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# The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant

JAMES A. COHEN\*

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## I. INTRODUCTION

The downtown branch of Citibank was robbed. The robber produced a note stating "Gemmie all the money silver too, or I'll hurt you." Shortly after the robbery, Robert Harris was found hiding behind a truck with dye on his hands and clothes (banks often conceal an exploding dye pack within a package containing a small amount of cash to make apprehension and identification of bank robbers easier). Harris was charged with bank robbery and assigned counsel.

While exploring possible defenses and other options with defense counsel, Harris explained that he was the "look out" and that "John" actually went inside the bank. It was John's idea to rob the bank because they needed the money. Harris' lawyer told him that the FBI's report indicated that Harris was apprehended hiding near the bank, that there was no one else around, and that the handwriting on the note was not Harris'. Harris confessed that John wrote the note before disappearing from the scene, but that John would return. Harris also expressed his wish to plead guilty because he was merely the look out, and that John had told him that if Harris got caught, he should plead guilty. Harris' attorney explained that pleading guilty to bank robbery could result in a lengthy jail sentence. This was especially probable because the judge assigned to the case was notorious for imposing lengthy sentences. This probability did not matter to Harris because he believed he would not spend a long time in jail. After ensuring that no one but his lawyer was listening, he proceeded to tell an extraordinary story.

Harris explained that he witnessed the planning of the assassination of President Kennedy and had been pursued by the conspirators, the government, or both, ever since. He believed he knew the identity of at least one of his pursuers—John, the same person with whom Harris claimed to be involved in the robbery. Harris did not know John's last name and could not positively identify the other conspirators; he thought they might work for the government, but he was not sure. He said that periodic conversations with John indicated that John might know where the conspirators could be found, but refused to disclose additional information about the conspiracy. The defense attorney tried to determine whether "John" really existed, and if so, his whereabouts. Harris, saying he did not want to get John "in trouble," refused to offer any other information about John.

When asked by his attorney why he thought he would not spend a long time in prison, Harris replied that if the government was not involved in the assassination conspiracy, it would quickly release him from jail because he was the only person who could identify and locate the conspirators. Alternatively, if the government did participate in the

conspiracy, he would be killed in prison. Thus, the length of the prison sentence was of no consequence. Harris instructed his attorney not to tell anyone of their conversation.

After an investigation, the defense attorney could not confirm the existence of "John." Neither the FBI agents who arrested Harris nor the people present at the bank knew that anyone other than Harris was involved in the robbery. They insisted that Harris had acted alone. Harris' sister (the only family he had) said that Harris once had a friend named "John" many years ago, but that she did not know how to locate him because he had been in and out of jail. Being several years younger than Harris and having been out of touch with her brother for many years, the sister was unable to accurately report on his childhood or provide helpful information.

With Harris' consent and without disclosing her client's statements, defense counsel retained a forensic psychiatrist to examine Harris. However, during the examination, Harris did not discuss the conspiracy or "John." After discussing the consequences of being found incompetent with his attorney, Harris said he did not want to be in a "loony bin." The psychiatrist reported to the court that Harris understood the charges; understood the roles of the judge, prosecutor, defense counsel, and jury; understood his rights; comprehended the consequences of being convicted; and that Harris wanted to plead guilty because he was guilty. The psychiatrist found Harris competent. Thus, the court, having no additional information on which to base a contrary conclusion, confirmed the expert's report.

This example, neither fictional nor extremely unusual, illustrates the kind of information that may be possessed solely by defense counsel. It further exemplifies the potentially harmful consequences of non-disclosure, and the difficulties faced by criminal defense counsel representing clients such as Harris.<sup>1</sup>

Attorneys who represent possibly incompetent defendants charged with criminal conduct face difficult ethical issues, implicating professional duties of loyalty, zealous representation, and confidentiality—as an ethical question and as a matter of the law of evidence. The principles of agency underlying the attorney-client relationship are also implicated when the defendant's capacity is in doubt. In the ordinary criminal case, the client has at least implicitly authorized his lawyer's

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1. This Article focuses on competence in criminal cases because such situations permit examination of the attorney-client relationship in a discrete setting. While this Article concentrates on the criminal defendant, there are important similarities to the attorney's role in representing impaired clients in civil cases, particularly those in which the state is the plaintiff.

conduct.<sup>2</sup> But if the defendant is impaired, the client may not have the mental capacity to authorize the attorney's actions.<sup>3</sup>

Defense counsel representing the possibly incompetent criminal defendant will often be the only one with relevant information about her client's incapacity. This information, related in confidence, may suggest that the client has difficulty in rationally understanding the charges against him and cannot assist his counsel.<sup>4</sup> Under current rules, limited options are available to the defense attorney. She is required to alert the court to the possibility that her client is incompetent,<sup>5</sup> but the attorney-client privilege, ethical rules,<sup>6</sup> and the criminal defense attorney's role, as presently understood, do not allow the attorney to disclose her client's confidences.<sup>7</sup> This prohibition results in trials or in guilty pleas by defendants who may not be competent to proceed, thus, violating due process.<sup>8</sup> Such an outcome is contrary to the fundamental values of justice in our criminal adversary system.

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2. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 38, 39 (Proposed Final Draft No. 1, 1996). See also RESTATEMENT (SECOND) OF AGENCY §§ 8, 20-21 (1958).

3. RESTATEMENT (SECOND) OF AGENCY § 122 (1958); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 (1996) ("Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent . . .") (citing *In re Houts*, 499 P.2d 1276 (1972)) [hereinafter ABA Formal Op. 96-404].

4. Clients who function at some level while having difficulty rationally understanding and assisting defense counsel, which suggests incompetence, are the focus of this article. Representation of these clients may pose more serious ethical issues than the representation of indisputably incompetent clients. See Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 31 UTAH L. REV. 515, 519 n.17 (1987) (noting that in civil matters involving plainly nonfunctioning individuals, the attorney-client relationship may be established through a proper proxy consent or a court order).

5. See *infra* Part II.

6. The phrase "ethical rules" refers jointly to the ABA's Model Rules of Professional Conduct and the Model Code of Professional Responsibility when their individual differences are not relevant. The Model Rules, sometimes with modifications, has been adopted in thirty-eight states and the District of Columbia. The Model Code is in force in fewer than fifteen states. Many of the Model Rules, however, closely parallel their counterparts in the Model Code.

7. See *infra* Part IV. Recently, the Committee on Professional Responsibility of the Association of the Bar of the City of New York issued a report, *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, which recommends the addition of a new disciplinary rule that would permit attorneys to protect a client whom the lawyer reasonably believes "cannot adequately" act in his own interest. See Comm. on Professional Responsibility, *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, 52 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 34, 42-43 (1997) [hereinafter *A Delicate Balance*]. The Committee further urges the approval of a new subdivision to Model Code DR 4-101 that would permit attorneys to reveal "confidences and secrets to the extent necessary to seek judicial or professional assistance for a client whom the attorney reasonably believes cannot act in the client's own best interest . . ." *Id.* at 44. While the report recognized the importance of permitting disclosure of client confidences, by addressing only the ethical rule and not the attorney-client privilege, it did not go far enough.

8. See *infra* notes 285-94 and accompanying text.

This Article argues that the importance of competence to the proper functioning of the adversary system requires that the criminal defense attorney be permitted to disclose client statements for the purpose of determining incompetence. Part II reviews *Medina v. California*,<sup>9</sup> in which the Supreme Court suggested that a criminal defense attorney could testify about a client's competency at competency hearings. Part III explores the legal standard of competency, its application to the criminal defendant, and the elusiveness of the concept of rationality. Part IV examines the attorney-client relationship. Part V discusses the attorney-client privilege and the ethical rules relative to competency proceedings. Finally, Part VI argues that an exception to the attorney-client privilege and the ethical rules is warranted in order to permit the criminal defense attorney to disclose client confidences which impact the client's competence and explores the implications of this exception.

## II. THE IMPORTANCE OF THE CRIMINAL DEFENSE ATTORNEY TO THE COMPETENCY DETERMINATION

Courts and attorneys regularly confront difficult problems concerning possibly incompetent criminal defendants.<sup>10</sup> Conflicts arise between client competency, which is indispensable to the criminal justice system,<sup>11</sup> and the rules requiring confidentiality, loyalty, and zealous representation—essential features of our adversary system. The importance of not prosecuting incompetent defendants is pitted against the ethical rules and the attorney-client privilege. Therefore, preventing disclosure of client confidences evidencing incompetence could result in the conviction of an incompetent defendant.

### A. *Medina v. California*

Traditional notions of confidentiality and perceptions of the role of the criminal defense attorney have presented obstacles to defense counsel participating in competency proceedings. Yet, *Medina v. California*<sup>12</sup> signaled the prospect of significant changes in the role of attorneys representing the possibly incompetent criminal defendant, the parame-

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9. 505 U.S. 437 (1992).

10. One study indicated that defense counsel in felony cases doubted their client's competence in 14.8% of their cases and referred 8.2% of their clients for evaluation. Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385, 392 (1992). In a subsequent study, it was found that attorneys doubted their client's competence in about 10% of the cases. Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 LAW & HUM. BEHAV. 437, 450 (1994).

11. See *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 1376 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975).

12. 505 U.S. 437 (1992) (holding that due process was not violated by a state statute that

ters of the attorney-client privilege in such cases, and the ethical rules implicated. Justice Kennedy, writing for the Court, said:

Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.<sup>13</sup>

Suggesting that the defense attorney has "the best-informed view"<sup>14</sup> of her client's competence is intriguing. It offers an outlet for the attorney's views, including testimony of facts and opinions relevant to the client's competence. The significance of Justice Kennedy's comment is underscored by the context in which it was made. The Court decided that placing the burden of proving incompetence to stand trial on the defendant did not violate due process.<sup>15</sup> Thus, counsel raising the competency issue on behalf of her client has the burden of proving it.

Prior cases provide support for *Medina's* suggestion that the defense attorney's role may differ when the issue is competence. Included as dictum, in *United States v. David*, Chief Judge Bazelon stated:

This court recognizes that in making a competency determination it may be very useful for the trial judge to question both the defendant and his counsel . . . . Thus, counsel's first-hand evaluation of a defendant's ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency.<sup>16</sup>

In *United States ex rel. Roth v. Zelker*,<sup>17</sup> the Second Circuit held that the opinions of three experienced defense attorneys that the defend-

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placed the burden of proving incompetency on the moving party even if that party is the defendant).

13. *Id.* at 450 (citing *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975)); *see also* *United States ex rel. Roth v. Zelker*, 455 F.2d 1105 (2d Cir. 1972) (holding that defense counsel's opinion of his client's capacity to understand and cooperate in the proceedings is significant and probative).

14. *Medina*, 505 U.S. at 450.

15. *Id.* at 446-48. *Medina* consented to putting his competency in issue. However, since the prosecution did not raise the issue of competence nor try to elicit testimony from defense counsel, the Court did not address these issues. Also, significantly absent from the Court's analysis was the situation wherein counsel and client disagree on the client's competence.

16. *United States v. David*, 511 F.2d 355, 360 n.10 (D.C. Cir. 1975) (footnote omitted) ("Judicial questioning of the accused and his trial counsel may be of special use in revealing whether the defendant is able to assist in the defense of his case.") (citing *Cooper v. United States*, 337 F.2d 538, 539 n.4 (D.C. Cir. 1964) (Wright, J., concurring)). These cases do not address the extent to which either the attorney's or the defendant's statements could be used after the competency determination. *See infra* notes 280-96 and accompanying text.

17. 455 F.2d 1105 (2d Cir. 1972).

ant was competent, offered in conjunction with the guilty plea, provided a sufficient basis to obviate the need for a competency hearing. As stated by the court, “[t]he opinion of a defendant’s attorney as to his ability to understand the nature of the proceedings and to cooperate in the preparation of his defense, is indeed significant and probative.”<sup>18</sup>

The dissent in *Medina*<sup>19</sup> recognized potential obstacles to defense counsel’s participation in the competency hearing. The dissent suggested that defense counsel would hesitate to participate due to concerns about violating the attorney-client privilege or other ethical rules, such as barring counsel from becoming a witness adverse to her client.<sup>20</sup> Judicial skepticism of the attorney’s testimony, presumably based on the duty of loyalty to the client,<sup>21</sup> was also cited as a reason counsel would not participate or might be an ineffective witness.<sup>22</sup>

Notwithstanding these concerns, recognizing the importance of the defense attorney in the competency determination has opened the door to an untraditional role for counsel. This role is consistent with the attorney’s duty as an “officer of the court,”<sup>23</sup> as well as to elementary principles of agency, which forms the basis of the attorney-client relationship.<sup>24</sup> However, the role suggested by the Court may be inconsis-

18. *Id.* at 1108. See also *United States ex rel. Mireles v. Greer*, 736 F.2d 1160, 1165 (7th Cir. 1984) (holding that defense counsel’s opinion as to the defendant’s ability to understand proceedings should be considered by the court); *United States ex rel. Rivera v. Franzen*, 692 F.2d 491, 500 (7th Cir. 1982) (holding that defense counsel is in a better position than other participants to evaluate his client’s ability to comprehend the proceedings); MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT 80-82 (1968); David E. Bennett, Comment, *Competency to Stand Trial: A Call for Reform*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 569, 574-78 (1968).

19. Justice Blackmun was joined by Justice Stevens in the dissent.

20. See *Medina*, 505 U.S. at 465-66 (citing ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8(b), commentary at 209, 212-13 (1989)).

21. See, e.g., *McKinney v. State*, 566 P.2d 653, 660 (Alaska 1977). *McKinney* held that defense counsel’s assessment of competency should be accorded great weight only if counsel opined that the client was competent. If the attorney concluded that the client was incompetent, although it may have been relevant, was not dispositive because “[a]n attorney’s duty as an advocate will often require him to present those arguments on behalf of his client . . .” *Id.*

22. See *Medina*, 505 U.S. at 466 (suggesting that defense counsel’s testimony might be discounted due to its “self-interested nature”). See also Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 72-73 (public defenders raising a competency defense might be perceived as being motivated by selfish reasons because they lack experience and resources, and have high case loads). Interestingly, the dissent in *Medina* focused on the defense attorney’s likely concerns, which may cause her to choose not to participate, rather than focusing on whether the attorney-client privilege or the ethical rules would act to bar the attorney’s testimony. *Medina*, 505 U.S. at 465-66.

23. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8(b), commentary at 209, 212-13 (1989). See also *infra* Part IV.B.

24. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 26 & cmt. d; RESTATEMENT (SECOND) OF AGENCY § 20; see also *infra* notes 145, 151 and accompanying text.



tent with the lawyer's ethical duties of loyalty, zealouslyness, and confidentiality, and may potentially violate the attorney-client privilege, creating a serious conflict for defense counsel.<sup>25</sup>

### B. *The Role of Defense Counsel*

Historically, the role of defense counsel in the competency process has been limited.<sup>26</sup> Counsel is obligated to bring concerns about her client's competency to the attention of the court whenever they occur.<sup>27</sup> However, the substance of the notice has been proscribed by traditional notions of the attorney-client privilege, ethical rules, and the conventional conception of the role of the criminal defense attorney.<sup>28</sup>

Although defense counsel may possess uniquely important information about the defendant's competence, unavailable from any other

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25. See *infra* Parts III.A and III.B.

26. Initially, courts must ascertain whether the attorney-client relationship exists. Neither the attorney-client privilege nor the confidentiality provisions of the ethical rules precludes inquiry into whether a genuine relationship exists. The trial judge has an independent obligation to conduct a competency inquiry when sufficient doubt about the defendant's competence exists. See *Pate v. Robinson*, 383 U.S. 375, 385 (1966). The importance of accurately determining competency of the defendant requires courts to conduct a full inquiry into the relationship between the defendant and his attorney. See William T. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 62 (1977).

27. See generally *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Youtsey v. United States*, 97 F. 937, 940-41 (6th Cir. 1899); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 and commentary at 180. *But see Uphoff*, *supra* note 22, at 74 (suggesting that in close cases, if the attorney's goals are consistent with the client's, the attorney need not raise the issue of incompetency); DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY* 37 (1996) ("[I]f a criminal defendant of doubtful competence expresses the choice to plead guilty or stand trial and counsel agrees that this election would be in the defendant's best interests, the defendant should be permitted to make the choice."). *Id.* at 43. ("When counsel disagrees . . . the defendant's competency should become the subject of inquiry.") *Id.* at n.137; Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 564-65 (1993). The attorney-client privilege cannot bar defense attorneys from notifying courts of competency problems as long as client confidences are not revealed. See *infra* notes 265-69 and accompanying text. And the ethical rules should not bar the notice for the reasons discussed *infra* Part VI.B.

28. See *infra* Part IV.

source,<sup>29</sup> she has been largely ignored in the competency process.<sup>30</sup> The defense lawyer, unlike the mental health expert, judge, or prosecutor, observes the client in the context of the particular facts and law of the case and, thus, is in a position to know the extent to which the client can rationally understand and cooperate. As a result, defense counsel is aware of communication and cooperation problems which could interfere with developing and presenting a defense.<sup>31</sup> The defense attorney is also familiar with the prosecution's evidence (in varying degrees depending on the jurisdiction and stage of the proceedings),<sup>32</sup> the law relevant to the case, and venue-specific idiosyncrasies.

Judicial and prosecutorial contacts with the defendant are fleeting. They are limited to court appearances which, other than trial or hearings,<sup>33</sup> are usually short and vary in frequency among the jurisdictions. Court appearances also tend to be formal, and criminal defendants are seldom asked to participate or testify even at trial or hearings. Other than guilty pleas, during which defendants commonly provide monosyllabic answers (yes or no) and a brief statement of facts making out the crime,<sup>34</sup> the judge's and prosecutor's first-hand knowledge of the defendant is limited to observations in the antiseptic environment of the

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29. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7-4.8 and accompanying commentary at 211-12 (observing that the defendant's ability to consult with defense counsel is at the heart of the competency standard and defense counsel may be the most important witness on that issue. "A defense attorney not only is in close and continuing communication with a client, but he or she also knows the extent to which presentation of substantive and factual defenses may turn on the client's ability to understand them and assist counsel in advancing them."). See also *Medina v. California*, 505 U.S. 437, 450 (1992) ("[D]efense counsel will often have the best-informed view of the defendant's ability to participate in his defense."); *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975) (noting the importance of defense counsel's evaluation of the defendant's competence); *Cooper v. United States*, 337 F.2d 538, 539 n.4 (D.C. Cir. 1964) (suggesting same).

30. See *Bishop v. Superior Court*, 724 P.2d 23, 27 (1986). See also Pizzi, *supra* note 26, at 27. Professor Pizzi remarked:

For practical reasons, the key to the competency issue is the defense attorney. The defense attorney has the most exposure to his client, and, unlike the court or prosecutor, he witnesses his client's behavior on various occasions and in various settings and circumstances. Given the test for incompetency, the importance of the defense attorney is not surprising; he generally has the best opportunity to notice any defects in the defendant's ability to consult with his lawyer.

*Id.* (footnote omitted).

31. See Paul A. Chernoff & William G. Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505, 517 (1972); Uphoff, *supra* note 22, at 95 ("It is defense counsel who is best able to assess the strengths and weaknesses of the defendant's case and the need for and ability of the defendant to assist counsel."); Pizzi, *supra* note 26, at 27, 58-59.

32. See, e.g., FED. R. CRIM. P. 16(a) (1997).

33. See Uphoff, *supra* note 22, at 95 ("[I]t is the defense lawyer, not the trial judge, who is in the best position to know the client's options and desires.").

34. See, e.g., FED. R. CRIM. P. 11(c).

courtroom.<sup>35</sup>

Although uniquely informed, there may be reason to question the defense attorney's actual performance. Professor Michael Perlin has described defense counsel's performance in representing the mentally disabled as "grossly inadequate,"<sup>36</sup> in part because defense counsel are usually not "conversant with psychiatric and psychological principles."<sup>37</sup> Additionally, criminal defendants presenting incompetency issues are frequently represented by assigned counsel who often suffer from inexperience, lack of resources, and heavy caseloads.<sup>38</sup> Notwithstanding the veracity of these general criticisms, many defense attorneys, including assigned counsel, have the experience, resources, and will to provide competent representation.<sup>39</sup> In any event, Professor Perlin's observations, as they relate to the attorney's ability—not integrity—should be cause to improve the quality of the representation provided to the mentally ill charged with criminal offenses. They should not, however, prevent counsel from disclosing client confidences that may support a finding that the defendant is incompetent to stand trial.

### III. COMPETENCE TO PROCEED

The phenomenon of incompetence, an inability to arrive at a reasoned decision,<sup>40</sup> has been overwhelmingly accepted in the fields of psychiatry, medicine, philosophy, and law.<sup>41</sup> Incompetence may be caused by a physical or mental disability. Normally, there is a clinically identifiable source of the deficit or irrationality,<sup>42</sup> but there need not be.<sup>43</sup> This concept is, by nature, dynamic and fluid.<sup>44</sup> Issues of competence

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35. See Pizzi, *supra* note 26, at 27; Uphoff, *supra* note 22, at 95.

36. See Michael L. Perlin, *Fatal Assumptions: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 43 (1992).

37. MICHAEL PERLIN, LAW AND MENTAL DISABILITY § 4.07 (1994). See also Bonnie, *supra* note 27, at 567 (observing that issues of defense counsel's performance "often masquerade as issues of client competence" and urging improved quality of representation).

38. See Uphoff, *supra* note 22, at 72-73.

39. Competence of defense counsel is a separate problem, outside the scope of this Article. However, no evidence suggests that defense counsel would be unable to respond appropriately to this proposal.

40. See *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding").

41. See Tremblay, *supra* note 4, at 536. But see generally THOMAS S. SZASZ, PSYCHIATRIC SLAVERY (1977); THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

42. See S. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 697, 701 (3d ed. 1985).

43. Long before modern psychiatry, courts recognized incompetency as a condition preventing proceedings against a criminal defendant. See, e.g., *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899). Today, courts put great emphasis on the fields of psychiatry and psychology in determining the competency of a defendant.

44. One can be competent for some matters but not for others. See Tremblay, *supra* note 4, at

among those charged with criminal conduct are common,<sup>45</sup> particularly for attorneys employed by institutional defenders.<sup>46</sup>

### A. *The Legal Standard of Competency to Proceed*

#### 1. THE COMMON-LAW TEST

The common law test to determine competence focused on the unjustness of proceeding against a mentally impaired criminal defendant who might not be able to assist with his defense.<sup>47</sup> The test explicitly recognized the possibility that the defendant might “feign” mental deficiency.<sup>48</sup> By emphasizing the need for the defendant to possess the capacity to appreciate his situation and rationally assist counsel, the common law test essentially mirrors the constitutionally based test announced by the U.S. Supreme Court.<sup>49</sup>

#### 2. THE CONSTITUTIONAL TEST

The standard for determining competency in a criminal case was announced in *Dusky v. United States*.<sup>50</sup> There, the Court said:

[I]t is not enough for the district judge to find that “the defendant [is] oriented to time and place and [has] some recollection of events,” but that the “test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”<sup>51</sup>

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536. See also WEXLER & WINICK, *supra* note 27, at 37 (“It is more appropriate to understand that there are degrees of competency falling along a continuum and that competency is almost always in flux.”). Professor Uphoff suggests that competency is a continuum. At one end is the client who is a rational decision maker, able to articulate goals and make informed decisions, and at the other end is the client seemingly unaware of anything said by defense counsel, unable to state any goals, and incapable of making any choices. See Uphoff, *supra* note 22, at 103-04.

45. See Hoge et al., *supra* note 10, at 392; Poythress et al., *supra* note 10, at 450.

46. See Uphoff, *supra* note 22, at 72.

47. See PERLIN, *supra* note 37, at § 4.03.

48. *Id.* (citing *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

49. *Id.*

50. 362 U.S. 402 (1960) (per curiam). While the focus in *Dusky* and this Article is determining competency to stand trial, competency determinations for post-conviction events also present difficult issues. The standard for the latter issue requires that courts determine: “whether [the petitioner] has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity.” *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1224 (9th Cir. 1993) (quoting *Rees v. Peyton*, 384 U.S. 989, 991 (1966)).

51. *Dusky*, 362 U.S. at 402. Professor Winick has criticized this standard as permitting clinical evaluators relied on by the courts, who typically are paternalistically oriented, to classify marginally competent people with mental disabilities as incompetent . . . . [M]any criminal defendants who wish to stand trial or plead guilty, and whose interests would be furthered by permitting them to do so, instead

In *Drope v. Missouri*, the Court went further by adding that the defendant had to possess the ability “to assist in preparing his defense.”<sup>52</sup>

### B. *Competence to Proceed Is Required by Due Process*

Convicting “an accused person while he is legally incompetent violates due process,” because competency to proceed is an “aspect of substantive due process.”<sup>53</sup> The exercise of rights integral to a fair trial depends on the defendant’s ability to rationally participate in the criminal proceeding.<sup>54</sup>

Our adversary system requires a criminal defendant to be competent for several reasons: (1) reliability (an incompetent defendant who is incapable of rationally understanding the charges and the process, and of rationally selecting and communicating information, may be wrongly convicted because exculpatory or mitigating information would not be provided to defense counsel);<sup>55</sup> (2) individual autonomy (refusing to proceed against defendants who are incapable of making rational decisions, safeguards individual autonomy);<sup>56</sup> and (3) considerations of fair-

are found incompetent and subjected to an enforced delay in the exercise of their right to speedy trial, and to the numerous disadvantages—sometimes including unnecessary detention, hospitalization, and treatment—that follow an incompetency adjudication.

WEXLER & WINICK, *supra* note 27, at 44-45 (footnotes omitted). However, actual findings of incompetency by courts relying on these experts are quite rare. See Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 930-33 (1985).

52. 420 U.S. 162, 171 (1975).

53. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). See also *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 1376-77 (1996) (“We have repeatedly and consistently recognized that ‘the criminal trial of an incompetent defendant violates due process.’”) (citations omitted); *Drope*, 420 U.S. at 171-72 (holding that trying a criminal defendant who is not competent violates due process and that counsel has a duty to raise the issue of competency); *Pate*, 383 U.S. at 384 (“[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.”). But see NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 79 (1982); Winick, *supra* note 51, at 968 (arguing that the discussion of substantive due process in *Pate* is dicta). See also *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-59 (1967).

54. See *Medina v. California*, 505 U.S. 437, 457 (1992) (Blackmun, J., dissenting) (“The right to be tried while competent is the foundational right for the effective exercise of a defendant’s other rights in a criminal trial.”); *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring) (“Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial . . .”).

55. See *Bonnie*, *supra* note 27, at 552; *Incompetency to Stand Trial*, *supra* note 53; Linda Fentiman, *Whose Right Is It Anyway?: Rethinking Competence to Stand Trial in Light of the Synthetically Sane Defendant*, 40 U. MIAMI L. REV. 1109, 1112-17 (1986) (arguing that defendants have a right not to be made synthetically competent and can still be tried with procedural safeguards).

56. Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1661 (1995) (Autonomy “presupposes a degree of competency . . . [T]he process of choosing implies that the decision maker is competent to weigh the alternatives and to assess their consequences in a

ness (proceeding against someone whose wits are not about him is unseemly,<sup>57</sup> in part because the image of the state with its enormous powers aligned against an impaired defendant offends our sense of fair play).<sup>58</sup> Furthermore, the bar against prosecuting incompetent defendants is grounded in the belief that such a proceeding would diminish society's respect for the judicial process.<sup>59</sup>

### C. Determination of Competency

The issue of legal competence is normally resolved in an adversary proceeding<sup>60</sup> intended to produce the "truth" or at least reliable results; however, the subject of competency has its critics.<sup>61</sup> Competency issues can arise at any time from arrest through appeal, collateral attack, and service of sentence. The most common situation occurs soon after arrest

rational and informed manner.""). Using the incompetency doctrine to protect autonomy is a two-edged sword. Properly used, it can prevent significantly impaired defendants from making disastrous choices; however, misuse can interfere with client choices that are simply different. *See generally* David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 466-67 (discussing difficulty in defining irrationality in a pluralistic society).

57. Pizzi, *supra* note 26, at 31 ("[E]ven if counsel could guarantee a reliable trial, something important in the criminal process is lost when a defendant is convicted in a proceeding he does not understand and in which he cannot play even a minimal role.") (footnotes omitted); *see also* Fentiman, *supra* note 55, at 1112-17.

58. Proceedings against incompetent defendants have long been prohibited. *See, e.g.,* Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 1376-77 (1996) (reaffirming this fundamental rule); Drope v. Missouri, 420 U.S. 162 (1975):

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought." Similarly, if he became 'mad' after pleading, he should not be tried, "for how can he make his defense?" For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice.

*Id.* at 171 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 24 (Univ. of Chicago Press 1979) (1769); accord MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (1847). *See also* Youtsey v. United States, 97 F. 937, 940-42 (6th Cir. 1899) (reviewing a long line of English and American authorities forbidding proceedings against incompetent criminal defendants).

59. There is also the related concern that punishment would not be meaningful to the incompetent defendant. Fentiman, *supra* note 55, at 1117; *Incompetency to Stand Trial*, *supra* note 53, at 453-59.

60. *See, e.g.,* 18 U.S.C. §§ 4241, 4242 (1984).

61. Adversarial competency hearings have been criticized. *See* Bishop v. Superior Court, 724 P.2d 23, 29 (Ariz. 1986) (en banc) (suggesting that defense counsel and the prosecutor "cannot be expected to fulfill their pragmatic adversarial roles" in competency proceedings); Pizzi, *supra* note 26, at 63-64 (same). *See also* Seidner v. United States, 260 F.2d 732, 735-36 (D.C. Cir. 1958) (Bazelon, J., concurring) (suggesting that a post-conviction competency hearing should not be adversarial where the defendant insisted he was competent but *amicus curiae*, appointed by the court, questioned the defendant's competency).

when the defense attorney alerts the court to an apparent competency problem.<sup>62</sup> The defendant is then interviewed by a mental health expert who renders a report on the defendant's competence. If the expert concludes that the defendant is competent, the issue is often resolved because, absent objection, the court will usually confirm the expert's report.<sup>63</sup> The case then proceeds. On the other hand, if the expert finds the defendant is incompetent, the defendant is usually interviewed by additional experts and confined until found to be competent.<sup>64</sup>

The defendant's status as incompetent cannot continue indefinitely. In *Jackson v. Indiana*, the Supreme Court held that confinement cannot last longer than reasonably necessary to determine if competency can be restored in a reasonable period of time.<sup>65</sup> If it is determined that this cannot be accomplished, the defendant must be civilly committed or released.<sup>66</sup>

Situations in which the lawyer and the client disagree about the issue of competence are less common. The prosecution and the court must also raise the question of competence if they have information causing them to doubt the sufficiency of the defendant's mental capacity.<sup>67</sup>

#### 1. A FUNCTIONAL TEST

The legal competency standard embodies two distinct but related concepts: a determination of the defendant's ability to rationally understand and appreciate the legal proceedings with which he is confronted; and a determination of whether the defendant can think rationally in order to assist defense counsel.<sup>68</sup> To make these assessments, courts must examine the defendant's ability to rationally understand, appreciate, and communicate about (1) the charges, including the range and

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62. As noted, at common law and to this day, the defense attorney has generally been obligated to notify the court whenever a competency problem presents itself. See *supra* note 27; but see Chernoff & Schaffer, *supra* note 31, at 520-21 (stating that defense counsel is not obligated to raise competency when "he believes he can win the case without the active participation of his client."); Uphoff, *supra* note 22, at 91-92 (attorneys should not be required to raise the issue of competency when it would be against the client's interest or desire); WEXLER & WINICK, *supra* note 27.

63. See BRAKEL ET AL., *supra* note 42, at 703. (recommendations by mental health professionals exert tremendous influence on judicial determinations, with rates of agreement typically exceeding 90%).

64. See, e.g., 18 U.S.C. § 4241 (1984).

65. 406 U.S. 715, 738 (1972).

66. See *id.*

67. See *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (where evidence raises "a bona fide doubt" as to competence, the judge must conduct a hearing *sui sponte*). Cf. *Berger v. United States*, 295 U.S. 78, 88 (1934) (a prosecutor's interest must be to serve justice, not just win).

68. See *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*).

nature of possible penalties and likely outcomes; (2) the roles of the judge, prosecutor, defense counsel, jury, and witnesses; and (3) the factual bases of the charges and possible defenses, including plea options, and the ability to make rational choices among them. Courts must also assess the defendant's ability to rationally assist his counsel in evaluating the testimony of witnesses and the significance of exhibits, whether the defendant can testify coherently, and whether the defendant can control motor and verbal behavior to avoid disrupting court proceedings.<sup>69</sup> The various facts underlying each of these categories will differ from case to case, and no single factor will necessarily be dispositive.

As these factors reflect, legal competency is not merely a measure of the function of the defendant's cognitive faculties, such as those that can be quantified or classified by psychological testing.<sup>70</sup> One can be intelligent and articulate, capable of goal oriented behavior which is internally consistent, yet still have underlying psychiatric and emotional problems which cause incompetence.<sup>71</sup> Simply having the capacity for rational understanding in the abstract is not sufficient if psychiatric or emotional problems prevent applying rational faculties to the problem.<sup>72</sup>

## 2. RELIANCE ON MENTAL HEALTH PROFESSIONALS

Administering this legal standard presents difficult issues. Of particular concern is the source and type of information on which courts may rely in making competency determinations and the importance of rationality to competence. These issues arise for two reasons. First, mental health professionals, heavily relied upon by courts, inevitably possess a therapeutic focus,<sup>73</sup> which is sometimes contrary to the legal standard.<sup>74</sup> Second, a legal focus does not currently factor into the competency determination. Notwithstanding the fact that courts routinely

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69. See *Dusky*, 362 U.S. at 402; *Lafferty v. Cook*, 949 F.2d 1546, 1550-51 (10th Cir. 1991); *Wieter v. Settle*, 193 F. Supp. 318, 321 (W.D. Mo. 1961); *Uphoff*, *supra* note 22, at 99-100; see also *United States v. Blohm*, 579 F. Supp. 495, 499 (S.D.N.Y. 1983) (distinguishing "rational" understanding from "factual" understanding).

70. See, e.g., *Dusky*, 362 U.S. at 402; *Lafferty*, 949 F.2d at 1554; *Blohm*, 579 F. Supp. 495.

71. *Blohm*, 579 F. Supp. at 504-05. See Kathleen Cranley Glass, *Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence*, 20 INT'L. J.L. & PSYCHIATRY 5 (1997) (discussing "emotional" competence as it affects cognitive functioning and understanding). See also *infra* notes 154-63 and accompanying text for discussion of rationality and competence.

72. See Glass, *supra* note 71. See also *infra* notes 138-66 and accompanying text.

73. See *Fentiman*, *supra* note 55, at 1118-19; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1 and accompanying commentary at 173-75.

74. See *id.* See also Douglas Mossman & Kathleen J. Hart, *Presenting Evidence of Malingering to Courts: Insights from Decision Theory*, 14 BEHAV. SCI. & L. 271, 271 (1996) ("Mental health professionals perennially feel uncomfortable and awkward about presenting psychiatric and psychological evidence to courts . . .").



obtain the assistance of psychological or psychiatric experts,<sup>75</sup> competency is a legal concept, requiring judicial determination.<sup>76</sup> Despite its legal character, however, competency determinations have been virtually delegated to mental health professionals,<sup>77</sup> whose opinions are given little scrutiny by the courts.<sup>78</sup> Often, courts are given little or no additional information for judging the competency of a defendant.

Mental health professionals possess the expertise to administer and interpret various psychological tests, and to conduct psychiatric interviews, to determine whether mental pathology exists.<sup>79</sup> As experts, they can also opine that their examination revealed clinical deficiencies, which may suggest that a defendant's professed lack of understanding or cooperation is willful.<sup>80</sup> Consequently, while their opinions may not always be harmonious,<sup>81</sup> these experts can reach a particular diagnosis and make predictions about its effect on the attorney-client relationship. But these mental health experts have no special education, training, or

75. See generally A. Louis McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U. L. REV. 46 (1969) (discussing the difficulties mental health experts experience in assessing legal competency); Chernoff & Schaffer, *supra* note 31, at 509-10 (discussing the role of mental health professionals in adversarial proceedings).

76. See, e.g., *United States v. David*, 511 F.2d 355, 360 n.9 (D.C. Cir. 1975) (judge determines competency and does not have to accept psychiatric opinion as determinative); *Cooper v. United States*, 337 F.2d 538, 539 (D.C. Cir. 1964) (Wright, J., concurring) (holding that trial court must make determination of competence to stand trial instead of accepting psychiatric opinion as dispositive); *Coffman v. United States*, 290 F.2d 212 (10th Cir. 1961); *Formhals v. United States*, 278 F.2d 43, 47-48 (9th Cir. 1960); *Krupnick v. United States*, 264 F.2d 213 (8th Cir. 1959); *United States v. Zovluck*, 425 F. Supp. 719 (S.D.N.Y. 1977); *Miller v. United States*, 207 F. Supp. 5 (N.D. Fla. 1962).

77. See *Medina v. California*, 505 U.S. 437, 455-56 (O'Connor, J., concurring) ("Competency determination is based largely on the testimony of psychiatrists"). See also Robert A. Nicholson & William G. Johnson, *Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psycholegal Ability*, 14 INT'L J.L. & PSYCHIATRY 287 (1991); BRAKEL ET AL., *supra* note 42, at 700.

78. See BRAKEL ET AL., *supra* note 42, at 703.

79. For diagnostic criteria of mental pathology, see generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM IV].

80. "Willfulness" in this context is known as malingering. Malingering is defined as "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as . . . evading criminal prosecution . . ." DSM IV, *supra* note 79, at 683.

81. Mental health experts often reach different conclusions even though the facts are the same. See, e.g., *Greenwood v. United States*, 350 U.S. 366 (1956) (several court appointed psychiatrists disagreed on defendant's competence). See also *Drope v. Missouri*, 420 U.S. 162, 180 (1975) ("trained psychiatrists can entertain [varying opinions] on the same facts"); M.N. Howard, *The Neutral Expert: A Plausible Threat to Justice*, 1991 CRIM. L. REV. 98, 101 (observing that experts considered venal when employed by a party are mysteriously "transformed into paragons of objectivity when employed by the courts."); Mossman & Hart, *supra* note 74, at 271; Roberta W. Shell, *Psychiatric Testimony: Science or Fortune-Telling?*, BARRISTER, Fall 1980, at 55 (quoting a criminal defense attorney as stating: "In virtually any case, I can find a psychiatric witness to make whatever recommendations I want.").

skill to determine whether a defendant's choice is rational.<sup>82</sup> Moreover, in most cases, the expert will only have one or two brief visits with the defendant.<sup>83</sup> Compounding this problem is the mental health expert's lack of information about the prosecution and the defense to be presented.<sup>84</sup>

In applying the legal standard, however, courts must distinguish between truly incompetent defendants and those with whose decisions the defense attorney merely disagrees. To be effective, the danger of circular reasoning must be resisted. Professor David Luban put it well when he said:

The trick is to come up with a notion of incompetence that is not self-justifying and self-serving. Thus, it would clearly be wrong to say something like, "You don't really want that. You just think you do because your decisionmaking mechanisms are impaired. How do I know? If they weren't impaired you wouldn't want that."<sup>85</sup>

Operation of the legal standard must also recognize that the concept of incompetency is not susceptible to mathematical or even scientific analysis; indeed, it reflects moral, political, and cultural judgments of the evaluator and the evaluated.<sup>86</sup>

### 3. ILLUSTRATIONS

The complex nature of the issues involved in a competency determination and the need for defense counsel participation are illustrated in the following three cases.

#### a. United States v. Blohm

William Blohm, acting *pro se*, filed a copyright infringement suit

82. This is not to say that mental health professionals are unable to opine as to whether a particular defendant is rational. Their training and experience, however, make them no better than a lawyer at reaching such a conclusion.

83. Competency is often determined on the basis of a single interview lasting less than an hour. See, e.g., *United States v. David*, 511 F.2d 355, 359 (D.C. Cir. 1975) (thirty minute interview); *United States v. Taylor*, 437 F.2d 371, 378 (4th Cir. 1971) (ten minute interview).

84. This will vary from case to case, expert to expert, and the party for which the expert is retained.

85. Luban, *supra* note 56, at 466 (footnote omitted). See also *id.* at 480-81 (discussing findings of incompetency in testament cases, based on the abnormal nature of the dispositions).

86. *Id.* at 488-90 & n.86. See also WEXLER & WINICK, *supra* note 27, at 46 ("A competency evaluation, however, inevitably involves subjective cultural, social, political, and legal judgments that are essentially normative in nature."); Bonnie, *supra* note 27, at 601 ("Whether a defendant fails to 'appreciate' the nature and consequences of the decision or lacks the capacity to make a 'reasoned choice' is, of course, not a clinical 'fact,' but rather a thick value judgment anchored in intuitions about individual autonomy and social obligation."). But see DSM IV, *supra* note 79, at xxiv (addressing different cultural and ethnic settings and suggesting its international acceptance demonstrates its usefulness in describing mental disorders around the world).

against Trans World International ("TWI").<sup>87</sup> Blohm claimed that a movie being produced by TWI was based on his handwritten document entitled "Screen Notes." "Screen Notes" is a story about a young man (Blohm) who appears normal and unremarkable, but who actually possesses superhuman strength.<sup>88</sup> Supposedly, the document was autobiographical and was sent to TWI unsolicited.<sup>89</sup>

As the civil case unfolded, Blohm submitted letters and other materials to the court. These materials included a "complaint" that charged the judge with conspiracy to suppress evidence, and alleged that the judge, Richard Nixon, and Arnold Palmer were co-conspirators because "they all play golf."<sup>90</sup> Additionally, Blohm moved to have the case reassigned based on the trial judge's "possible association" with TWI because of Palmer's position on the board of directors of a corporate relative of TWI.<sup>91</sup> Further, after TWI was granted summary judgment, Blohm sent a letter threatening the trial judge and the judges of the Second Circuit.<sup>92</sup> After sending an empty shotgun shell box, earplugs, and a letter to the trial judge stating that if he did not get relief from the Second Circuit, "he would bring a sawed off shotgun to the courthouse for the purpose of assassinating,"<sup>93</sup> Blohm was arrested. He was charged with threatening the life of a federal judge, pursuant to 18 U.S.C. § 876.<sup>94</sup>

Blohm was assigned counsel and subsequently offered a deferred prosecution<sup>95</sup> on the condition that he engage in outpatient psychological counseling and that all communications with the court be through counsel. Defense counsel urged Blohm to accept the offer, but he rejected it. Blohm wanted to expose the golf conspiracy at trial. During the pendency of the criminal proceeding, Blohm persisted in sending letters to the trial judge and the prosecutor, as well as filing complaints against a number of other judges.<sup>96</sup>

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87. See *Blohm v. Trans World Int'l*, 82 Civ. 1684 (Complaint filed March 18, 1982) (on file with author). The author initially represented Blohm in *United States v. Blohm*, 579 F. Supp. 495 (S.D.N.Y. 1984).

88. See *Blohm*, 82 Civ. 1684, Complaint at 3.

89. See *id.*

90. *Blohm*, 579 F. Supp. at 497. Blohm thought that Richard Nixon, the judge (who was appointed by Richard Nixon), and Arnold Palmer, who was part owner of a company that owned the building in which TWI maintained its offices, all knew each other and played golf together.

91. See *id.*

92. See *id.*

93. See *id.*

94. See *id.*

95. A deferred prosecution conditionally suspends the prosecution for a period of time. If the conditions are complied with, the charges are dismissed. See UNITED STATES ATTORNEY'S MANUAL, DEPARTMENT OF JUSTICE.

96. See *Blohm*, 579 F. Supp. at 501.

Two experienced forensic psychiatrists (one selected by the prosecutor and one by the defense attorney) examined Blohm to determine if he was competent to proceed. Both experts found that, although he suffered from a paranoid delusion, he was competent, because he understood the charges, the role of the judge, prosecutor, defense attorney, and jury, his rights, and the possibility that a conviction could result in a jail sentence.<sup>97</sup> Nonetheless, the court ordered a competency hearing at which both psychiatrists testified that Blohm was competent but mentally ill.<sup>98</sup> Blohm also testified.

After the prosecution's direct examination of the first psychiatrist, defense counsel was relieved and assigned as an *amicus curiae* to the court.<sup>99</sup> Blohm was assigned new counsel. Subsequently, at the continued hearing the *amicus* cross-examined one of the experts, as well as his former client, but was instructed not to reveal client confidences.<sup>100</sup>

In finding Blohm incompetent to stand trial, the court agreed with the examining psychiatrists that he had a factual understanding of the proceedings, the applicable statutes, and the procedures,<sup>101</sup> but found that the critical issue was rationality:

It is the determination of *rationality* about which the dispute centers. I conclude that the rationality to be demonstrated is that of an objective rationality, what would be regarded as rational to the average person, not to the defendant, not to the psychiatrists, who in this instance considered Blohm competent because his perspective and his acts were consistent with his felt need, his delusion . . . . [T]he technical standards which the psychiatrists considered were entirely appropriate for their professional purpose but failed to include the sense of

97. See *id.* at 502. One of the experts who found Blohm competent, defined delusion as "a false, 'unshakable idea'" and described Blohm's conspiracy beliefs as "psychotic and irrational." See *id.* at 503. See also DSM IV, *supra* note 79, §§ 295.30-298.9, at 287-315.

98. See *Blohm*, 579 F. Supp at 503. Although one of the doctors said Blohm was rational, when asked for another word descriptive of him, she replied: "Crazy . . . . It looks crazy to the rest of the world." *Id.* at 499.

99. The district court relied on *Seidner v. United States*, where the defendant was incarcerated as a "certified psychotic." *Id.* at 498 & n.1 (citing *Seidner v. United States*, 260 F.2d 732, 734 (D.C. Cir. 1958)). In *Seidner*, counsel appointed as *amicus curiae* to present the defendant's case argued that the defendant's sentence should be vacated because he was incompetent at the time he pleaded guilty. However, when the defendant rejected this position, the *amicus*' motion to vacate was denied. See *Seidner*, 260 F.2d at 732. On appeal, the court said:

If appellant is indeed mentally incompetent, as the *amicus* memorandum suggests, we cannot rely upon his election as to whether that issue is to be raised in his defense. The court below may, at its discretion, appoint counsel to represent appellant's interests, or if he persists in refusing counsel the court may appoint an *amicus curiae* to present the case independently.

*Id.* at 734. See also *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978).

100. See *Blohm*, 579 F. Supp. at 498.

101. See *id.* at 499.

rationality as it is commonly understood . . . . "Rational," as used in the cases, must not be devoid of common understanding, and it is the court to which the society has assigned the decisional task, not the medical profession.<sup>102</sup>

The court determined that Blohm's decision to go to trial was irrational, the product of mental illness.<sup>103</sup>

#### b. Dusky v. United States

Although the Supreme Court reversed the Eighth Circuit's decision in *Dusky v. United States*,<sup>104</sup> the lower court's factual discussion concerning the competency issue demonstrates the confusion which continues to exist.<sup>105</sup> The Eighth Circuit's opinion includes significant portions of the psychiatrists' reports that indicated, among other problems, Dusky suffered from "poor reality contact" and "auditory and visual hallucinations."<sup>106</sup> One psychological test revealed that Dusky's personality had "decompensated to a psychotic degree of severity and thus impl[ie]d the personality [sic] loss of capacity to master conflict situations and to meet reality demands."<sup>107</sup> He experienced hallucinations, delusions, and ideas of reference, and was diagnosed as schizophrenic.<sup>108</sup> The hospital staff opined that although Dusky was "oriented as to time, place, and person," and possessed average intelligence, including a normal capacity for abstract thinking, he was unable to understand the nature of the proceedings, the charges against him, and was unable to properly assist defense counsel.<sup>109</sup>

At the competency hearing, the hospital's doctor explained that Dusky knew the days of the week, the time, where he was, his circumstances, and the roles of his lawyer, the judge, and the jury.<sup>110</sup> Dusky apparently also understood that he would be punished if found guilty.<sup>111</sup>

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102. *Id.* (emphasis in original).

103. *See id.* at 506.

104. 362 U.S. 402 (1980), *rev'g* 271 F.2d 385 (8th Cir. 1959).

105. The district court found that Dusky had sufficient mental competence to stand trial. Objections by the defense attorney suggested that he possessed information that, if disclosed, could have persuaded the court otherwise. *See Dusky*, 271 F.2d at 390. Defense counsel announced his agreement with the government's psychiatrist but decided it would have been improper to "take the witness stand and be sworn and offer evidence in that regard. I make this statement as a lawyer to the Court and I believe that the man is not properly able to assist his counsel in his defense and should not be tried at this time." *Id.*

106. *Id.* at 387.

107. *Id.*

108. *See id.* at 387-89. Ideas of reference occur when "the person believes that certain gestures, comments, passages from books, newspapers, song lyrics, or other environmental cues are specifically directed at him or her." DSM IV, *supra* note 79, at 275.

109. *See Dusky*, 271 F.2d at 389.

110. *See id.*

111. *See id.*

Dusky had been able to furnish accurate background information and some facts about the events alleged in the indictment.<sup>112</sup> The doctor, however, believed Dusky would have been unable to properly assist his attorney in his defense because he could not “properly interpret the meaning of the things that have happened . . . [or] convey full knowledge of his actual circumstances . . . due to an inability to interpret reality from unreality . . . which is part of his mental illness.”<sup>113</sup> The doctor also testified that Dusky’s account of the relevant events would inevitably be filtered through his mental illness, which could result in the attorney receiving “false factual statement[s].”<sup>114</sup> The trial court’s finding of competency was affirmed by the Eighth Circuit.

### c. Lafferty v. Cook

The defendant in *Lafferty*<sup>115</sup> purportedly received religious revelations. One such revelation instructed him to “remove” his sister-in-law and her child,<sup>116</sup> which resulted in their deaths and Lafferty’s arrest for murder. Initially, Lafferty refused the assistance of counsel. Believing all attorneys to be corrupt, he suspected that he was the object of a judicial conspiracy that included his attorney.<sup>117</sup> Furthermore, he claimed that because God directed his actions, the court lacked jurisdiction since courts cannot intercede in religious or spiritual issues.<sup>118</sup>

Prior to trial, four competency hearings were conducted. At the first hearing, two mental health experts concluded that Lafferty was incompetent, and one diagnosed his condition as a “paranoid delusional state.”<sup>119</sup> Nonetheless, the court found Lafferty competent.<sup>120</sup> At the second hearing, four doctors employed by the state hospital reported that Lafferty was competent. The court agreed.<sup>121</sup> But, after Lafferty suffered organic brain damage as a result of a suicide attempt, a third competency hearing was held. The court concluded that Lafferty was incompetent to proceed.<sup>122</sup> Subsequently, the four doctors who had declared Lafferty competent at the second hearing, revised their opinions at the fourth hearing. Ultimately, the doctors concluded that he was incompetent because “while [Lafferty] physically knew the nature of the

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112. *See id.*

113. *Id.* (second alteration in original).

114. *Id.*

115. 949 F.2d 1546 (10th Cir. 1991).

116. *See id.* at 1548.

117. *See id.* at 1553.

118. *See id.* at 1551-52 & n.5.

119. *Id.* at 1552.

120. *See id.*

121. *See id.*

122. *See id.*

proceedings against him, and their possible consequences, he was unable as a result of his paranoid delusional system to interpret them in a realistic way."<sup>123</sup> Lafferty's plunge into irrationality was attributed to oxygen deprivation during his attempted suicide. As a result, his already precarious mental condition deteriorated into a "religious delusional system containing strong elements of paranoia and an inability to 'determine the boundaries between himself and good and evil spirits.'"<sup>124</sup>

In contrast, the prosecution's expert, an attorney and a forensic psychologist, testified that Lafferty was competent, although he conceded that he had not personally examined Lafferty.<sup>125</sup> The prosecution's expert posited that Lafferty understood the charges, was aware of the nature of the proceedings, and thus was competent.<sup>126</sup> The court agreed, finding that the only evidence of irrationality was the suicide attempt, and that Lafferty's "refusal to cooperate, assist counsel or admit that he is amenable to the laws of the State of Utah are all consistent with his paranoia and any delusional system pertaining to religion."<sup>127</sup> Lafferty was then tried, convicted, and sentenced to death.<sup>128</sup>

Because Lafferty was found competent, he was permitted to control his representation at trial and waive an insanity defense over his attorney's objection.<sup>129</sup> He also prohibited the introduction of expert medical evidence which might have reduced the charges from murder to manslaughter.<sup>130</sup>

The Tenth Circuit granted habeas relief finding that the state trial court misunderstood the concept of competency.<sup>131</sup> It concluded that a defendant who acted consistently and logically within a delusional system, but who was unable to accurately comprehend reality, was not competent within the meaning of *Dusky*.<sup>132</sup> The court observed that the physical demeanor of a defendant suffering from paranoid delusions

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123. *Id.*

124. *Id.* at 1564 (footnote omitted). In a letter to the court, these doctors indicated that oxygen deprivation to the brain had exacerbated his religious delusions which thus interfered "with his ability to meaningfully function, either independently . . . or with the aid of counsel in a courtroom." *Id.* (alteration in original).

125. *See id.* at 1552. The prosecution's expert had merely reviewed the reports of the other examining doctors.

126. *See id.* at 1553-55.

127. *Id.* at 1554 (quoting Memorandum Decision of the state trial court). Notably, the trial court found that Lafferty did not possess the ability to "engage in a rational decision making process regarding . . . treatment," but criticized the conclusions of the doctors who had found him to be incompetent because they were based on the Supreme Court's decision in *Dusky*. *See id.*

128. *See id.* at 1549.

129. *See id.* at 1555.

130. *See id.* at 1549.

131. *See id.* at 1548.

132. *See id.* at 1554-55.

rarely provides relevant information about the effect of the delusional system on his judgment.<sup>133</sup> In addition, the court specifically addressed the risk that a competency determination could become a vehicle for imposing society's beliefs about right and wrong on individuals. "The issue is not whether particular beliefs are 'wrong,' but whether those beliefs are the product of a deluded view of reality that significantly prevents a defendant from consulting with his lawyer."<sup>134</sup>

The dissent<sup>135</sup> was troubled by the elusive nature of the rationality concept. It feared the risk that a defendant's "unorthodox political beliefs" might trigger competency proceedings, and that lawyers would assume too much power.<sup>136</sup> "When one is judged incompetent for rejecting his attorney's advice we will then have truly established the elitism of the bench and bar."<sup>137</sup>

#### 4. THE RATIONALITY REQUIREMENT OF THE COMPETENCE STANDARD

The capacity to act rationally is not synonymous with a defendant's comprehension of the charges against him, the roles of the participants, and the judicial process.<sup>138</sup> Rather, the key to legal competence in a criminal case is the capacity of rational thought.<sup>139</sup> Any doubt or confu-

133. *See id.* at 1555.

134. *Id.* at 1556 n.11.

135. The dissenting opinion relied on the state trial court's findings of competence, and the deference owed to state courts in habeas matters. *See id.* at 1561 (Brorby, J., dissenting).

136. *See id.* at 1566 & n.15.

137. *Id.* at 1566 n.15.

138. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373 (1996). *Cooper* construed an Oklahoma statute that placed the burden on the defendant to prove incompetence by clear and convincing evidence, *see id.* at 1374-75, and required that the defendant be able to "effectively and rationally assist in his defense." *Id.* at 1377 n.5 (quoting OKLA. STAT. tit. 22, § 1175.1(1) (West Supp. 1996)). Defendant, afraid the lead defense attorney was going to kill him, fell off the witness stand trying to get away from him, refused to wear street clothes because they were "burning" him, *see id.* at 1375 n.1, and sat apart from counsel "crouching in the fetal position and talking to himself." *Id.* at 1376 n.2. Nevertheless, the trial court found the defendant competent. *See also, e.g., Lafferty*, 949 F.2d 1546; *Lagway v. Dallman*, 806 F. Supp. 1322, 1336, 1344 (N.D. Ohio 1992) (reversing, on substantive due process grounds, a state court determination of competency where the defendant believed that the judge and the attorneys were agents of Satan); *United States v. Holmes*, 671 F. Supp. 120, 121-22 (D. Conn. 1987) (finding the defendant, a lawyer, competent to stand trial for mailing threatening letters to the son of former President Bush because he believed the son and members of the U.S. Secret Service, among others, were involved in a conspiracy to test experimental drugs on the defendant).

139. The *Dusky* Court stated:

[I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding—and whether he has a *rational* as well as factual understanding of the proceedings against him."

*Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (alterations in original and emphasis added) (no citation in original).



sion about the importance of rationality to the competence standard should be resolved by comparing the Eighth Circuit's decision in *Dusky* with the Supreme Court's *per curiam* reversal of it. The Eighth Circuit clearly relied on Dusky's understanding of the charges, the roles played by the participants in the process, and his general orientation as to time and place.<sup>140</sup> In reversing the lower court's decision, the Supreme Court explained that basic cognitive comprehension, while necessary, was insufficient.<sup>141</sup>

Distinguishing between rationality and irrationality, and mental illness and "normalcy," involves moral, philosophical, and factual judgments, about which there is no universal agreement. Inevitably, evaluating whether a defendant can rationally assist his counsel creates tension between individual autonomy and paternalism.<sup>142</sup> Frequently, clients make choices that their lawyers think are risky, foolish, silly, odd or harmful. But difference is not the equivalent of irrationality. The challenge is to identify a standard that minimizes the risk of confusion.

In *Paternalism and the Legal Profession*, Professor David Luban attempts to answer the question of when a lawyer can "justifiably exercise paternalism over a client."<sup>143</sup> In so doing, he makes several important observations. First, he equates autonomy with rationality, and concludes that an individual with impaired decisionmaking capacity is not autonomous.<sup>144</sup> But, for individuals who express acceptable "reasons for non-self-interested preferences," paternalism is unjustified.<sup>145</sup>

Professor Luban next attempts to distinguish "unacceptable from acceptable bad reasons for a preference."<sup>146</sup> He advances a test set forth in *Matter of Will of White*:

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140. See *Dusky v. United States*, 271 F.2d 385 (8th Cir. 1959).

141. See *Dusky*, 362 U.S. at 402.

142. See Federle, *supra* note 56, at 1669 ("[A]n incompetent client cannot be said to be autonomous because she lacks the capacity to engage in rational decision making.").

143. Luban, *supra* note 56, at 460. Professor Luban defines "paternalism" as lawyer manipulation of the case or the client in order to achieve what the lawyer thinks is for the client's own good "even though the client does not see it that way." *Id.* at 458. Paternalism has also been described as "an assault on the individual's integrity." *Id.* at 474.

Professor Luban begins by discussing seven examples drawn from actual cases. All of the cases illustrate client choices, with which some might disagree, and propose possible ways for the lawyer to manipulate the client to arrive at a result more comforting to the lawyer. See *id.* at 455-46. Although none of Luban's examples suggests that mental illness interferes with the clients' choices, his discussion is significant. He shows that client choices are affected by social and psychological factors and values. See *id.* Thus, the test for competence, at least where mental illness is not suggested, must be respectful of individual autonomy to avoid paternalistic interference. See *id.* See also Tremblay, *supra* note 4, at 526 (a "client's knowledge of his own interests and values requires that the final choices be his.").

144. See Luban, *supra* note 56, at 465.

145. *Id.* at 474.

146. *Id.* at 478.

[I]f there are facts, however insufficient they may in reality be, from which a prejudiced or a narrow or bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect.<sup>147</sup>

Thus, an individual is competent “if any process is going on in the person’s head that can be called ‘inference from real facts,’”<sup>148</sup> regardless of whether the inference is valid, objective, or correct; in such instances, paternalism is not justified.<sup>149</sup> Professor Luban concedes that the *White* test is “permissive” and will “countenance some strange folk as capably rational.”<sup>150</sup>

Professor Luban’s proposed test may be suitable for our highly pluralistic society, but can it be applied to criminal defendants who may be mentally ill? Assuming we can avoid circular reasoning, the question must be answered in the negative. In this context, the test suffers from two principal defects.<sup>151</sup> First, “real facts” is a concept about which there may well be serious disagreement. Even if there was agreement on its meaning, there seems to be no limit on the permissible inferences that can be drawn by the individual. Second, although the ability to draw inferences reveals something about the individual’s ability to think, it does not mean that the person is rational. For example, Blohm identified several real facts, but the inferences he drew from them were absurd.<sup>152</sup> In the end, Professor Luban’s test grants autonomy to individuals who are simply different. Unfortunately, the test also bestows competence on those whose “inferences from real facts” are delusional.<sup>153</sup>

Rationality, pursuant to the competence standard set forth in *Dusky*, embraces much more than the capacity to identify “real facts” and draw inferences therefrom. There must be an additional tool that permits appropriate distinctions between difference and irrationality. Although imperfect, illness is such a tool. Illness is at least a crude way to distinguish client choices that the lawyer thinks unwise from choices that are irrational.<sup>154</sup> Neither the facts nor the inferences can be the product of illness. As long as the client’s decisions are not the product of illness,

147. At 479 (quoting *Matter of Will v. White*, 24 N.E. 935, 937 (N.Y. 1890)).

148. Luban, *supra* note 56, at 479. Professor Luban proposed two alternative “non-circular” tests of incompetency: “a definitive causal account of how the individual became incompetent, or an inability on the individual’s part to [explain] motives which [pass] the *White* test.” *Id.* at 482.

149. *See id.* at 479.

150. *Id.* at 482.

151. Professor Luban did not explicitly address paternalism in the context of clients charged with criminal conduct who were possibly incompetent as a result of mental illness.

152. *United States v. Blohm*, 579 F. Supp. 495, 504-05 (S.D.N.Y. 1983).

153. *See* Luban, *supra* note 56, at 479.

154. *See* Tremblay, *supra* note 4, at 537-38. *See also* Federle, *supra* note 56, at 1669 (“Respect for the client’s autonomy implies that eccentric or peculiar decisions do not necessarily denote incapacity.”).

interference is inappropriate. If these choices, however, are the result of impairment, the client may be incompetent.<sup>155</sup> The risk of paternalism can be minimized by giving less weight to the actual choices made by the defendant, while relying more on the process used in making the choices and by examining the explanations offered for the decision.<sup>156</sup>

In some cases, however, the defendant's choice itself may be compelling evidence of irrationality.<sup>157</sup> Is the client who rejects a misdemeanor offer when charged with a serious felony (from which there is virtually no chance of acquittal) that mandates a five-year prison sentence, and who is not claiming factual innocence, competent?<sup>158</sup> Underlying this question are assumptions about the goals of all criminal defendants as well as the purposes of the criminal justice system. Assuming the goal of every defendant is acquittal or a lenient sentence, any choice that does not maximize prison avoidance seems irrational. But, not every client tells the lawyer to "get me off" or "get me as little time as possible." Clients know far more than even a skillful interviewer can elicit.<sup>159</sup> Criminal defendants may be motivated by desires to tell their story, to protect someone, or to remain free, even when these desires may not be in their best interests. Their goals, like those of many clients, may not be entirely consistent, but that does not make them irrational. Some clients elect to go to trial with the understanding that the chances for acquittal are slim, because the risk of conviction after a trial is preferable to the certainty of the specific jail sentence provoked by a guilty plea.

Rationality, therefore, is not solely about whether a defendant's choices are consistent with his best interests as judged by the lawyer. Foolish or wise, the choice belongs to the unimpaired client.<sup>160</sup> At a minimum, when the client's choice would seem irrational to the "average person," the attorney must be confident that it is not substantially influenced by, or is the product of, illness.<sup>161</sup> If it is not influenced by or

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155. See Tremblay, *supra* note 4, at 537-38.

156. See Luban, *supra* note 56, at 474. ("It is important, though, that the individual have reasons for non-self-interested preferences. Otherwise, we may be forced to conclude that these preferences are irrational wants, the product of impaired capacities.")

157. See *id.* at 480-82.

158. Professor Uphoff, a strong advocate of the impaired client's choice, supports the view that interference in this instance is warranted. See Uphoff, *supra* note 22, at 106.

159. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 100-02 (1979).

160. See, e.g., *Martin v. Dugger*, 686 F. Supp. 1523, 1572 (S.D. Fla. 1988) (citing *Sweezy v. Garrison*, 554 F. Supp. 481, 492 (W.D.N.C. 1982)).

161. *Dusky* does not require "illness" as an element of incompetency. See *Dusky v. United States*, 362 U.S. 402 (1960). As a practical matter, however, it will be the rare case in which a client's bizarre choice will not be thought by some mental health professionals to be the product of illness.

the product of illness, there should be no interference with the client's choice.<sup>162</sup> Illness then becomes a tool to reduce the chance that determinations of rationality will be defined by politics or popularity.<sup>163</sup> For example, Blohm threatened a federal judge and refused a deferred prosecution because he believed he would be acquitted when he exposed the golf conspiracy.<sup>164</sup> Harris, on the other hand, apparently committed the bank robbery and wanted to plead guilty. Harris' decision, however, was influenced by a delusional belief that his sentence would be affected by his status as a witness to the conspiracy to kill President Kennedy. Blohm was found to be incompetent to stand trial because he communicated his delusions to the world.<sup>165</sup> In contrast, Harris was found to be competent because he only communicated with his attorney. Harris, however, may have been no more competent than Blohm.<sup>166</sup>

#### IV. THE ATTORNEY-CLIENT RELATIONSHIP

##### A. *The Attorney's Responsibility to the Client*

The rules governing the attorney-client relationship are, in many respects, based on the law of agency.<sup>167</sup> The lawyer, as a fiduciary, can only act with the explicit or implicit authority of the client.<sup>168</sup> "In our legal system, an attorney is [the] client's agent and representative; the

162. Cf. *Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991); *United States v. Blohm*, 579 F. Supp. 495 (S.D.N.Y. 1983); Tremblay, *supra* note 4, at 537-38.

163. To some extent, of course, this merely moves the discussion to the definition of illness.

164. See *Blohm*, 579 F. Supp. at 503.

165. See *id.* at 504.

166. One may question whether the criminal justice system should be used as a forum for delusional defendants to exorcise their delusions. Blohm was intent on going to trial to prove that the judge, among others in the civil case, were part of a conspiracy and, thus, should be impeached. See *id.* at 505. Although therapeutic, permitting defendants to play out their delusions in court abuses the justice system.

167. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 28 & cmt. c (Proposed Final Draft No.1, 1996). Although the attorney-client relationship is closely related to agency law, the attorney has obligations to the court as well as to society. Lawyers' roles also differ from those of other agents by virtue of the independence they are permitted to exercise. See *id.* See also generally RESTATEMENT (SECOND) OF AGENCY (1958).

168. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 38, 39 (Proposed Final Draft No. 1, 1996). Professor Tremblay stated that:

Fundamentally, a lawyer's authority to act on behalf of a client stems from her status as the client's agent. . . . This principle not only permits courts to hold parties liable for the negligence of their chosen counsel, . . . but its accompanying effect is to deny a lawyer the power to act except under delegated authority, either explicit or implicit, from her principal.

Tremblay, *supra* note 4, at 518 n.12 (citation omitted). See also Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1617 (1996) (a lawyer's obligation of confidentiality is rooted in fiduciary duties that an agent owes to a principal).

client retains ultimate authority over the conduct of litigation.”<sup>169</sup> This principle is designed to ensure that each party makes his own choices and bears the consequences of those choices.<sup>170</sup> This increases the moral authority and acceptability of the resultant decisions.<sup>171</sup>

As agent, the lawyer functions to assist her client in making informed decisions. It is not the lawyer’s function to impose her view of what is in the client’s best interest.<sup>172</sup> The agency relationship requires a principal who is competent;<sup>173</sup> the attorney, therefore, is not authorized to act when she has a reasonable belief that the principal is incompetent.<sup>174</sup>

The ethical rules reflect the agency principles which underlie the attorney-client relationship. The ABA Model Rules of Professional Conduct require lawyers to follow a client’s instructions regarding the goals of the representation, and further require that the client be kept informed and be consulted about the methods to be used to obtain the goals.<sup>175</sup> Similarly, the ABA Model Code of Professional Responsibility places all decision-making in the hands of the client except for those “decisions not affecting the merits of the cause or substantially prejudic-

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169. *Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1996); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983).

170. See Spiegel, *supra* note 159, at 75.

171. See *id.*

172. See generally DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (1991) (advocating a model of “client-centered” representation emphasizing lawyer neutrality and avoiding any form of persuasion).

173. See *Kuder v. United Nat’l Bank*, 497 A.2d 1105, 1108 (D.C. 1985) (stating the general rule that when the principal loses requisite mental capacity the agency relationship terminates). See also RESTATEMENT (SECOND) OF AGENCY § 120 cmt. (principal’s incapacity terminates relationship). *But see id.* § 122, at Caveat (“The Institute expresses no opinion as to the effect of the principal’s temporary incapacity due to a mental disease.”). It is less clear how this general rule applies to: (1) agents for principals who are temporarily incapacitated and/or have not been adjudicated incompetent; and (2) agents or third parties without notice of the principal’s incapacity. See generally W. Alfred Mukatis, *Does the Agency Die When the Principal Becomes Mentally Incapacitated?*, 7 U. PUGET SOUND L. REV. 105 (1983). It does seem clear that notice of the principal’s incapacity deprives agents of authority and the right of third parties to rely on the agent’s authority. See *id.* at 113-16.

174. *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(2) (Proposed Final Draft No.1, 1996) (When a client’s ability to make adequately considered decisions is impaired, the lawyer may pursue a reasonable view of client’s objectives “even if the client expresses no wishes or gives contrary instructions.”) See also *id.* § 43(3) cmt. e (stating that application of the general agency rule, that incompetence of a principal terminates an agent’s authority, may be inappropriate to bar the attorney’s efforts to protect an incapacitated client). This suggests the rule is concerned with emergency situations in which the client might be harmed by the attorney’s inaction. Two cases cited in the Reporter’s Note, however, support the general rule that incapacity of the principal terminates the agent’s authority. See *id.* at 131 (citing *Donnelly v. Parker*, 486 F.2d 402, 407 (D.C. Cir. 1973); *Graham v. Graham*, 240 P.2d 564 (Wash. 1952)).

175. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2.

ing the rights of a client.”<sup>176</sup> The ABA Criminal Justice Mental Health Standards are more specific. According to these standards, the client decides: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify.<sup>177</sup> Decisions about whom to call as witnesses, examination of these witnesses, juror selection, what motions to proffer, and all other “strategic and tactical” decisions are reserved to the lawyer, after consultation with the client.<sup>178</sup> Despite the purported distinctions between goals and means in the Rules, the Code, and the Standards, the differences are often vague.<sup>179</sup>

At the heart of the attorney-client relationship are the lawyer’s duties of loyalty,<sup>180</sup> zealousness,<sup>181</sup> and confidentiality to the client.<sup>182</sup> The significant overlap of these duties combine to form a bundle of obligations and client expectations, rather than discrete, compartmentalized concepts.

Professor Charles Fried describes the attorney’s duty of loyalty as the responsibility to be a “special” or “limited-purpose [l]egal friend.”<sup>183</sup> As legal friend, the lawyer adopts her client’s legal interests as her own and becomes both shield and sword.<sup>184</sup> Loyalty has also been described as “the most basic obligation of any lawyer, an obligation that gives his work great dignity and purpose—the obligation to serve his clients rather than to become part of the official machinery that judges

176. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, EC 7-8.

177. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 4-5.2(a) (1989).

178. See *id.* § 4-5.2(b). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt.; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, EC 7-9.

179. See Spiegel, *supra* note 159, at 100-04 (discussing the artificiality of the distinction between means and goals).

180. The comments to Model Rule 1.7 provide, in pertinent part: “Loyalty is an essential element in the lawyer’s relationship to a client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1. See generally *id.* at Rules 1.7-1.9; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5; KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 87, at 205-06 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE]. It has been suggested that the origins of this duty lie in Roman law, stemming from the relationship between master and servant. See James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 289-90 (1963) (citing Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928)).

181. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1.

182. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101. See *infra* notes 199-201, 227-40, and accompanying text (discussing this duty).

183. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976). But see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108 (criticizing Fried’s analogy and suggesting that the attorney-client relationship is more like prostitution than like friendship); Edward A. Dauer and Arthur A. Leff, Correspondence, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977) (responding to Fried).

184. See Fried, *supra* note 183, at 1071-73.

them.”<sup>185</sup>

In zealously representing a client, lawyers have always been under a duty to use every lawful device to achieve the client's goals.<sup>186</sup> Lord Henry Brougham described the “traditional view” of the attorney's role during his defense of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.<sup>187</sup>

This traditional view is reflected in our adversary system where the criminal defense attorney is portrayed as the protector of the client.<sup>188</sup> As such, the attorney is permitted to act with little concern for the truth and, indeed, may intentionally attempt to manipulate the credibility of witnesses.<sup>189</sup>

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185. Edward W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 355 (1981).

186. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 1; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.

187. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821). For a more recent, but no less aggressive view of the defense attorney's role, see generally ALAN DERSHOWITZ, *THE BEST DEFENSE* (1982); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975). For a thoughtful discussion of the tension between personal values and the attorney's role, see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1 (1975-1976) (suggesting that the lawyer's role often requires them to be amoral).

188. Kenneth Mann reported: “It's my mission and obligation to defend the client, not to sit in moral, ethical, or legal judgment of him. . . . My role in the adversary system is to protect him.” KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 121 (1985). Our popular culture reinforces this view. In the movie *To Kill a Mockingbird*, the image of Atticus Finch going to the jail in the middle of the night and guarding the door of his client's cell speaks volumes about society's perception of the lawyer's role as protector. *TO KILL A MOCKINGBIRD* (Universal-International 1962); Symposium, *To Kill a Mockingbird*, 45 ALA. L. REV. 389 (1994); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981). See also PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* (1996) (reviewing seventy movies about courtroom lawyers); Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281 (examining treatment of lawyers in movies, television, and books); Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987) (examining the treatment of lawyers in books, movies, and philosophy).

189. See *United States v. Wade*, 388 U.S. 218 (1967)

Defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not . . . reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure

### B. *The Attorney's Responsibility to the Court*

Attorneys serve two masters—the client and the court.<sup>190</sup> Normally, there is no tension between the two. Attorneys have obligations as officers of the court.<sup>191</sup> They are forbidden to make affirmative misrepresentations to courts<sup>192</sup> or others.<sup>193</sup> And, “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”<sup>194</sup> Candor, respect, the professional obligation to obey court orders, and the promotion of justice are among the lawyer’s responsibilities as an officer of the court.<sup>195</sup>

Representing the mentally impaired criminal defendant does, however, pose special challenges for attorneys. The competency issue is an occasion when the attorney’s duties to the client and the court may be in conflict.<sup>196</sup> For example, despite the duties of loyalty, and zealousness, and the duty to keep client confidences and secrets,<sup>197</sup> defense counsel is obligated to inform the court when she has reasonable cause to doubt her

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or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth. . . . In this respect, . . . as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

*Id.* at 256-58 (White, J., dissenting in part and concurring in part).

190. In most jurisdictions, courts have regulatory control over attorney admissions to the bar and attorney discipline.

191. See MODEL RULES OF PROFESSIONAL CONDUCT, at Preamble (“A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”). See also *Bishop v. Superior Court*, 724 P.2d 23, 27 (Ariz. 1986) (stating that a defense attorney has special non-adversarial obligations with respect to competency).

192. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 4-1.2(f) (“Defense counsel should not intentionally misrepresent matters of fact or law to the court.”).

193. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5).

194. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 2.

195. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 1; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 4-1.2(f) (“Defense counsel should not intentionally misrepresent matters of fact or law to the court.”).

196. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 and accompanying commentary.

197. The ethical duty is broader than the attorney-client privilege. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 111-112 and accompanying commentary at 121, 129 (Proposed Final Draft No.1, 1996). During the course of the representation, an attorney may receive information about the client’s matter that she is ethically bound not to disclose, but that is not protected by the privilege.



client's competency.<sup>198</sup> Depending on how the competency process unfolds, the conflict between these competing duties becomes difficult to resolve.

## V. THE DUTIES OF CONFIDENTIALITY IN COMPETENCY PROCEEDINGS

The lawyer's obligation of confidentiality derives from agency law and the law of evidence.<sup>199</sup> The ethical duty of confidentiality is broader than the attorney-client privilege in two significant respects. First, client confidences and other information relating to the representation must be kept confidential.<sup>200</sup> Second, the information obtained as a product of the representation must be kept secret from the world. The attorney-client privilege, although dictated by the lawyer's duty of loyalty, is a rule of evidence that only protects against the introduction of client confidences as evidence in a judicial or other governmental proceeding.<sup>201</sup> There are, however, various circumstances under the ethical rules and attorney-client privilege where the attorney is permitted to disclose information about the client.

### A. *The Attorney-Client Privilege*

The attorney-client privilege<sup>202</sup> is the dominant focus of the profes-

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198. See *supra* notes 26-27 and accompanying text. See also *infra* notes 266-70 and accompanying text.

199. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (“[A]n agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency . . .”). The agent's duty of confidentiality is subject to exceptions. Disclosure is permitted to protect the agent or a third person and to prevent a crime. See, e.g., *id.* § 395 cmt. f; MCCORMICK ON EVIDENCE *supra* note 180, at §§ 87-97.

200. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 1-4; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1.

201. See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3, at 394 (1993) (“The first [rationale for the attorney-client privilege] was the duty of loyalty the attorney owed his client, which included the obligation not to testify against his own client.”). The second rationale was to promote full and frank communications. See *id.* Whether the attorney's disclosure of client confidences is pursuant to an “exception” to the privilege or disclosure is considered to be outside the scope of the privilege is not important for purposes of this Article. See, e.g., *Doe v. A Corp.*, 330 F. Supp. 1352, 1355-56 (S.D.N.Y. 1971) (discussing the difference between the attorney-client privilege and the duty of confidentiality). Professor Luban suggests that the rationale for protecting information beyond the client's confidences is that otherwise, the lawyer may be reluctant to conduct a full investigation. See DAVID LUBAN, LAWYERS AND JUSTICE 201 (1988). The attorney-client privilege is complemented by the work product doctrine which provides qualified immunity for ideas and information developed by the attorney or her agents during the course of the representation. See *Hickman v. Taylor*, 329 U.S. 495 (1947). This protection was partially codified in the Federal Rules of Civil Procedure. See FED. R. CIV. P. 26(b)(3) (1997).

202. There are two oft-cited formulations of the privilege. The first is:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in

sional role of the American lawyer:

The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good.<sup>203</sup>

The attorney and the client can refuse to reveal their communications in judicial proceedings because of the importance placed on candid communication in the professional relationship.<sup>204</sup> It is an exception to the important duty of all individuals to disclose relevant evidence in legal proceedings.<sup>205</sup> The privilege is rooted in the belief that the client will not be truthful with his lawyer absent the guarantee that the client's secrets will be held inviolate.<sup>206</sup> The argument in support of this privilege is simple. If the client communicates candidly and completely, the lawyer will be better able to provide legal advice and steer the client through a lawful course.<sup>207</sup> Furthermore, an adversary system that operates with fully informed lawyers will produce reliable results.<sup>208</sup>

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his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

JOHN H. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton rev. ed. 1961). Judge Wyzanski devised the second formulation as:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate [agent] and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

203. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978).

204. See EDWARD CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (2d ed. 1982) ("The proposition is that the detriment to justice from a power to shut off inquiry to pertinent facts in court will be outweighed by the benefits to justice (not the client) from a franker discussion in the lawyer's office."). The attorney-client privilege is often codified in the law of evidence. See, e.g., CAL. EVID. CODE ANN. §§ 950-962 (West 1995); N.Y. C.P.L.R. § 4503 (McKinney 1992); FED. R. CIV. P. 26(b)(5).

205. See United States v. Bryan, 339 U.S. 323, 331 (1950); *In re LTV Securities Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981); see also *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

206. See CLEARY, *supra* note 204, at 175. But see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 366 (1989) (suggesting that this belief is "simply untrue").

207. See *Upjohn*, 449 U.S. at 389. But see Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard for the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 787 (1977); Zacharias, *supra* note 206, at 358-59.

208. See Gardner, *supra* note 180, at 592; *Incompetency to Stand Trial*, *supra* note 53, at 457;

Notwithstanding the importance of the attorney-client privilege to the professional relationship, it is enforced by courts only when necessary to achieve its specific purpose,<sup>209</sup> otherwise, enforcement would deny the fact-finder access to relevant information. This, theoretically, would have an adverse impact on any search for truth.<sup>210</sup> The high cost of protecting client confidences from disclosure in judicial proceedings has resulted in a narrow interpretation of the privilege.<sup>211</sup> Its exceptions, however, have been interpreted broadly.<sup>212</sup> Under the privilege, disclosure of client confidences is permissible to reveal an ongoing crime,<sup>213</sup> an intentional tort,<sup>214</sup> or a fraud or the intent to commit one.<sup>215</sup> The privilege is waived where the client raises claims or defenses which disclose, expressly or impliedly, communications between the attorney and the client.<sup>216</sup> An attorney may also disclose client confidences when the client challenges the attorney's conduct, competence, or representation,<sup>217</sup> or when it is necessary for the attorney to defend herself against

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Levine, *supra* note 207, at 817-18; LUBAN, *supra* note 201, at 197 (suggesting that human dignity, a basis for the Fifth Amendment privilege against self-incrimination also supports the prohibition against forced disclosure of a client's statements).

209. See WIGMORE, *supra* note 202, §§ 2285, 2291: [The] benefits [of the attorney-client privilege] are all indirect and speculative; its obstruction plain and concrete . . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'). See also *United States v. Sindel*, 854 F. Supp. 595, 599 (E.D. Mo. 1994) (privilege protects only disclosures necessary for informed legal advice and that would not be made in the absence of a privilege), *aff'd in part and vacated in part*, 53 F.3d 874 (1995).

210. See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994) ("Privileges forbid the admission of otherwise relevant evidence when certain interests the privileges are thought to protect are regarded as more important than the interests served by the resolution of litigation based on full disclosure of all relevant facts."). Cf. *United States v. Nixon*, 418 U.S. 683, 710-13 (1974) (discussing limits on Presidential privileges).

211. RICE, *supra* note 201, at § 2.3.

212. See *id.* § 8.2.

213. See *Marc Rich & Co. v. United States*, 731 F.2d 1032, 1038 (2d Cir. 1984) (advice in furtherance of a fraudulent or an unlawful goal is socially perverse, unworthy of protection); *In re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979) (using attorney's services "to further a continuing or future crime or tort" is inconsistent with the "ultimate aim" of the privilege which is to promote the proper administration of justice).

214. See, e.g., *Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982).

215. The relevant inquiry is the client's intent. See RICE, *supra* note 201, at § 8:4.

216. See, e.g., *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 479-80 (3d Cir. 1995); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994); *Saint-Gobain/Norton Indus. Ceramics Corp. v. General Elec. Co.*, 884 F. Supp. 31, 33 (D. Mass. 1995). See generally RICE, *supra* note 201, §§ 9.1-9.94 (discussing waiver in detail).

217. *Thompson v. United States*, 7 F.3d 1377, 1378 (8th Cir. 1993); *Doe v. A Corp.*, 709 F.2d 1043, 1048-49 (5th Cir. 1983). The attorney may only disclose confidences that relate to the substance of the waiver or to the self-defense of the lawyer. Neither the waiver nor self-defense exceptions authorizes the wholesale disclosure of the client's confidences. See Levine, *supra* note 207, at 786-818 (discussing history, scope and propriety of this exception).

such claims by a third party.<sup>218</sup> Disclosure can also be required by court order; however, the attorney must assert the privilege to avoid a finding of waiver.<sup>219</sup>

Courts have distinguished among disclosure of client statements, the attorney's opinion testimony about the client's competency, and testimony about the client's demeanor. The attorney-client privilege does not bar the attorney from testifying about her observations of the client's demeanor and her opinion about the client's competency in a post-conviction competency hearing,<sup>220</sup> as long as the client's statements are not disclosed.<sup>221</sup> In such cases, courts have distinguished between the information the attorney obtains through the sense of hearing, which is protected by the privilege, and information obtained through the sense of sight, which is not.<sup>222</sup> Courts that permit attorneys to testify about information they obtained through observation have followed the dominant view—Wigmore's analysis of the privilege. Wigmore limits the application of the attorney-client privilege to the client's words, except that any information the client intended to be confidential, no matter the

218. See *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1430 (S.D. Tex. 1993) (attorney can waive the privilege to protect against third-party accusations even though client does not agree to waive privilege). See generally Jennifer Cunningham, Note, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992 (1990); RICE, *supra* note 201, §§ 9:54-9:59.

219. See RICE, *supra* note 201, at § 9.19.

220. See *Darrow v. Gunn*, 594 F.2d 767 (9th Cir. 1979); *Clanton v. United States*, 488 F.2d 1069 (5th Cir. 1974); *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964); *Howell v. United States*, 282 F. Supp. 246 (N.D. Ill. 1968); *People v. Kinder*, 512 N.Y.S.2d 597 (N.Y. App. Div. 1987).

221. The notion that the client's statements are truly protected when defense counsel is permitted to testify to her opinion of her client's competency is reminiscent of Hans Christian Andersen's fairy tale *The Emperor's New Clothes*. See also *Bishop v. Superior Court*, 724 P.2d 23, 29 (Ariz. 1986) ("[I]t defies reality to pretend that the lawyer has formed opinions on competency without relying on discussions with the defendant."); Pizzi, *supra* note 26, at 60 (the lawyer's opinion will almost certainly be based on client communications and it will be difficult to determine the precise source of the lawyer's opinion); Uphoff, *supra* note 22, at 91 (same).

222. See *Coveney v. Tannahill*, 1 Hill 33, 35 (N.Y. Sup. Ct. 1841) ("This privilege of the client does not extend to every fact which the attorney may learn in the course of employment. There is a difference, in principle, between *communications made* by the client, and *acts done* by him in the presence of the attorney."); *Daniel v. Daniel*, 39 Pa. 191, 211 (1861) ("If a lawyer learns from professional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it."); *Robson v. Kemp*, 170 Eng. Rep. 735, 736 (K.B. 1803) ("One sense is privileged as well as another. [The attorney] cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been [derived] from his situation as an attorney."); WIGMORE, *supra* note 202, § 2306, at 588 ("[W]hether the privileged knowledge of the attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing; and this mode of statement corresponds more closely to the distinction between utterances and acts of the client.").

sense through which it was obtained, is also protected.<sup>223</sup>

Another view, which is more protective of the privilege and the attorney-client relationship, bars the attorney's observations and opinions from being disclosed on the ground that they were learned as a consequence of the attorney-client relationship and thus should be protected. For example, in *Gunther v. United States*,<sup>224</sup> the court commented on the impropriety of receiving testimony from defense counsel:

If trial counsel in a criminal case could be called by the Government and asked to give an opinion as to the accused's competency and ability to assist in the defense, he could necessarily also be asked for the factual data upon which he premised his opinion. These questions would open to inquiry by the Government the entire relationship between the accused and his counsel. Such revelations would be a violation of the attorney-client privilege and would also invade an accused's right to counsel in the trial of the criminal charge.<sup>225</sup>

Courts adhering to this view take a holistic approach to the privilege, focusing on the core relationship it is designed to foster, effectively preventing the attorney from becoming a witness against her client on the issue of competency.<sup>226</sup>

Generally, the rule is that disclosure of client confidences is barred by the privilege even when the client may be incompetent. Therefore, absent a recognized exception to the privilege and the ethical rules, an

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223. WIGMORE, *supra* note 202, § 2306, at 588. While the privilege does not bar the attorney's opinion and demeanor testimony regarding the client's competence, such testimony surely violates the lawyer's duties of loyalty, zealotry, and confidentiality under the ethical rules unless court ordered.

224. 230 F.2d 222 (D.C. Cir. 1956) (per curiam) (the court remanded for a second post-conviction competency hearing and addressed testimony by the defendant's attorney).

225. *Id.* at 223-24. Another example of this view is stated in *United States v. Kendrick*, where the concurring opinion pointed out that the defense counsel's opinion as to his client's competence was inseparable from the client's statements:

Any expression as to the client's mental competency necessarily embraced more than facts observable by anyone; it comprehended conclusions drawn in the course of an association that is uniquely regarded in the law. The lawyer's observations were inextricably intertwined with communications which passed between him and his client. It cannot be said that the testimony was confined to nonconfidential matters.

331 F.2d 110, 115 (4th Cir. 1964).

226. See *State v. Adams*, 283 S.E.2d 582, 586 (S.C. 1981) ("[t]he entire setting of the confidential conference must be protected as well. To lend privilege to the words spoken but to allow disclosure of professional impressions drawn from the manner of their delivery all but destroys the substance of the privilege.") In *Adams*, the court relied on *State v. Doster*, which held that "[t]he privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981).

attorney representing a client such as Harris cannot disclose the client's confidences.

### B. *The Confidentiality Provisions of the Ethical Rules*

Agents, in general, owe their principals the duty to keep information relative to the relationship confidential.<sup>227</sup> But, the lawyer's code of silence is special.<sup>228</sup> It keeps their lips sealed in a way that other agents' and employees' lips are not.<sup>229</sup> The duty of confidentiality professes to encourage the client to tell everything—even sensitive or embarrassing facts—without fear that they will be disclosed.<sup>230</sup> The fully informed lawyer will be able to provide more effective representation. The Rules and the Code provide that information learned about the client will not be revealed<sup>231</sup> unless the client consents, explicitly or implicitly.<sup>232</sup> Thus, the attorney is required to protect client confidences, and other information, relating to the representation.<sup>233</sup>

Professor Luban describes the lawyer's duty of confidentiality this way: "Lawyer's, then, are expected to keep their client's confidences. That is perhaps the most fundamental precept of lawyer's ethics, the one over which to go to the mat, to take risks, to go to jail for contempt if the alternative is violating it."<sup>234</sup> "Elemental decency" stemming from the lawyer's duty of loyalty, including the quality of being trustworthy, is a component of the lawyer's duty of confidentiality.<sup>235</sup>

The ethical rules only permit disclosure of client information pursu-

227. See *supra* note 168 and accompanying text.

228. See LUBAN, *supra* note 201, at 178.

229. See *id.*

230. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 2-4; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1.

231. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 4-5. Under the Model Code, the lawyer must maintain the confidentiality of information "gained in" the professional relationship that the client requested be held inviolate "or the disclosure of which would be embarrassing or would be likely detrimental to the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A).

232. The Model Rules recognize that "the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that the disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges." MODEL RULES OF PROFESSIONAL CONDUCT, at Preamble. See *also id.* Rule 1.6(a); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A), (B).

233. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (protecting information "relating to representation of a client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (protecting information covered by the attorney-client privilege, information gained in the professional relationship that the client requests be kept confidential, and "embarrassing" and "detrimental" information).

234. See LUBAN, *supra* note 201, at 186. But see *supra* note 218 and accompanying text (attorney is permitted to disclose client confidences to defend against allegations of third parties).

235. See LUBAN, *supra* note 201, at 186.

ant to court order,<sup>236</sup> when client consent is obtained,<sup>237</sup> to protect the lawyer from allegations of wrongful conduct and assist in fee collection,<sup>238</sup> and when the purpose of the consultation was for commission of a crime or a fraud.<sup>239</sup> A lawyer's failure to keep information about the client confidential may expose her to disciplinary proceedings.<sup>240</sup>

C. *The Guidance Provided by the Ethical Rules and the Criminal Justice Standards for the Attorney Representing the Impaired Client*

Returning momentarily to the Harris illustration, Harris' next scheduled court appearance is to set a trial date or to enter a plea guilty. Harris clearly has expressed his wish to avoid a trial. His lawyer, however, is troubled by Harris' belief in the existence of a conspiracy, which appears to be influencing his decision to plead guilty. Furthermore, his lawyer does not understand where, if at all, "John" fits in. What should Harris' attorney do? A sensible step would be to seek guidance from the applicable rules of professional responsibility and the studies of the American Bar Association.<sup>241</sup>

1. THE MODEL RULES OF PROFESSIONAL CONDUCT AND THE IMPAIRED CLIENT

The Model Rules of Professional Conduct deal with the problem of the impaired client broadly, without exactitude.<sup>242</sup> The Model Rules urge attorneys representing impaired clients to maintain a normal attor-

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236. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 20; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2).

237. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1).

238. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4). This exception generally applies in matters involving a client, but it is also pertinent in matters involving third parties.

239. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (permitting disclosure to prevent a client from committing a criminal act that the lawyer believes will likely result in imminent death or substantial bodily harm); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (a lawyer may reveal the client's intention to commit a crime and the information necessary to prevent it). *But see A Delicate Balance*, *supra* note 7 (recommending that the disciplinary rules be amended to allow the attorney to reveal the impaired client's confidences in order to assist the client.).

240. See, e.g., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 4.21-4.24, at 28-29 (1991) (promulgating graduated punishments ranging from disbarment to admonishment based on the lawyer's *mens rea* and the consequential impact on the client).

241. Professor Tremblay finds that the guidance offered by the Model Code and the Model Rules is "either . . . too incoherent and ambiguous to be meaningful or . . . unjustified in its delegation of authority to the lawyer." Tremblay, *supra* note 4, at 540.

242. The Model Rules treat impairment caused by mental illness like impairment manifested by minors. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a).

ney-client relationship,<sup>243</sup> and permit them to seek the appointment of a guardian, or other form of protection, only if the lawyer “reasonably believes” the client cannot act in his own best interests.<sup>244</sup> This rule, however, apparently envisions the lawyer acting as a *de facto* guardian with some frequency.<sup>245</sup> The language of the rule does not direct the lawyer to act as guardian to her client. Nor does the rule, or comments thereto, cite to any authority or reasons for deviating from the normal practice that the attorney acts as an agent of the client, and that an incompetent principal nullifies the agent’s authority to act.<sup>246</sup>

The tension among the lawyer’s duties of loyalty, zealousness, and confidentiality, and the failure of the Model Rules to provide sufficient guidance is reflected in Comment 5 to Rule 1.14: “disclosure of the client’s disability can adversely affect the client’s interests . . . [because it could] lead to . . . involuntary commitment. The lawyer’s position in such cases is an unavoidably difficult one.”<sup>247</sup> The Model Rules, how-

243. See *id.* The Model Rules refer to the impaired client’s “ability to make adequately considered decisions in connection with the representation,” *id.*, which is similar to the language of the Model Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.

244. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b). See also ABA Formal Op. 96-404, *supra* note 3 (suggesting that seeking appointment of a guardian should be a last resort).

245. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 2 (“[T]he lawyer often must act as *de facto* guardian.”). In the final draft of Model Rule 1.14(b), the permissive “may” replaced the mandatory “shall,” thus giving the lawyer the option of seeking a guardian. Both the Model Rules and Model Code permit counsel to act as *de facto* guardians. Professor Tremblay has observed that, notwithstanding the likelihood that lawyers may be as able as anyone to act as guardians, other professionals, notably physicians and psychiatrists, are not permitted to act as *de facto* guardians. See Tremblay, *supra* note 4, at 571-72 & n.241. See also *supra* notes 2, 3, 169, 174, and accompanying text.

246. Professor Tremblay, observing that the rule permits the lawyer act in the absence of either client authorization or court approval, referred to this conduct as “lawlessness.” Tremblay, *supra* note 4, at 546. See also Jan E. 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, 1138 (1994) (“Between subsections (a) and (b) of [Model] Rule 1.14, [ ] the assumptions make an unannounced turn that leaves the lawyer representing the client without any recognized basis for doing so.”). See *supra* notes 2, 3, 169, 174, and accompanying text.

247. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 5. With respect to disabled non-clients in emergency situations, the ABA recently amended the comments to Model Rule 1.14 to clarify the lawyer’s prerogatives. An “emergency” is defined as an occasion where the “health, safety, or a financial interest [of the disabled individual] is threatened with imminent and irreparable harm . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmts. 6, 7 (1998 ed.). The comments also obligate the lawyer to attempt to stabilize the attorney-client relationship as quickly as possible and suggest that compensation should not be sought for the emergency services rendered. *Id.* The amendment was designed to address “rare situations” of genuine emergencies and where no other lawyers or agents are representing the individual. *Id.* Remarks of Lawrence J. Fox, Chair ABA Ethics Committee. The amended comments permit lawyers to reveal confidences of the disabled individual “to the extent necessary to accomplish the intended protective action,” but still prohibit the general disclosure of client confidences. *Id.* See also ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 132 (2d ed. 1995) (interpreting Model Rule 1.14 to permit disclosures of client confidences that the lawyer reasonably believes are in the client’s best interests).



ever, do not allow disclosure of the impaired client's confidences.

## 2. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND THE IMPAIRED CLIENT

Under the Model Code, client communications indicating the client's incompetence are privileged and confidential.<sup>248</sup> The Model Code is flexible, providing the lawyer with authority over virtually any course of action, while failing to provide structure for decision-making. Although there is no disciplinary rule regarding impaired clients,<sup>249</sup> the ethical considerations impose additional responsibilities on the attorney for a client who, because of a physical or a mental condition, is "incapable of making a considered judgment on his own behalf."<sup>250</sup> In the absence of a legal representative, the attorney may make decisions for the client in court as long as those decisions "safeguard and advance the [client's] interests"<sup>251</sup> and do not include decisions that are reserved to the client by law.<sup>252</sup>

Illustrating the lack of guidance to the attorney representing an impaired client is the Model Code's failure to explain the meaning of "best interests." For example, is it a "substituted judgment" standard (what the client would have decided); or, is it simply the attorney's judgment about what is best for the client?<sup>253</sup> The Model Code also does not provide any basis for substituting the client's authority with that of the

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248. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (prohibiting disclosures that would be embarrassing or that might be detrimental to the client).

249. *But see A Delicate Balance*, *supra* note 7, at 42-46 (proposing amendment to New York's Code of Professional Responsibility to permit disclosure of an impaired client's confidences for the purpose of helping the client).

250. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.

251. *Id.* No reason is stated that would permit a lawyer to make decisions for the client in court. The drafters may have believed that by the time the matter was "in court," the client had already identified objectives such that the lawyer was simply carrying them out. On the other hand, the drafters may have found comfort in having judicial officers implement the decisions, rather than permitting the attorney to unilaterally make and execute decisions. See Tremblay, *supra* note 4, at 543. Theoretically, the first reason appears sufficient, but some record of the lawyer's assumption of control should be made. The second possible reason is clearly inadequate.

252. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12. This proscription does not differ from the general rule that directs lawyers to make strategy decisions, while preserving the goals or objective decisions to the client. Professor Tremblay suggests that "[a] more sensible construction is that EC 7-12 permits the lawyer to make decisions that otherwise would be 'exclusively' for the client under EC 7-7." Tremblay, *supra* note 4, at 542. However, the language of EC 7-12 states that the lawyer "cannot perform any act or make any decision which the law requires his client to perform or make." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.

253. Since the Model Code has identified a client's inability to make a "considered judgment" as the trigger, an advocacy standard would be inappropriate. See Tremblay, *supra* note 4, at 543.

lawyer's, permitting the attorney to make decisions for the client.<sup>254</sup> Neither the Model Rules nor the Model Code mandates disclosure, leaving the decision entirely to the lawyer's discretion.<sup>255</sup>

### 3. THE ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS AND THE IMPAIRED CLIENT

The ABA Criminal Justice Mental Health Standards contain detailed criteria that address complexities involved in the legal representation of the impaired client.<sup>256</sup> The ABA Standards treat competency as a cornerstone of the adversary system<sup>257</sup> and recognize agency principles, such as the right of criminal defendants to control their defense,<sup>258</sup> the inability of incompetent defendants to exercise that right,<sup>259</sup> and the difficulty of accurately determining the best interests of a client.<sup>260</sup>

The ABA Standards resolve the tension between the attorney's conflicting role obligations as an officer of the court, responsible for maintaining the integrity of the adversary system, and as a loyal and zealous advocate for her client. That tension is resolved in favor of the former.<sup>261</sup> Counsel is obligated to the court, as well as to the fair administration of justice.<sup>262</sup> The lawyer's duty to the court prohibits her from going forward with plea proceedings or trial with an incompetent client because it would violate due process.<sup>263</sup> This responsibility requires that counsel move for a mental evaluation of her client even when she believes such an evaluation would not serve her client's "legal best interests."<sup>264</sup>

254. Professor Tremblay assumes that the drafters relied on principles of agency and implied consent. See Tremblay, *supra* note 4, at 543 n.116.

255. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C).

256. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2(c) and accompanying commentary.

257. See *id.* § 7-4.1 and accompanying commentary.

258. See *id.* See also *Faretta v. California*, 422 U.S. 806, 819-20 (1975) (the Sixth Amendment guarantees the defendant the right to personally participate in and control the defense); *Bishop v. Superior Court*, 724 P.2d 23, 25 (1986) (same).

259. See *supra* notes 2, 3, 169, and 174.

260. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2(c) and accompanying commentary ("In addition, to permit defense counsel to proceed to trial with incompetent clients deprives defendants of their personal right to participate in and to control the thrust of their defense. It further assumes that defense attorneys properly determine the best interests of their clients."). *Id.* at 180. Cf. *Faretta*, 422 U.S. 806.

261. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2(c) and accompanying commentary.

262. See *id.*

263. See *id.* at 180. ("Because the trial of an incompetent defendant necessarily is invalid as a violation of due process, a defense lawyer's duty to maintain the integrity of judicial proceedings requires that a trial court be advised of the defendant's possible incompetence.").

264. See *id.* § 7-4.2(b) commentary, at 178.

Defense counsel is acknowledged to possess information essential to ascertain her client's ability to rationally understand the process and to rationally assist with his defense.<sup>265</sup> A good faith doubt about a client's competency is sufficient grounds to move for an evaluation, even over the client's objection.<sup>266</sup> Although "specific facts" supporting the good faith doubt must be reduced to writing,<sup>267</sup> the lawyer cannot divulge confidential information or statements protected by the attorney-client privilege.<sup>268</sup>

Similarly, at the competency hearing, the attorney is urged to "relate to the court personnel [presumably the judge] observations of and conversations with the defendant,"<sup>269</sup> but "confidential communications" may not be disclosed and the attorney-client privilege cannot be violated.<sup>270</sup> Cross-examination regarding testimonial observations and conversations is permissible, but caution must be exercised to ensure confidential statements, or other information within the privilege, are not revealed.<sup>271</sup> The court may also question defense counsel about the defendant's ability to communicate and the quality of the attorney-client relationship; but again, the substance of confidential communications, or other matters protected by the privilege, may not be divulged. Moreover, the prosecution may not cross-examine defense counsel on subjects raised by the court.<sup>272</sup>

In sum, protecting the possibly incompetent client's statements

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265. See *id.* § 7-4.8(b)(i) and accompanying commentary ("A defense attorney not only is in close and continuing communication with a client, but he or she also knows the extent to which presentation of substantive and factual defenses may turn on the client's ability to understand them and assist counsel in advancing them."). *Id.* at 211-12.

266. See *id.* § 7-4.2(c). The standards do not address the type or the amount of information that would equate to a "good faith" doubt about the client's competency. This may be because each case will turn on its own facts. It seems clear, however, that isolated odd acts or statements by a defendant, who in all other respects appears competent, would be insufficient to justify raising the issue. Before subjecting the client to a competency evaluation, defense counsel should have a good faith belief that the client is incompetent, not simply that the client has done or said something that is odd.

267. See *id.* § 7-4.2(d). The lawyer may make the application orally if making it in writing "might deleteriously affect the attorney-client relationship." The possibility that attorney may have to move for withdrawal is acknowledged. *Id.*

268. See *id.* § 7-4.2(f). See also *id.* § 7-3.3(b) (disclosures made by the defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege); *id.* § 7-3.4(b) (in court-ordered evaluations upon prosecution request, the expert shall notify prosecution and defense of clinical findings and opinions, but shall not refer to the defendant's statements).

269. *Id.* § 7-4.8(b)(i). "Conversations" is not defined.

270. The distinction between "conversations" with the client and "confidential communications" in this context is not clear, since revelation of client confidences, as part of the attorney-client privilege, is prohibited.

271. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8(b)(i). See also *People v. Kinder*, 521 N.Y.S.2d 597 (N.Y. App. Div. 1987).

272. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8(b)(ii).

forces courts to rely on unchallenged, conclusory testimony. Thus, courts are deprived of the most compelling evidence determinative of the competency issue—the defendant's own statements.<sup>273</sup>

Unfortunately, as the foregoing demonstrates, much of the advice offered by the Model Rules, the Model Code, and the ABA Criminal Justice Mental Health Standards is internally inconsistent. In some respects, it is contrary to the law of agency. None of the wisdom contained in these schemes satisfactorily answers the dilemma facing attorneys who represent impaired defendants.

Other possible options do exist, however.<sup>274</sup> For example, under certain circumstances, an attorney can withdraw from the representation. In court proceedings, judicial permission is generally required.<sup>275</sup> Most judges in criminal cases are not enthusiastic about motions to withdraw, especially when the client may be impaired. Even if the motion is granted, the problem simply gets shifted to another attorney. Or, the problem may “disappear” in the sense that the defendant may not relay the information to the substituted lawyer because it may result in another withdrawal. In addition, the attorney's role as a counselor requires that she attempt to get her client to understand the consequences of his choices and to steer her client away from harmful choices.<sup>276</sup> Quite often, however, the hours spent counseling clients prove fruitless.

Although advocated by some,<sup>277</sup> acting as a *de facto* guardian in a criminal case has constitutional implications, as well as raising questions under agency law. Since in a criminal case the client is required to make certain choices, permitting the lawyer to make the incompetent client's choices seems unconstitutional.<sup>278</sup> On the other hand, if the lawyer has

273. The commentary to the ABA Criminal Justice Mental Health Standards states, without elaboration, that permitting disclosure of client confidences was considered and rejected. *See id.* § 7-4.8(b)(i) commentary, at 213.

274. Professor Tremblay has identified six possible options for an attorney representing an impaired client in the civil context: (1) move to withdraw; (2) seek appointment of a guardian, either by acting as petitioner or by recruiting a third party; (3) seek unofficial consent from a family member or close friend of the client (i.e., rely on family as proxy decision maker); (4) seek to persuade the client to do what the lawyer thinks is appropriate; (5) act as a *de facto* guardian; and (6) presume competence and follow the client's wishes even if the result will be disastrous. Tremblay, *supra* note 4, at 519-20 (adding that withdrawal should be avoided if possible). *Cf.* ABA Formal Op. 96-404, *supra* note 3 (discussing the problems involved in withdrawal). All of these alternatives compromise the attorney-client relationship.

275. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(1).

276. Even Professors Binder, Bergman, and Price, strong proponents of client-centered decision making and lawyer neutrality, recognize the appropriate use of interference when the client's decision will result in substantial economic, social or psychological harm in return for little gain. *See* BINDER ET AL., *supra* note 172, at 282-86.

277. *See infra* Part VI.D.

278. *See infra* notes 304-07 and accompanying text.

reasonable cause to doubt the client's competence, but still follows the client's instructions, this problem causes the same result.<sup>279</sup>

#### VI. ALLOWING CRIMINAL DEFENSE COUNSEL TO DISCLOSE CLIENT CONFIDENCES IN COMPETENCY PROCEEDINGS

Proceeding against an incompetent criminal defendant potentially harms both the defendant and society's perception of a fair and just legal system.<sup>280</sup> This threat to the integrity of the system justifies the creation of a limited exception to the attorney-client privilege and the ethical rules for disclosure of client confidences<sup>281</sup> in cases involving a defendant's possible incompetency.

In substantiating the attorney's professional role, the privilege, and the controlling legal ethics, the defense attorney—who possesses important information about her client's competence—has been virtually eliminated from the process. As a result, Harris and other similarly situated defendants who do not disseminate their digressions outside the attorney-client relationship appear deceptively competent. Currently, judicial inquiry to determine a defendant's competence relies too heavily on the judgments of mental health professionals. Moreover, these experts often know little about the legal capabilities required of a criminal defendant. Thus, they view the defendant through a therapeutic, rather than through a forensic, lens.<sup>282</sup> Even when the mental health professionals acquire information to suggest that the defendant is incompetent, defense counsel's assessment of her client's rational ability to assist in his own defense would greatly assist the fact finder in determining competence.

The solution to the dilemma faced by Harris' counsel, and other attorneys representing possibly incompetent clients, is to permit the disclosure of client confidences solely for the purpose of determining competency.<sup>283</sup> Various exceptions to the attorney-client privilege and the

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279. See *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

280. Society also has significant interests in preventing the competent defendant from being found incompetent. These interests include the rights of crime victims, the prompt resolution of criminal charges, and the reduction of risks (i.e., disappearing witnesses, fading memories, or lost or stale evidence). These interests, while not implicating fundamental constitutional values, are sufficiently compelling to permit disclosure of client confidences that demonstrate competence, particularly because the lawyer's testimony will be afforded significant protections, preventing its use for any other purpose. Cf. *People v. Kinder*, 512 N.Y.S.2d 597 (N.Y. App. Div. 1987).

281. The ethical rules require attorneys to keep all information relating to the client confidential, not just those communications protected by the attorney-client privilege. A key premise for my proposal is that information in defense counsel's possession is not otherwise available; disclosure of client information, therefore, should be limited to client confidences that are not otherwise available from other sources.

282. See *supra* notes 74-87 and accompanying text.

283. The standard to be applied for determining the feasibility of adopting this limited

confidentiality provisions of ethical rules already exist. These exceptions have not destroyed the legal order of our judicial system.<sup>284</sup> Similarly, this proposal will not alter that reality.

Any proposal seeking to modify the ethical rules, and a rule as old and venerated as the attorney-client privilege, is bound to elicit objections. Opponents of permitting lawyers to disclose client confidences for the purpose of determining competency submit four arguments in support of their position: (1) the duty of confidentiality should not be violated; (2) the ethical duties of loyalty and zealousness should not be violated; (3) the prosecution would be advantaged by the disclosed statements; and (4) impaired criminal defendants should have the same rights as non-impaired defendants.

#### A. *The Importance of Confidentiality and Its Limits for the Possibly Incompetent Defendant*

The rationale behind the attorney-client privilege is that confidentiality assures free and open communication between the client and the lawyer, enabling the lawyer to guide the client along a lawful course. This also serves as the basis for the confidentiality provisions of the ethical rules.<sup>285</sup> Critics of my proposed exception will likely argue that permitting disclosure will inevitably discourage clients from telling their attorneys the complete truth, contrary to the purpose of the attorney-client privilege and the ethical rules. Any response to such an argument

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exception should balance the cost of this exception against its benefits. See Zacharias, *supra* note 206, at 408. In some respects, this proposal is similar to Professor Pizzi's argument that defense counsel has a special responsibility to protect the defendant's constitutional right to be prosecuted only when competent, and that asserting the attorney-client privilege should not interfere with the court's determination of whether an attorney-client relationship exists. See Pizzi, *supra* note 26, at 61-63. The image of the possibly incompetent client being so close to a vegetative state that judicial inquiry to determine capacity to even enter the relationship, is artificial. In such a case, the lawyer's information would be superfluous. Clients who are mentally impaired can still enter into the attorney-client relationship. See BRAKEL, *supra* note 42, at 682.

284. Cf. Zacharias, *supra* note 206, at 408 n.276 (comparing other legal systems that provide exceptions to the duty of confidentiality).

285. See *supra* Part V. Under the ethical rules, the duty of confidentiality includes information relating to the representation, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a), secrets, and client confidences. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A). This broader duty, however, is relatively new. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 245 (1992). According to Professors Rhode and Luban, this obligation is not addressed in the earliest works on legal ethics in the United States and it appears to have originated in the Field Code of 1849. See *id.* The Field Code defined one obligation of attorneys as "maintain[ing] inviolate the confidences, and, at every peril to himself, to preserve the secrets, of his clients." *Id.* This definition formed the basis for a similar rule in the 1908 ABA Cannons and subsequently, was incorporated in the Model Rules and Model Code. See *id.* See also Daly, *supra* note 168, at 1617-19. The rationale behind the ethical rules includes the maintenance of loyalty and integrity of the attorney-client relationship.

depends largely on balancing the importance of confidentiality<sup>286</sup> with the importance of determining competence. Although both values are significant in our justice system, competence is more important.

Competency determinations are more important because our adversarial system cannot function reliably without competent parties. As a threshold matter, we must be able to make a reliable determination as to competence in order to meaningfully commence the process. Proceedings against an incompetent defendant are fundamentally unfair and violate the due process guarantee of the U.S. Constitution.<sup>287</sup> Our society will not tolerate the prosecution of helpless, deranged defendants.

Moreover, the privilege is utilitarian in nature.<sup>288</sup> Both the privilege and the confidentiality provisions of the ethical rules are based on the belief that, in the long run, society *and* the client benefit from the private nature of the attorney-client relationship.<sup>289</sup> The benefits of fully informing the attorney outweigh the costs imposed by requiring strict confidentiality. The underlying assumption is that the client will tell the lawyer everything essential to adequate representation if the secrecy to which the attorney must adhere is assured.<sup>290</sup> This assumption has been questioned on the basis of empirical studies<sup>291</sup> and is, therefore, especially difficult to accept for the impaired client. Arguably, the impaired client's statements do not warrant protection because they are not the product of a rational mind and the privilege assumes the client is rational. Consider, for instance, Harris' ramblings about being a witness to the plot to kill President Kennedy, or Blohm's belief in a golf conspiracy, or Lafferty's religious commands. There is no value in keeping

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286. A rule that asserts that client statements are protected is important for symbolic value. See *Pearse v. Pearse*, 11 Jar. 52, 55 ("Truth like all good things may be loved unwisely, may be pursued too keenly, may cost too much."); *State v. Douglass*, 20 W. Va. 770, 783 (1882).

287. See cases cited *supra* note 53.

288. See Daly, *supra* note 168, at 1624; Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1159-72 (1985) (characterizing the rule as "instrumental"); RHODE & LUBAN, *supra* note 285, at 224 (same).

289. See *supra* notes 183-97 and accompanying text. See also generally Subin, *supra* note 288, at 1159-72. Professor Subin argues that the strict rule of confidentiality is based on client rights and, to the extent that it assumes that the lawyer will dissuade the client from wrongful conduct, is instrumental. Additionally, the lawyer should disclose client confidences in situations wherein serious harm could occur. See *id.*

290. Professor Subin observed that the "rights-based" justification for confidentiality rests, in part, on the claim that clients will not be fully candid without confidentiality. See *id.* at 1160-63. He argues that this claim lacks empirical support, is "intuitive," and ignores "competing propositions, equally intuitive, but of equal or greater persuasive force." *Id.* at 1163.

291. See Zacharias, *supra* note 206, at 376-82 (purporting to conduct an empirical study of community awareness of confidentiality). See also Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (survey revealed significant misinformation about the attorney-client privilege).

these delusional statements confidential. Conversely, disclosure of them will not only benefit the client, it will benefit society as well—by preserving the integrity of the system.<sup>292</sup>

The privilege and the confidentiality provisions normally protect the individual client. But the possibly incompetent client does not profit from the attorney's forced silence. On the contrary, the attorney's silence may result in substantial harm to the client—finding the incompetent defendant to be competent and proceeding to trial will likely result in a conviction. As a result, the incompetent defendant has permanently lost an important set of rights and has only a remote chance of vindication on appeal.<sup>293</sup> The possibly incompetent client whose confidences are not disclosed would then find himself irreparably harmed. Thus, neither the attorney-client privilege nor the duties of confidentiality outlined in the ethical rules of conduct should act as a bar to disclosure of a client's statements.

As proposed, such an exception is justified when compared with the reasons for the existing exceptions to the attorney-client privilege and the circumstances under which the ethical rules permit disclosure.<sup>294</sup> Public policy considerations prohibit attorneys from assisting clients in the commission of crimes, frauds, or intentional torts. Waiver of the privilege is generally left to the client's discretion,<sup>295</sup> and fairness dictates that the attorney be permitted to disclose client statements in self-defense.<sup>296</sup>

The rationale for permitting disclosure of statements by the possibly incompetent client<sup>297</sup> is different than that underlying the other exceptions,<sup>298</sup> but it is no less compelling. Correctly resolving competency issues is at least as important as permitting disclosure of client confidences that are evidence of a future or ongoing crime, tort, or fraud, and the self-defense exception (even as to claims by third parties).

292. Some may disagree with this position. The disagreement, however, is about when paternalism or interference is warranted, not whether it is *ever* justified.

293. On the other hand, the competent client who is found to be incompetent suffers some hardship for a relatively short period during which he is typically confined, pending periodic review. *See, e.g.*, 18 U.S.C. § 4142 (1984) (providing for in-patient evaluation and periodic review). *But see* WEXLER & WINICK, *supra* note 27, at 25-36 (arguing that the referral for, and process of, evaluating competency, itself, stigmatizes the client and has an antitherapeutic effect). After review, the defendant will almost certainly be found competent; if not, he will be subject to civil commitment. *See, e.g.*, 18 U.S.C. § 4247(c)(4)(C), (D) (1984). Thus, only a small number of defendants remain incompetent long enough to be civilly committed. *See* Winick, *supra* note 51, at 932-33.

294. *See supra* Part IV.B.

295. *See supra* note 213-19 and accompanying text.

296. *See supra* note 217-18 and accompanying text.

297. *See supra* notes 209-26 and accompanying text.

298. *See supra* notes 212-19, 236-39, and accompanying text.



Indeed, since it benefits both society and the client, disclosure is arguably more important than silence under specific circumstances.

Critics may argue that by creating an exception to the attorney-client privilege, its sanctity will gradually erode. This contention constitutes a “slippery slope” and has no completely satisfactory answer because it depends on predictions about the future. It is noteworthy, however, that a number of exceptions to the attorney-client privilege and ethical rules already exist and the confidentiality requirement has lost none of its effect. Although exceptions have a tendency to swallow a rule, that will not happen under this proposed limited exception. The proposed exception is applicable in a very narrow circumstance in which genuine questions about the client’s competence are raised. It will not descend down a slippery slope.

### B. *The Ethical Rules*

Consider the following scenario: As criminal defense counsel, you appear at the arraignment proceeding as appointed counsel to a defendant charged with disorderly conduct (urinating in public). After introducing yourself, the client refers to you as “Your Majesty” and begins to talk about the monarchy in England in the 1800s. Despite your efforts, your client will not talk about anything else; however, he did reply affirmatively when you told him of the charge against him. When your case is called, the judge calls you and the prosecutor to the bench for purposes of disposition. The judge is amenable to the guilty plea and sentence of time served as offered by the prosecution (in this jurisdiction the client is not required to allocute to violations). Should you: (A) Plead the client guilty; or (B) ask for a competency evaluation?

The lawyer’s duties of loyalty, zealousness, and responsibility as an officer of the court are implicated by this example. If you raise the competency issue, your client will obviously be confined for evaluation<sup>299</sup> longer than the criminal disposition of the case.<sup>300</sup> Since many criminal defense attorneys define zealous advocacy as “getting the client off” or obtaining the most lenient sentence possible,<sup>301</sup> defense counsel likely sees herself as “responsible” for the time the client spends confined for the competency evaluation.<sup>302</sup>

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299. Despite serious problems associated with incompetency commitments, such as non-existent or inadequate treatment, most defendants are ultimately found competent—many by virtue of the treatment they received. See Winick, *supra* note 51, at 932-33.

300. Cf. Uphoff, *supra* note 22, at 102-03; Winick, *supra* note 51, at 947.

301. See *supra* notes 187-90 and accompanying text.

302. See Subin, *supra* note 288, at 1169 (suggesting that proponents of strict confidentiality would find it “emotionally unacceptable” to participate in a system that would require the attorney to be a “whistle-blower”). See also ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-

Properly understanding the defense lawyer's role in competency matters provides an answer. In a criminal case, decision making is governed by the ethical rules<sup>303</sup> and the U.S. Constitution. The Constitution clearly requires that certain decisions be made by the defendant. For example, the decision about how to plead,<sup>304</sup> whether to waive the right to a jury trial,<sup>305</sup> and whether to waive the right against self-incrimination and to testify<sup>306</sup> are all choices that are reserved to the client. The defense attorney who proceeds with a guilty plea or proceeds to trial despite reasonable cause to believe the defendant is incompetent violates the ethical rules and deprives the client of his constitutional right to make those decisions.<sup>307</sup> Thus, the notion that loyalty or zealotry permit the criminal defense attorney to act on behalf of the possibly incompetent criminal defendant is doubtful as a matter of ethical rules and constitutional law.

In addition, under the ethical rules, all attorneys have an affirmative duty to avoid perpetrating a fraud on the court.<sup>308</sup> If counsel does not raise the competency issue when she has reasonable cause to believe her client is incompetent (and there is no notice from another source), the lawyer's silence may violate this duty.<sup>309</sup> In a typical case, the lawyer's activities are explicitly or implicitly authorized by the client. The court is entitled to infer that the lawyer's conduct is authorized because of the lawyer's duty to raise the competency issue.<sup>310</sup> Under such circum-

4.2(c). "The conflict, if it exists, arises from a perceived pragmatic failure of the criminal justice system to live up to its promise, in that the deficiencies in the system of incompetence evaluation and treatment implicitly threaten excessive or inappropriate sanctions against defendants." *Id.* at 194-95. See also Chernhoff & Schaffer, *supra* note 31, at 513 (describing conditions at mental health facilities used to diagnose and treat criminal defendants).

303. See *supra* notes 242-79 and accompanying text.

304. See *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988) (citing *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966)); *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

305. See *Taylor*, 484 U.S. at 418 n.24 (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Barnes*, 463 U.S. at 751; *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

306. See *Barnes*, 463 U.S. at 751; *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992).

307. Furthermore, despite the arguments of some commentators, there are no exceptions to the requirement that a criminal defendant be competent. See *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373 (1996); *Medina v. California*, 505 U.S. 437, 439 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960).

308. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102. See also *Evans v. Kropp*, 254 F. Supp. 218, 222 (E.D. Mich. 1966) ("Regardless of [defense counsel's] personal views, he may not withhold from the court such critical information as the diagnosed mental incompetency of his client and of his consequent possible inability to stand trial.").

309. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 commentary, at 180 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1)).

310. See *supra* notes 27, 41, 49, 62, and accompanying text.

stances, an argument could be made that by not raising the issue of competency, the attorney has perpetrated a fraud on the court.<sup>311</sup>

Professor Uphoff disagrees with this position. He contends that the criminal defense attorney's role often requires her to act in ways that frustrate the search for truth.<sup>312</sup> Traditionally, defense counsel has been permitted to withhold information from the authorities and to create misleading impressions during cross-examination and in closing argument. Therefore, Professor Uphoff claims that defense counsel's decision not to raise the issue of competence does not constitute a fraud on the court.<sup>313</sup>

The extensive latitude granted to defense counsel does not provide an acceptable answer to this argument.<sup>314</sup> Impeaching witnesses she believes are being truthful or making misleading arguments in closing remarks is profoundly different from allowing the defense attorney to act without authority while implicitly presenting a contrary position to the court. The former is a function of our adversarial system, which places demands on the criminal defense lawyer and dictates the lengths to which society is prepared to go to avoid convicting the innocent defendant—all of which occurs in a public setting under the supervision of a judge and countered by the role of the prosecutor. The latter permits the determination of whether the defendant can even participate in the adversary system to be made by the defense attorney in complete isolation, in contravention of the checks and balances contained in the adversary system.

Furthermore, the ethical rules prohibit an attorney from testifying as a witness while acting as an advocate in the same matter. As the dissent in *Medina*<sup>315</sup> suggests, the exception should not be adopted because it violates this prohibition.<sup>316</sup> One reason for this prohibition is that impeachment of the lawyer as a witness, could adversely affect the lawyer's credibility as an advocate of the defendant.<sup>317</sup> But the fact that the defense attorney may be the only witness possessing particular infor-

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311. Silence in the face of reasonable cause to believe the client is incompetent also implicates defense counsel's role as agent. See *supra* note 26-39, 192-94, and accompanying text.

312. See Uphoff, *supra* note 22, at 89-90. Professor Uphoff acknowledges that the ABA Standards' claim, that failure to disclose doubt about a client's competency, may constitute a false statement of material fact. See *id.* at 90.

313. See Uphoff, *supra* note 22, at 91.

314. See, e.g., *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting).

315. *Medina v. California*, 505 U.S. 437, 466-67 (1992) (Blackmun, J., dissenting).

316. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B). The lawyer may testify if the matter is uncontested, a formality, related to collection of a fee, or if preclusion would result in a substantial hardship for the client. See *id.*

317. See *McKinney v. State*, 566 P.2d 653, 660 (Alaska 1977). This concern is grounded in the lawyer's duty of loyalty. See *supra* notes 181-86 and accompanying text.

mation,<sup>318</sup> as well as recognizing that the competency issue and this exception impose different obligations on the defense attorney, should minimize the risk that the lawyer's testimony will be misconstrued.<sup>319</sup> Because testimony about competence is not directed at the merits of the criminal case, the prohibition against the lawyer as a witness should not apply.<sup>320</sup>

Consequently, the defense attorney would have to be relieved and new counsel appointed or retained. The successor attorney would have to advocate what the client wants during the competency hearing and in subsequent proceedings.<sup>321</sup> However, the destruction of the first attorney-client relationship is no more significant than any other circumstance that might disqualify defense counsel.<sup>322</sup>

### C. *The Risk That Disclosed Statements Will Be Used by the Prosecution*

In view of the nature of the competency inquiry, it is likely that the attorney's testimony would include the defendant's admissions or information leading to the discovery of other evidence. Skeptics may object to this proposal for fear that the defense attorney's testimony, or its fruits, could be used against the defendant at a trial on the criminal charges. This raises the possibility that the prosecution could use the competency process to gather information about the defense's theories and strategy. The following scenario illustrates such a concern.

Suppose that one of the guards in the jail where Harris is being held before trial overheard Harris talking to "John" about the JFK conspiracy and tells the prosecutor. The prosecutor informs the expert appointed to conduct the competency evaluation, who then asks Harris about "John"

318. See *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988). Reviewing the disqualification of defense counsel who testified at his client's pre-trial competency hearing with the client's consent, the court stated that: "No one but [the defense attorney] was in a position to offer the testimony which he gave—only he had the insight into the difficulty which his client had with remembering counsel's instructions and advice, and he, uniquely, could detail the practical inability of representing Baca when Baca was unable to participate in his defense." *Id.* at 117-18. The concurring opinion of Judge Cox suggests that the issue of competency, like the issue of speedy trial, is collateral for purposes of the rule, and that disqualification would not normally be required. See *id.* at 120. But if defense counsel's credibility was put in issue and the court found against counsel's position, there may be a spill over effect on other issues.

319. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8 commentary (permitting defense attorney to testify with caution and suggesting that counsel is not in an adversary role when testifying). But see *McKinney*, 566 P.2d at 660.

320. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8 commentary.

321. See, e.g., *Seidner v. United States*, 260 F.2d 732, 734 (D.C. Cir. 1958); *United States v. Blohm*, 579 F. Supp. 495, 498 (S.D.N.Y. 1983).

322. For example, disqualification resulting from conflicts would have similar effects. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.11; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5.

and the conspiracy. Harris denies knowing anything about either. The expert notes this in her report and suggests that if the information were true, Harris might be experiencing delusions and thus may not be competent. But based on the available information, the expert thinks Harris is competent, although she recommends additional information be gathered. The prosecutor then contacts defense counsel and threatens to call her as a witness at a competency hearing unless defense counsel can offer assurances that her client is competent.

The response to this scenario depends on the adequacy of the protection afforded the disclosure of client communications. Since the competency inquiry determines whether the defendant can proceed to trial, both the defendant and society stand to benefit from that determination. Therefore, the prosecution should not be able to profit from the defense attorney's testimony or its fruits, once disclosed solely for the purpose of resolving the competency issue.<sup>323</sup>

Courts have protected the defendant's statements in comparable circumstances. In certain situations, the Constitution forbids the forced surrender of one constitutional right in order to assert another.<sup>324</sup> To avoid this forced surrender of the defendant's due process right—to proceed only while competent—in favor of the Fifth Amendment right against self-incrimination, neither the defense attorney's nor the defendant's statements, nor their fruits, should be admissible for any purpose other than resolving issues of the defendant's mental condition.<sup>325</sup>

Many jurisdictions provide statutory protections for a defendant's statements made to mental health experts<sup>326</sup> and to the court<sup>327</sup> at a competency hearing. Mental health professionals are also prevented from testifying at trial or at the sentencing phase using information learned

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323. Cf. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS §§ 7-3.3, 7-3.3(b) (statements made by defense counsel and defendant during the course of evaluation are protected by the attorney-client privilege) and Levine, *supra* note 207, at 824 (suggesting that attorney's disclosure of client confidences under self-defense rationale be protected from any other use).

324. See, e.g., *Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding that a defendant's statements in a motion to suppress based on an alleged Fourth Amendment violation, could not be used at trial because it is "intolerable that one constitutional right should be surrendered in order to assert another."); *United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993) (finding that the defendant's financial affidavit and testimony of the agent who witnessed defendant's statements to magistrate judge in order to obtain assignment of counsel could not be used against the defendant at trial).

325. Cf. FED. R. CRIM. P. 12.2 (limiting use of defendant's statements to issues involving mental condition when raised by the defendant); *United States v. Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975).

326. See, e.g., FED. R. CRIM. P. 12.2.

327. See, e.g., N.Y. CRIM. PROC. L. § 730.20 (5) (McKinney 1992); *People v. Grisset*, 460 N.Y.S.2d 987, 990 (N.Y. Sup. Ct. 1983) (protecting the defendant's statements in response to a competency inquiry by the court).

during the competency phase.<sup>328</sup> This protection is derived from the Fifth Amendment's prohibition against eliciting compelled statements from those charged with criminal conduct.<sup>329</sup> Providing protection to the defendant's statements made to examining doctors and courts, but not protecting the same statements when repeated by an attorney at a competency hearing, would defeat the principles underlying this ban. By providing use and derivative use immunity,<sup>330</sup> no penalty will attach to the defendant's statements without undue concern that the information elicited would be improperly used in subsequent proceedings. Thus, defense counsel could be obliged to participate in the competency determination.<sup>331</sup>

Furthermore, it may be asserted that precluding the prosecution from using defense counsel's testimony or its fruits for any purpose other than the resolution of issues of the defendant's mental condition frustrates the search for truth.<sup>332</sup> In other contexts, typically where governmental misconduct results in the judicial suppression of evidence, the prosecution is permitted to use suppressed evidence to impeach the defendant's testimony.<sup>333</sup> The justification for permitting impeachment, however, is inapposite to allowing defense counsel's testimony to be used for impeachment. The suppression of evidence in the case of governmental misconduct is based on an exclusionary rule designed to deter law enforcement officers from violating constitutional rights.<sup>334</sup> As the deterrent effect becomes attenuated, truth becomes more important than deterrence, and the evidence becomes admissible for impeachment purposes.<sup>335</sup> Therefore, cases treating the defense attorney's testimony as compelled are more analogous.

Finally, due to the importance of the various conflicting interests, the judge should be especially vigilant in avoiding inappropriate and unnecessary questioning of defense counsel and the defendant.<sup>336</sup> The

328. Cf. *Estelle v. Smith*, 451 U.S. 454 (1981); *New Jersey v. Portash*, 440 U.S. 450 (1979).

329. U.S. CONST. amend V.

330. See 18 U.S.C. § 6002 (1970).

331. Cf. *Kastigar v. United States*, 406 U.S. 441 (1972).

332. See, e.g., *United States v. Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

333. See, e.g., *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954).

334. See, e.g., *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 222-26; *Walder*, 347 U.S. 64-65.

335. See, e.g., *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 222-26; *Walder*, 347 U.S. 64-65.

336. Intrusions into attorney-client relationships should be minimized because the relationship is vital to the proper functioning of the adversary system. Cf. MICHAEL M. MARTIN, ET AL., *NEW YORK EVIDENCE HANDBOOK: RULES, THEORY, AND PRACTICE* § 5.2 (1997). ("[T]he privilege is a recognition of the societal importance of privacy and the private attorney-client relationship."). *Id.* at 333-34. Cf. *Levine*, *supra* note 207, at 818 (privilege fosters human dignity and individual integrity).

court should thus confine counsel's testimony to information that is necessary and relevant to determine competency.<sup>337</sup> As an additional safeguard, the defense attorney should not be compelled to be a witness absent the court's determination that: (1) additional evidence concerning the defendant's competency is required; (2) the defense attorney is likely to have the necessary information; and (3) the prosecution is not seeking to cause the disqualification of defense counsel. These safeguards, and the significance of correctly resolving the issue of competence, require that the attorney's testimony, including the disclosure of client confidences, be closely regulated. The prosecution will not be prejudiced by these restrictions because the information barred is information to which it would not have otherwise been privy.<sup>338</sup>

#### D. *The Rights of Impaired Defendants*

In most jurisdictions, the incompetency doctrine provides only two options: competence or incompetence. A finding of incompetence virtually prevents the defendant from exercising any rights with respect to the charges.<sup>339</sup> This has been a controversial matter.

Some commentators take the position that, under certain circumstances, defense counsel should be allowed to act for the client and not be obligated to notify the court of a client's possible incompetence.<sup>340</sup> The justification given for this posture is that the incompetency doctrine denies incompetent defendants the rights to make case dispositive motions, to obtain favorable plea dispositions, and even to be vindicated at trial.<sup>341</sup> Delay, pretrial confinement in conditions often worse than jail, stigma, and the absence of professional treatment, or the effects of

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337. Cf. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.8(b)(ii) (limiting cross examination of the defense attorney); *People v. Grisset*, 460 N.Y.S.2d 987, 990 (N.Y. Sup. Ct. 1983).

338. Existing law answers prosecutorial concern about having trial evidence challenged as the result of the attorney's statements. When a witness is granted immunity in exchange for grand jury testimony, and is subsequently indicted, the prosecution bears the burden of proving that its trial evidence did not originate from the witness' testimony or its fruits. See *Kastigar v. United States*, 406 U.S. 441, 460-61 (1972). This same burden should apply to the prosecutor after a competency hearing at which defense counsel or her client testifies.

339. Some jurisdictions provide for some rights to be exercised for the incompetent defendant. See, e.g., MODEL PENAL CODE § 4.06(3) (allowing an attorney to contest any issue which could be fairly determined without the personal participation of the defendant); see *id.* § 4.06(4) (permitting an attorney to assert certain defenses). This sort of statute, however, is rarely used.

340. WEXLER & WINICK, *supra* note 27, at 84. See *Bonnie*, *supra* note 27, at 566; Uphoff, *supra* note 22, at 67, 98-108; ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 36-38 (Rodney J. Uphoff ed., 1995).

341. WEXLER & WINICK, *supra* note 27, at 84. See *Bonnie*, *supra* note 27, at 566; Uphoff, *supra* note 22, at 67, 98-108; ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 36-38 (Rodney J. Uphoff ed., 1995).

such treatment, are offered in support of their contentions.<sup>342</sup> These commentators claim that the lawyer acts paternalistically when she interferes with the expressed choice of the client and that paternalism is bad. Although paternalism is bad in many situations it can be justified when necessary to properly resolve the competency issue of an impaired defendant.<sup>343</sup>

The counter-argument is that increased participation by defense counsel in competency proceedings will result in more competency evaluations and will increase the number of defendants found to be incompetent. Assuming this to be true and recognizing that there is no panacea, the importance of correctly determining a defendant's competency, principles of agency and the limits imposed by the Constitution dictate the adoption of the limited exception to the attorney-client privilege and the ethical rules regarding disclosure of client communications.

Professor Bruce Winick advocates that defendants "impaired by mental illness who, with the concurrence of counsel, clearly and voluntarily express the desire to stand trial or plead guilty" ought to be able to waive competency determinations.<sup>344</sup> Professor Winick challenges the view that competence is "an essential prerequisite for waiver of rights in the criminal process."<sup>345</sup> He also claims that one of the negative consequences of the competency process, as it currently exists, is that client autonomy is diminished.<sup>346</sup> His proposal substitutes the defense attorney for the mental health professional and the judge as the decision-maker.<sup>347</sup>

Under Professor Winick's proposal, the defense attorney becomes a *de facto* guardian. As long as the lawyer agrees with the client's voluntarily expressed desire, she follows the client's instructions.<sup>348</sup> If the

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342. The possibility that delay resulting from the competency evaluation will hurt the defendant's case has been raised as a concern. There are some criminal cases in which a prompt trial would benefit the defendant. The prevailing wisdom among defense lawyers, however, is that delay normally works in favor of the defendant. See, e.g., *Brown v. Warden*, 682 F.2d 348, 353 (2d Cir. 1982) (the right to a speedy trial is not vigorously pursued by defendants). Witnesses disappear, memories fade, the prosecutors interest diminishes or moves on to another case, evidence grows stale, is lost or mishandled. Most of the time, the prosecutor's case is strongest at the time of arrest when, for most crimes, the investigation ends. There are exceptions. For some very serious or high profile crimes, the investigation continues. And, in some jurisdictions, the investigation often continues at least to the extent the government is prepared to sign up cooperators. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1995).

343. See Tremblay, *supra* note 4, at 523.

344. WEXLER & WINICK, *supra* note 27, at 84. See also Bonnie, *supra* note 27, at 542-46 (analyzing Winick and discussing problems with his proposal).

345. WEXLER & WINICK, *supra* note 27, at 84.

346. See *id.*

347. See *id.*

348. See *id.* The meaning of "voluntarily" in this context is not satisfactorily explained. This is troubling when one considers that the general standard for waiver—whether the defendant's



lawyer disagrees with the client, a competency evaluation is ordered.<sup>349</sup> This result raises serious questions about defense counsel's role as an agent, and has constitutional implications as well.<sup>350</sup> Additionally problematic, is the lack of guidance given to the lawyer in determining whether to concur with the client's expressed desire. Does Winick's proposal involve an individualized assessment of the client's goals, or is the underlying assumption simply that the client wants to "get off" or "get off with as little time as possible?"<sup>351</sup>

Professor Uphoff has also suggested a role for defense counsel that includes the right to determine whether to raise the issue of competency in certain exceptional cases.<sup>352</sup> Professor Uphoff makes a strong and indisputable argument urging defense counsel to carefully assess the client and consider all available options, including the client's choice, before raising the issue of competency.<sup>353</sup> However, Professor Uphoff's proposal, like Professor Winick's proposal, requires the defense attorney to act as *de facto* guardian, yet provides no guidance for assuming that role.

Professor Richard Bonnie agrees with Professors Winick and Uphoff that the information possessed by the criminal defense attorney permits her to make reasonable judgments about the client's capacity to rationally understand the charges against him and to assist in his defense.<sup>354</sup> Professor Bonnie proposes that the decision to raise the issue of competency should be left to counsel, subject only to the Sixth Amendment obligation to provide effective assistance of counsel.<sup>355</sup> This proposal, like that of Professors Winick and Uphoff, sets forth no explicit guidance for decision-making by the attorney. In addition, defense counsel's representation will be virtually immune from review, since the hurdle for proving an attorney's ineffectiveness under the *Strickland* test is so high.<sup>356</sup>

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choice was made "knowingly and voluntarily" or was "an intentional relinquishment or abandonment of a known right or privilege"—seems to assume competence. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

349. See WEXLER & WINICK, *supra* note 27, at 84. See also *supra* notes 134-37 and accompanying text.

350. See *supra* notes 2, 3, 169, 174, and accompanying text.

351. See *supra* notes 160-62 and accompanying text.

352. See Uphoff, *supra* note 22, at 67, 98-106; ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, *supra* note 340, at 36-38.

353. See ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, *supra* note 340, at 32-34. Before deciding whether to raise the competency issue, Professor Bonnie suggests that defense counsel consult with another attorney or seek *ex parte* judicial review. See Bonnie, *supra* note 27, at 564.

354. See Bonnie, *supra* note 27, at 565.

355. See *id.* at 566.

356. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the defendant

Although Professor Bonnie is certainly correct in recognizing that many defense attorneys resolve doubts about the client's competency without judicial intervention,<sup>357</sup> this fact cannot condone their conduct. His proposal grants defense counsel too much power. Moreover, the decision about an individual's competence should be made by the court in an appropriate evidentiary hearing. As flawed as that process can be,<sup>358</sup> the competency determination is too important to be entrusted to anyone else.

## VII. CONCLUSION

The capacity of each participant in a judicial proceeding to present favorable information is essential to the proper functioning of the adversarial system of justice. Possibly incompetent defendants who are incapable of rationally assisting defense counsel cannot fully participate in the system. If a criminal case proceeds without a competent defendant, confidence in the reliability of the outcome of the proceeding and respect for the integrity of the system are lost. Because of the importance of competence, the criminal defense attorney should be permitted to provide testimony, including disclosure of client confidences, concerning competence. Only by permitting the defense attorney to testify about her client's inability to rationally communicate and assist in his defense, can the constitutional rights of incompetent clients be adequately protected.

The competency process must distinguish between a defendant's choices that are simply odd, and those which result from impaired mental processes. A defendant who is irrational cannot be autonomous. Contrary to the views of some commentators, permitting defense counsel to act on behalf of the impaired defendant reduces individual autonomy because the attorney is actually making the choices. Paternalism is not justified unless the client's ability to make rational decisions is impaired. But separating defendants whose choices are merely different from those whose decision making processes are impaired requires a judgment that some criticize as being subjective. While not perfect, illness can be a valuable tool in making the judgment more objective.

Any damage inflicted on the attorney-client relationship and the

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must show that defense counsel's errors were so serious that counsel was not functioning as "counsel" and that the outcome is unreliable before being entitled to relief on ineffective assistance of counsel grounds. The Court mandated that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that defense counsel's conduct is "strong[ly]" presumed to be "sound trial strategy." *Id.* at 689.

357. See Bonnie, *supra* note 27, at 558-59.

358. See, e.g., Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991); Dusky v. United States, 271 F.2d 385 (8th Cir. 1959); Lagway v. Dallman, 806 F. Supp. 1322 (N.D. Ohio 1992).

ethical rules is nominal when measured against the harm of trying the incompetent defendant and the consequences of permitting the lawyer to act without client authority. Given the significant values that competence exemplifies in our judicial system, it is more important for the criminal defense attorney to disclose client confidences to insure that the court does not try or proceed against the possibly incompetent criminal defendant.

Finally, no provisions exist, in a criminal case, that enable defense counsel to make primary decisions for the impaired client. Indeed, attorney decision making for the impaired client tends to violate the defendant's constitutional rights.

Moreover, failure to notify the court may constitute a fraud on the court exposing the attorney to disciplinary actions. In effect, the imposition of conflicting duties to the court and to the client creates a quagmire for the criminal defense attorney, which is in dire need of resolution.