

## At an Impasse Again

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Twenty-five years ago the North Carolina Supreme Court departed from national standards on attorney-client decision-making and gave clients greater control over the direction of their case, including trial strategy and tactics. Since then, the North Carolina courts have sorted through various matters on which attorneys and clients have disagreed. A recent decision, [State v. Ward](#) (Nov. 1, 2016), applies and perhaps expands one of the exceptions to client control over the case.

**Background.** The American Bar Association (ABA) standards state that “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” [ABA Standards for Criminal Justice: Prosecution and Defense Function](#), Standard 4-5.2(a) (3d ed. 1993). With the advice of counsel, the accused decides certain major matters, such as whether to accept a plea bargain, whether to waive a jury trial, and whether to testify. Strategic or tactical decisions—such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, and what trial motions to make—are defense counsel’s decisions, after consulting with the client. See ABA Standard 4-5.2(b).

In *State v. Ali*, 329 N.C. 394 (1991), the North Carolina Supreme Court cited the ABA standards with approval but, based on its view that an attorney is the client’s agent, the court took the position that ultimately the attorney must carry out the client’s wishes. Although tactical decisions normally are for the attorney to make, “when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client’s wishes must control.” *Id.* at 404.

In *Ali*, the court applied this rule to whether to accept or strike a juror, holding that the client makes the call if the attorney and client reach an impasse. Later decisions have applied this rule to other trial decisions, such as whether to present mitigating evidence on a client’s behalf. See, e.g., *State v. Groom*, 353 N.C. 50, 84–86 (2000); see also Jessica Smith, [Absolute Impasse](#), North Carolina Superior Court Judges’ Benchbook (Nov. 2011).

*Ali* and subsequent cases have recognized two main exceptions to this rule. Even if an attorney and client have reached an absolute impasse, an attorney is not required to carry out an unlawful act. Nor must an attorney assert a frivolous or unsupported claim. The court of appeals in *Ward* addressed the latter exception.

**The charges and evidence.** The defendant in *Ward* was charged with two counts of statutory rape of a person 13, 14, or 15 years old and two counts of indecent liberties. He was convicted of all charges and received consecutive sentences on the statutory rape charges, with the indecent liberties charges consolidated for sentencing.

The evidence showed that Ward was a 40-year old man who, through Facebook, invited a 14-year old girl, Rebecca (a pseudonym to protect her identity), to a modeling photo shoot. Rebecca told her parents that she was going to the library, but then met Ward at a local restaurant. Ward admitted that he drove her to his motel room, gave her grape juice spiked with vodka, and took nude photos of her. Rebecca also testified that Ward had sexual intercourse with her two times (and engaged in an oral sex act with her, which apparently was not charged). Ward denied having sex with her. After three or four hours at the motel, Ward drove Rebecca back to the library. During this time, Rebecca’s parents unsuccessfully tried to contact her numerous times on her cell phone. Over the course of the night after

returning home, Rebecca eventually disclosed to her parents what had happened. The next day they took her to the hospital, which collected specimens for a rape kit. Ward submitted to a cheek scraping for collection of his DNA.

In addition to Rebecca, the investigating officer, and the examining nurse at the hospital, the State called as its last witness the DNA analyst who analyzed the specimens. Qualified as an expert, the analyst gave the opinion that Ward's DNA matched the DNA from the rape kit and that the probability of another person being a match was 1 in 2.54 quadrillion.

**The impasse.** Before the DNA analyst testified, the trial court heard ex parte arguments, outside the presence of the jury and prosecutor, from Ward and his trial counsel about an impasse between them over a line of questioning for cross-examination. In discovery, the State had disclosed that there had been contamination in a freezer in the lab that did the analysis—that mold had been found in the freezer and apparently near and on some DNA samples. The defendant advised the trial judge that he wanted his counsel to cross-examine the DNA analyst about the mold in an effort to raise a reasonable doubt about the evidence. Defense counsel advised the judge that he did not see any indication that the mold affected the DNA analysis.

The trial judge ruled that trial counsel was not required to cross-examine the DNA analyst about the mold, stating that "raising an issue that is not an issue . . . when you know it's not an issue is improper." The court of appeals agreed, stating that the proposed challenge to the DNA analysis was "not a challenge rooted in relevant facts" and counsel was not required to pursue a line of questioning "to elicit irrelevant facts." Slip Op. at 9–10.

**Ward and prior law.** The courts have held that trial counsel is not required to take an unlawful action requested by a client. See *State v. Williams*, 191 N.C. App. 96 (2008) (holding that counsel was not required to engage in racially discriminatory jury selection). The court in *Ward* did not rely on this ground in reaching its decision.

In *State v. Jones*, 220 N.C. App. 392 (2012), the court held further that trial counsel is not required to assert frivolous or unsupported claims. The defendant in *Jones* wanted his attorneys to assert that prior defense counsel and a private investigator had conspired with the prosecutor and police to frame the defendant. Before moving to withdraw, one attorney advised the trial judge that the claim had no merit; a subsequent attorney advised the trial judge that he was certain that none of these people had done anything improper. The court concluded that the *Ali* line of cases did not require counsel to comply with the client's wishes. Further, asserting a frivolous or unsupported claim would violate an attorney's professional ethics—namely, the obligation not to assert an issue "unless there is a basis in law or fact for doing so that is not frivolous." *Jones*, 220 N.C. App. at 395, quoting [N.C. State Bar Rev. R. Prof. Conduct 3.1](#).

*Ward* relied on this rationale in reaching its decision, holding that counsel is not required to assert and may even be ethically barred from asserting frivolous or unsupported claims. The facts of *Ward* raise the possibility that the decision may go further than *Jones* and give counsel more leeway over tactical decisions. In *Jones*, the attorneys took the position that no evidence supported the defendant's conspiracy claims. In *Ward*, there was evidence of contamination, but the court found that Ward's claim that the contamination may have affected the DNA analysis wasn't rooted in "relevant facts."

The line remains murky between frivolous claims and claims viewed by counsel as unwise or counterproductive. The Rules of Professional Conduct do not resolve the issue. Rule 3.1 states that counsel may not assert a frivolous claim, but it also states that a lawyer for a defendant in a criminal case "may nevertheless so defend the proceeding as to require that every element of the case be established."

If counsel reaches an absolute impasse with a client over trial strategy and counsel does not wish to follow the client's wishes, counsel must bring the matter to the trial judge's attention. The trial judge then decides whether the lawyer's or client's position controls. See *State v. Freeman*, 202 N.C. App. 740 (2010) (reversing for trial judge's failure to determine whether counsel had to comply with client's decision to strike juror).