts/overview.shtml](http://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml). Specifically, pursuant to Criminal Procedure Law Article 216, courts are authorized to divert eligible felony offenders into substance abuse treatment programs. The defense lawyer's

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<sup>1</sup> Drug courts combine drug treatment with ongoing judicial supervision. In this way, drug courts seek to break the cycle of addiction, crime, and repeat incarceration. While practice varies widely from state to state (and county to county), the outlines of the drug court model are that: addicted offenders are linked to treatment; their progress is monitored by a drug court team composed of the judge, attorneys, and program staff; participants interact directly with the judge, who responds to progress and setbacks by providing a range of rewards and sanctions; and successful participants generally have the charges against them dismissed or reduced, while unsuccessful participants are generally convicted and incarcerated. *See* The New York State Drug Court Evaluation – Center for Court Innovation 2003 page ix.

traditional role as zealous advocate for the client may be at odds with the focus of drug courts and diversion programs, which utilize a “nonadversarial, collaborative approach” among the prosecutor, defense attorney, judge and others. *See* National Association of Criminal Defense Lawyers, *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, September 2009 p.30.

3. Often, the defendant may receive two plea offers from the prosecution. One involves diversion to a treatment program, and the other does not involve diversion. The penalty for failure to complete the treatment program successfully may be greater than the sentence offered for conviction without diversion.

4. For purposes of this opinion, we will assume that the procedures detailed in CPL Article 216 regarding the judicial diversion program apply:

- At any time before the entry of a guilty plea or commencement of trial, the court, at the defendant’s request, may order an alcohol and substance abuse evaluation.
- The defendant must, in writing, authorize disclosure of the results of such evaluation to the defense attorney, the prosecutor, the local probation department, the court, and authorized court personnel.
- After receipt of the evaluation, the court may hold a hearing on the issue of whether the defendant should be offered treatment pursuant to Article 216, and, upon completion of such a hearing, will make findings about whether the defendant’s participation in judicial diversion could effectively address the defendant’s substance abuse or dependence.
- Before the court issues an order granting judicial diversion and releasing the defendant into the diversion program, unless an exception applies, the eligible defendant must plead guilty to the charge or charges.
- The defendant must agree on the record or in writing to abide by the release conditions set by the court, which will include participation in a specified period of treatment, and may include periodic court appearances and urinalysis, to enable the court to monitor the defendant’s progress in treatment.
- If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may impose any sentence authorized for the crime for which the defendant has been convicted in accordance with the plea agreement, although the court will consider the extent to which persons who ultimately successfully complete a treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program and may use graduated and appropriate responses or sanctions designed to address inappropriate behaviors. *See* CPL Article 216.

## QUESTIONS

5. Under this backdrop, the inquirer raises several questions:
  - a. May a defense attorney ethically counsel the client regarding the client's drug addiction? In particular, may the defense attorney suggest that the client enter a drug rehabilitation program, even if such participation is not required to resolve the client's criminal case?
  - b. May defense counsel advise a client to request a substance abuse evaluation and enter a rehabilitation program in connection with a court-sponsored diversion program, even if there are negative consequences if the client is not successfully discharged?
  - c. May a defense attorney permit a client to sign a release authorizing a court-supervised program to receive information regarding the client's performance in treatment?

## OPINION

### Rendering advice on non-legal matters, such as drug addiction

6. The initial question is addressed by Rule 2.1 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.1 ("Advisor") reads:

In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation. [Emphasis added.]

7. The Comments to Rule 2.1 provide further guidance. Comment [2] to Rule 2.1 specifically states that "[it] is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."

8. Comment [5] to Rule 2.1 states: "In general, a lawyer is not expected to give advice until asked by the client. However, ... it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

9. A lawyer is not required to give advice on medical or other non-legal matters. However, when rendering "candid advice" as required by Rule 2.1, the lawyer "may" refer to considerations beyond the law. Thus, a lawyer may discuss with the client the client's substance abuse/addiction and provide advice regarding the pros and cons of entering a treatment program. If the lawyer believes that continued substance abuse may lead to adverse legal consequences for the client, such as subsequent charges or arrest, the lawyer should discuss the consequences with the client. See Rule 2.1, Cmt. [5]; Rule 1.4. As advisor, the lawyer may point out the potential

consequences of the client's actions or inaction related to the treatment of the underlying substance abuse, including recidivism and death.

10. This Committee has previously addressed the lawyer's role as advisor and has said that a lawyer's advice need not be confined to purely legal considerations. In N.Y. State 769 (2003), quoting EC 7-8, the Committee said:

A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

11. N.Y. City 2011-2 (2011) also discussed the lawyer's role as advisor, saying: "In providing candid advice, a lawyer should advise the client to consider the costs and benefits [of a course of action], as well as possible alternatives." Opinion 2011-2 added that "lawyers must be cognizant of the various ethical issues...and should advise clients accordingly. The issues may include the compromise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment."

12. In sum, the inquirer ethically may counsel the client regarding the client's drug addiction, including recommending that the client enter a drug rehabilitation program.

#### The Duty to Advise the Client About Diversion Programs

13. If the client has been charged with a drug-related crime and is eligible for a court-sponsored diversion program, then the lawyer must advise the client about the pros and cons of entering such a program. *See* Rule 1.4(a)(2) ("A lawyer shall ... reasonably consult with the client about the means by which the client's objectives are to be accomplished."); Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

14. This mandated consultation requires that the lawyer be familiar with the procedures of the diversion program or drug court, the sanctions that may apply for failure to complete the program, as well as the options and alternatives available to the client, so that the lawyer can explain to the client the options, alternatives, and possible consequences. *See* Rule 1.1(a) ("[t]he lawyer should provide the client with competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; *see also* Rule 1.1, Cmt. [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); *Cf. Padilla v. Kentucky*, 559 U.S. 356 (2010) (lawyer advising a non-U.S. citizen whether to plead guilty to a felony must advise that felony conviction would make client subject to deportation).

15. The objective of most individuals charged with a drug offense may be to avoid a criminal conviction or to minimize or avoid incarceration or other penalties. A diversion program may achieve those objectives. However, one risk of a diversion program (which may include progressive sanctions or incarceration) is that sanctions for violating the terms of the program may be more severe than the penalty offered by the prosecutor for conviction without participation in a diversion program. Thus, entering into a diversion program may conflict with the client's stated objective of minimizing penalties. The attorney must therefore advise the client of the nature of the drug court or diversion program, the consequences of abiding or failing to abide by the rules, and how participation in a diversion program will affect the client's interests. In addition, the lawyer should provide information and advice on alternative courses of action, including legal and treatment alternatives available outside of the drug court program, the opportunity to plea bargain, and the right to go to trial. The lawyer should then discuss these options with the client.

16. The inquirer asks if it is ethical to recommend a diversion program that would include the imposition of sanctions against the lawyer's client. If the lawyer believes there is a reasonable possibility that the client will succeed in the rehabilitation program, the lawyer may not only explain but may actually recommend a rehabilitation program even though the program could result in the imposition of harsh sanctions against the client if the client fails in the program.

#### Determining Client's Best Interest

17. The ultimate decision whether to enter a program with sanctions, to which the client will be subject if the client violates the terms of the program, rests with the client. Rule 1.2(a) states:

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. 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.

18. Comment [1] to Rule 1.2 states: "Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Once the lawyer presents the relevant considerations and alternatives pursuant to Rule 1.4 and the client makes a decision as to the desired course of action, Rule 1.2 compels the lawyer to pursue the client's stated objective.

19. As this Committee stated in N.Y. State 1037 (2014), "Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the 'objectives' of a representation, and to consult with the client as to the 'means' by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means

by which the client's objectives are to be accomplished.” Thus, the lawyer must sufficiently explain a matter to a client so that the client can make informed decisions.

20. Where the sanctions for failing the rehabilitation program may be more severe than the criminal penalties offered to the client for pleading guilty to a drug charge, the client may prefer a criminal penalty rather than being monitored for upwards of a year in a drug treatment program. Even if the lawyer believes it would be in the ‘best interests of the client’ to obtain treatment for addiction, the decision is not the lawyer’s to make. Under Rule 1.2(a), a lawyer must abide by the client’s decision concerning the objectives of representation, and, in a criminal case, must abide by the client’s decision (after consultation with the lawyer) as to the “plea to be entered, whether to waive jury trial and whether the client will testify.” Once the client makes his or her choice, whether it be to attend a treatment program or to go through the traditional criminal justice system, the lawyer must abide by that decision.

### Confidentiality

21. Typically, as a condition of entry into a diversion program, the client is required to consent to the release of health and treatment information to the judge, attorneys and other personnel of the court.<sup>2</sup> This treatment and monitoring information raises confidentiality concerns.

22. Rule 1.6 generally bars a lawyer from knowingly revealing “confidential information” unless the client gives “informed consent.” *See* Rule 1.6(a)(1). The Rule defines “confidential information” as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential.” The client’s treatment information would be “confidential information,” as it is likely to be embarrassing or detrimental to the client if disclosed. Although it would not be the lawyer who discloses it, by recommending that the client agree to be diverted to a drug program, the lawyer is in effect asking the client’s consent to the disclosure of confidential information. Thus, the defense lawyer must counsel the client on how those disclosures could undermine the attorney client privilege or otherwise be detrimental to the client, and must ensure that the client has enough information to give informed consent before executing confidentiality waiver forms.<sup>3</sup>

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<sup>2</sup> Whether the contract or release signed by the client complies with the Health Insurance Portability and Accountability Act of 1997 (“HIPAA”), which prohibits release of health information by certain agencies, and whether the contract or release complies with 42 CFR Part 2, which prohibits the release of alcohol or drug use information, is a matter outside the jurisdiction of this committee – but pursuant to Rule 1.4, a lawyer advising a client about a drug rehabilitation program, whether in response to criminal charges or otherwise, should counsel the client about the client’s rights under those laws.

<sup>3</sup>*See* Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH U.L.Q. 1205, 1289-1290 (1998) (“[I]f the choice to enter treatment is to be genuine, defendants must be helped to understand the potential costs and benefits involved, including the potentially harmful consequences that can result from the disclosure to judges or prosecutors of personal and sometimes

23. The lawyer, where possible, should also seek to limit the scope of the release, such as specifying the persons to whom information will be provided, the uses to which such disclosures may be put, the nature of the information that will be disclosed and the time period in which disclosures may be made. See also N.Y. State 1059 (2015) (lawyers for clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases where the clients give voluntary, informed consent to the disclosure). Whether the lawyer should recommend the client to sign a release for the court/attorneys to receive the client's treatment information depends on the client's stated objectives.

#### Other Considerations

24. Finally, whether, the plea agreement signed by the client as a condition for diversion may be used as evidence against the client in future criminal or civil proceedings is an evidentiary question that is beyond the jurisdiction of this committee.

#### **CONCLUSION**

25. An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before requesting the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

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incriminating information gained in the course of substance abuse treatment. Defendants must be informed of the considerable benefits in terms of confidentiality to which defendants are entitled if they enter treatment on their own without mandate from the criminal justice system. In other words, a genuine choice with respect to the waiver of confidentiality requires that defendants be informed of the unusually generous privacy protections already in place, which their consent will extinguish.”)