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A Legal and Ethical Puzzle: Defense Counsel as Quasi Witness

Elizabeth Slater
Fordham University School of Law

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A LEGAL AND ETHICAL PUZZLE: DEFENSE COUNSEL AS QUASI WITNESS

*Elizabeth Slater**

The U.S. criminal justice system is built on the concept of an adversarial trial. The defense and prosecution present competing narratives to a neutral audience that judges whether the prosecution has proved its case beyond a reasonable doubt. In this context, defense counsel is expected to be a zealous advocate for the defendant, providing the most effective representation possible in light of the evidence presented by the government. However, there are occasions outside of trial where defense counsel's traditional role changes and she is asked to disclose, not to the jury, but to the court, personal opinions and knowledge about her client and the attorney-client relationship.

This Note argues that during these occasions, defense counsel becomes a "quasi witness." Even though she is not presenting testimony at trial, she is still providing information about her client to the judge. Indeed, the duties of confidentiality and loyalty that defense counsel owes her client are pitted against those she owes the court, spawning a serious ethical dilemma. This Note examines this dilemma and the potential damage that it can cause to the attorney-client relationship. Ultimately, this Note proposes several mechanisms for limiting the disclosures needed from defense counsel but argues that now that the category of quasi witness has been identified, a more profound debate within the profession is warranted.

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* J.D. Candidate, Fordham University School of Law, 2017; B.A., 2010, Washington University in St. Louis. I would like to thank Professor Bruce Green for his advice and wisdom. I would also like to thank my family for their support throughout the writing process.

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INTRODUCTION

Consider the following scenario: a criminal defendant is unhappy with her counsel's performance. She is irritated that her attorney—a public defender—fails to answer the phone and has met with her only once before trial. Defense counsel, unable to assuage her client's frustration, moves to withdraw from the case. The judge asks why, noting that, with the trial date so near, granting the motion would result in delay.[1] What information can defense counsel now reveal? Defense counsel faces the insurmountable hurdle of substantiating her motion without revealing client confidences or appearing disloyal to the defendant. Additionally, if the judge asks further questions of defense counsel in an attempt to obtain more information, the judge risks damaging an already fragile attorney-client relationship and forcing defense counsel to reveal client confidences. Given defense counsel's desire to be removed from the case, there is a risk that any representation she makes will be tainted with bias. Thus, the judge also has to evaluate the sincerity of counsel's representations.

Now, consider a different scenario. Defense counsel becomes aware that a client is hearing voices and "responding to internal stimuli," so she moves for a competency evaluation.[2] Under such circumstances, defense counsel has to decide how to persuade the judge to grant the motion without disclosing client confidences. If she believes it necessary to make disclosures, she has to decide whether, under the governing professional responsibility rules, she has implied permission to do so.[3] Furthermore, if the defendant does not want to undergo a competency evaluation, defense counsel has to navigate how to request one without appearing disloyal.

The traditional role of an attorney is to control the strategy of a case and make legal arguments based on evidence presented at trial.[4] However, in both of these examples, defense counsel steps out of that role and proffers witness-like statements based on personal knowledge and belief. This Note refers to defense counsel in this nontraditional role as a "quasi witness."[5] Although not testifying under oath in front of the trier of fact, defense counsel acts as a witness on a collateral issue.[6]

Lawyers are prohibited from serving as witnesses on behalf of clients during civil or criminal trials.[7] Despite this longstanding rule, there are times

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1. *See, e.g.*, State v. Harter, 340 P.3d 440, 445 (Haw. 2014).

2. *See, e.g.*, United States v. Maxton, No. 13-cr-00411-PAB, 2013 WL 6800695, at *2 (D. Colo. Dec. 24, 2013) (denying defense counsel's motion for competency evaluation despite assertions that defense counsel could not reveal more information due to ethical constraints).

3. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2016) (permitting disclosure by a lawyer if it is "impliedly authorized").

4. *See* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 209–10 (2008).

5. *See infra* Part I.A for a definition of "quasi witness."

6. A "collateral issue" is "a question or issue not directly connected with the matter in dispute." *Collateral Issue*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See infra* Part I.C for examples of collateral issues in which defense counsel may end up in the role of witness.

7. *See infra* Part II.A (describing the advocate-witness rule).

when they have to make representations and express opinions about clients on collateral matters.[8] They are permitted to do so because the information they are offering, or are asked for, may not appear to be privileged or confidential. Even if the information is confidential, a judge can still order it to be revealed.[9] Courts may fail to recognize that placing counsel in the position of quasi witness raises serious ethical concerns. In criminal cases, which are the focus of this Note, placing defense counsel in such a position has the potential to damage the attorney-client relationship, force defense counsel to reveal client confidences, or lead to possible misrepresentations of fact by defense counsel who may be torn between a duty of zealous advocacy, self-interest, and a duty of loyalty to the court.

Accordingly, Part I of this Note defines the term "quasi witness." It then introduces relevant ethical duties defense attorneys owe their clients and identifies situations where defense attorneys become quasi witnesses, placing those duties at risk. Part II argues that the American Bar Association's Model Rules of Professional Conduct ("the Model Rules") fail to provide guidance to defense attorneys in the position of quasi witness. It demonstrates that, lacking guidance, judges have developed informal ad hoc approaches to deal with the challenges posed by defense attorneys in the role of quasi witness. Part II then analyzes these approaches and their shortcomings. Finally, Part III provides guidance to defense attorneys and judges in light of this often overlooked issue.

I. THE PREVIOUSLY UNRECOGNIZED PROBLEM OF THE QUASI WITNESS

The role of a defense attorney is by nature complicated. Defense attorneys have to strike a delicate balance as advocates for their clients while simultaneously being officers of the court. This task is made ever more difficult when defense attorneys become quasi witnesses. This part defines the new, unique term of "quasi witness." It then analyzes the ethics issues that come into play. Finally, it brings to the fore a myriad of scenarios when defense counsel becomes a quasi witness.

A. What Is a Quasi Witness?

There are times when attorneys make representations about a client based on personal knowledge or belief.[10] They may be asked to do so by a judge, or they may do so voluntarily in an attempt to influence a judge's decision on a collateral matter.[11] In criminal practice, this occurs when defense counsel has to make representations about a client to assist the judge in deciding a procedural issue. Such procedural issues may include when defense counsel must substantiate a motion to withdraw, expose a

8. *See infra* Part I.C for examples of collateral issues in which defense counsel may end up in the role of witness.

9. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2016).

10. *See infra* Part I.C.

11. *See infra* Part I.C.

defendant's intent to commit perjury, make representations about a defendant's competency, divulge to the judge a belief about a waiver being knowing and intelligent, and present information about a defendant's absence or prior convictions.[12]

In making these representations, defense counsel inherently provides personal beliefs based on information that the client has revealed to counsel or on counsel's own observations about the attorney-client relationship.[13] Whether intentional or not, defense attorneys making representations based on personal knowledge or belief are quasi witnesses. They simultaneously fit and do not fit within the definition of "witness"—they "see[], know[], [and] vouch[] for something," but they do not give "testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit."[14] Further lending defense counsel the *quasi* witness moniker, the information provided to a judge by defense counsel acting in this role is unrelated to the merits of the defendant's case.[15] It does not directly relate to whether the defendant is innocent or guilty but rather is intended to sway the judge with regard to procedural outcomes.[16]

Substantial concerns arise from a defense attorney acting as a quasi witness. This Note focuses on several in particular: the harm to the attorney-client relationship that occurs when a client perceives defense counsel as disloyal, the potential for defense counsel to reveal confidential information provided by the client, and the potential for defense counsel to make biased representations either out of self-interest or to receive a favorable ruling for a client.[17]

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12. *See infra* Part I.C.

13. For example, defense counsel's belief that a client is incompetent may come from statements made by the defendant or from defense counsel's observations about the defendant's behavior.

14. *Witness*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* People v. Martin, 26 N.W.2d 558, 560 (Mich. 1947) (holding that a "witness" is a person who is "sworn and examined in open court").

15. "Merits" are "[t]he elements or grounds of acclaim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp[ecially] of procedure." *Merits*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. Formal and unsworn witnesses, in contrast, provide information intended to be used as evidence regarding the merits of a case. Unsworn witnesses have intimate knowledge of the events of a case, partially resulting from their own involvement in the activities in dispute. *See, e.g.*, United States v. Locascio, 6 F.3d 924, 933 (2d. Cir. 1993); *see also* Roxanne Malaspina, *Resolving the Conflict of the Unsworn Witness: A Framework for Disqualifying House Counsel Under the Advocate-Witness Rule*, 67 N.Y.U. L. REV. 1073, 1095 (1992). Defense counsel in the position of quasi witness does not have insider knowledge of the activities that resulted in defendant's charge.

17. Indeed, oftentimes an attorney's representations made as quasi witness are harmless and make no dent in the attorney-client relationship. This Note, however, focuses on the anomalous situation of when defense counsel's representations are not harmless and raise grave ethical concerns.

B. Ethics Duties Threatened by Defense Counsel in the Role of Quasi Witness

Criminal defense attorneys owe their clients and the court several ethical duties that stem from being agents of their clients and, simultaneously, officers of the court.[18] To their clients, defense attorneys owe a duty of zealous advocacy.[19] To fulfill this duty, they must build productive relationships with their clients,[20] maintain confidences,[21] and not reveal privileged information.[22] To the court, defense attorneys owe a duty of candor.[23] These ethical responsibilities are rooted in our notions of what creates a successful adversarial system that simultaneously protects the truth and the individual rights of defendants.[24] This part introduces these competing ethical obligations, explores their justifications, and highlights the governing Model Rules.[25]

1. Duty of Zealous Advocacy

Our adversarial criminal justice system depends on counsel's ability to be loyal to her client[26] and serve as a zealous advocate on her client's behalf.[27]

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18. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 361–62 (1989) ("At the heart of attorney-client confidentiality rules is the notion that lawyers are clients' agents, and often their fiduciaries.").

19. *See* Rodney J. Uphoff, *Introduction* to ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS, at xxiv (Rodney J. Uphoff ed., 1995) ("In trying to be a zealous advocate, defense counsel frequently finds that counsel's responsibilities as a zealous advocate clash with the interests of the judge, the legal system, third parties, or counsel's own interests.").

20. *See infra* Part I.B.2.

21. *See infra* Part I.B.3.a.

22. *See infra* Part I.B.3.b.

23. *See infra* Part I.B.4.

24. *See* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121 (1987) (describing the various theories behind the adversarial trial).

25. The ethical duties that lawyers owe their clients are delineated in standards disseminated by the American Bar Association (ABA), state rules of professional responsibility, formal and informal ethics opinions, the Restatement (Third) of the Law Governing Lawyers, and common law doctrines. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016); MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1980); CANONS OF ETHICS (AM. BAR ASS'N 1908); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000). The ABA's standards are the most influential, and many jurisdictions have adopted them as law. *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 875–76 (2012); Ría A. Tabacco, Note, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568, 574 (2008) (explaining that almost every state has "sculpted its code from the ABA's block"). Furthermore, because federal courts rely "on state-court rules and state-court disciplinary processes," standards established by the ABA have set the landscape for how both state and federal courts regulate attorney conduct. Green, *supra*, at 875.

26. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986) ("[T]he client-lawyer relationship . . . is founded on the lawyer's virtually total loyalty to the client and client's interests.").

27. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 ("The duty of a lawyer . . . is to represent his client zealously within the bounds of the law."); WOLFRAM, *supra* note 26, at

Zealous advocacy furthers the truth-seeking goal of the criminal justice system by enabling "a clash between proponents of conflicting views."[28] Zealousness has been a guiding principle within the adversarial system for centuries, with scholars continuously discussing and reaffirming the early statement by Lord Henry Brougham that

> an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that 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 consequences, though it should be his unhappy fate to involve his country in confusion.[29]

In being a loyal and zealous advocate, defense counsel is obligated to "use legal procedure for the fullest benefit of the client's cause."[30] Defense counsel must address the evidence in a case and "devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client."[31]

Defense counsel in the role of quasi witness is not acting as an advocate—she is not making legal arguments. Rather, she is making representations about the defendant based on her own personal opinions or knowledge.[32] This conflicts with the duty of loyalty and zeal, as defense counsel's personal viewpoints may sully the judge's or prosecution's assessment of the defendant. If defense counsel presents information that is unfavorable to the defendant, defense counsel is not furthering the client's goals. However, if defense counsel presents information that is favorable to the client, there is a risk that defense counsel will be perceived to be acting as a loyal and zealous advocate, and, therefore, the judge will not give full credit to counsel's representations.[33]

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317 (stating that lawyers "may be subjected to a greater requirement of zealousness than other agents").

28. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966).

29. TRIAL OF QUEEN CAROLINE: PART II, at 3 (N.Y., James Cockcroft & Co. 1874); *see also* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS §§ 4.01, 4.04 (4th ed. 2010); Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1165 (2006). *But see* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV 1, 4 (2005) (providing an in-depth discussion on whether our legal system ever fully embraced Lord Brougham's famed statement).

30. MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. 1.

31. WOLFRAM, *supra* note 26, at 578.

32. *See infra* Part I.C.

33. *See, e.g.*, United States v. Yannai, 791 F.3d 226, 233 (2d. Cir 2015) (dismissing defense counsel's representations that his client's absence was involuntary because the court saw the lawyer as merely advocating for his client).

2. Protecting the Attorney-Client Relationship

The attorney-client relationship stands at the heart of our legal justice system.[34] A successful one ensures that the client will trust the lawyer, confide in her, and collaborate with her. This helps to guarantee effective representation at trial because defense counsel can work more "closely with the defendant in formulating defense strategy."[35] A defense attorney armed with an effective defense strategy and a collaborative client prevents a defendant from "be[ing] put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."[36] In essence, a successful attorney-client relationship facilitates defense counsel's ability to act with zeal. Relying on defense counsel to provide her own beliefs and knowledge about a client places an immense strain on the attorney-client relationship, the very thing our justice system should be geared toward preserving.

3. Confidentiality and Privilege

To be a successful advocate and foster a collaborative attorney-client relationship, defense counsel must maintain client confidences.[37] This duty is considered so important that lawyers will "go to the mat, . . . take risks, . . . go to jail for contempt if the alternative is violating it."[38] The ethical principle of confidentiality, however, should not be confused with the evidentiary rule of attorney-client privilege. Quasi witnesses may be ordered to reveal client confidences but can never be ordered to reveal privileged information.

a. Confidentiality

Almost every jurisdiction in the United States has adopted rules of professional conduct prohibiting attorneys from disclosing confidential client information.[39] These rules are commonly based on Model Rule 1.6, which broadly construes as confidential any information "relating to the representation of a client."[40] Thus, confidential information may include counsel's impressions of a client and any information about the attorney-client relationship that was not expressly communicated by the client to counsel.[41] The duty to protect client confidences is absolute. It never ends,

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34. *See* Morris v. Slappy, 461 U.S. 1, 20–21 (1983) (Brennan, J., concurring) ("Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney.").
35. *Id.*
36. Powell v. Alabama, 287 U.S. 45, 69 (1932).
37. *See* Freedman, *supra* note 28, at 1470.
38. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 186 (1988).
39. *See* Zacharias, *supra* note 18, at 352.
40. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).
41. *See id.* r. 1.6 cmt. 3.

and must be followed inside and outside the court,[42] "regardless of whether disclosure would harm the client or not."[43]

Prohibiting an attorney from revealing a client's confidences "induce[s] clients to make disclosures to lawyers."[44] If an attorney safeguards client confidences, the client will feel encouraged to reveal information and, consequently, the attorney will be able to deliver more effective representation.[45] As one commentator noted, "Maintaining confidentiality is especially important in cases involving indigent defendants, who are less likely to trust their court-appointed counsel."[46] Because a large percentage of criminal defendants are indigent and receive court-appointed counsel,[47] guaranteeing stringent protection against the revealing of client confidences is a particularly salient interest.

Despite forbidding the disclosure of confidential client information, it is important to note that Model Rule 1.6 is not absolute in scope. It contains several exceptions, including when complying "with other law or a court order,"[48] when the client grants his consent to share confidential information,[49] and when "the disclosure is impliedly authorized."[50]

b. Attorney-Client Privilege

Attorney-client privilege is a common law evidentiary doctrine that protects communications between the lawyer and client.[51] It is related to, but distinct from, the ethical duty of confidentiality. There are several important differences between the two. First, attorney-client privilege is narrower in scope than the duty of confidentiality.[52] It only protects *communications*

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42. *See* Jenna C. Newmark, Note, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699, 710 (2010).

43. *Id.*

44. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 54 (1998).

45. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 268–69 (3d ed. 1999). *But see* Zacharias, *supra* note 18, at 354 (arguing that there may be extreme situations when society's interests outweigh the need to maintain client's confidences).

46. Newmark, *supra* note 42, at 711.

47. *See* LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), http://www.bjs.gov/content/pub/pdf/pdo07st.pdf ("The public defender offices received more than 5.5 million cases in 2007.") [https://perma.cc/3DH4-U4AX].

48. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2016).

49. *See id.* r. 1.6(a).

50. *Id.* Interestingly, the Model Rules instruct attorneys, even when ordered to reveal client confidences, to "assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law." *Id.* r. 1.6 cmt. 15. This instruction emphasizes the presumption against disclosing information gained during representation of a client.

51. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978).

52. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 242 (5th ed. 2009) ("The ethical duty of confidentiality under the Model Rules covers a much broader range of communication than the attorney-client privilege."); *see also* Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, A.B.A. (May 2007), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidenti

between a lawyer and his client, as opposed to "all information relating to representation, whatever its source."[53] Second, because attorney-client privilege is an evidentiary rule, "it pertains only to eliciting information at trial" and does not protect client confidences outside of the trial context.[54] Third, a court can order an attorney to reveal confidential information but cannot order an attorney to reveal privileged information unless a client has waived the evidentiary protection.[55] A client can do this expressly or impliedly through conduct.[56] Examples of waiver include when a client discloses privileged information to a third party, testifies to privileged information in court, or questions the reasonableness of his attorney's conduct when requesting postconviction relief.[57] Although a judge cannot order the release of privileged information, there are instances when defense counsel in the role of quasi witness may be tempted to violate the well-established doctrine of attorney-client privilege.[58]

4. Duty of Candor to the Court

Defense attorneys are officers of the court and, as such, owe a duty of candor to the judge and jury.[59] This duty of candor prevents lawyers from offering false evidence,[60] ignoring legal precedent,[61] or making a legal argument based on a false representation of law.[62] A duty of candor also implies that, when defense counsel is responding to a judge's inquiries about collateral matters, defense counsel maintains a duty to respond honestly. Thus, when a judge asks about the attorney-client relationship, the lawyer has a duty to provide that information, unless it is confidential or privileged.[63]

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ality_or_attorney.authcheckdam.pdf ("[T]he ethical duty of client-lawyer confidentiality is quite extensive in terms of what information is protected. It applies not only to matters communicated in confidence by the client but also to all information relating to the representation . . . .") [https://perma.cc/4RHH-LVM3].

53. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3; *see* RHODE & LUBAN, *supra* note 52, at 242.

54. LUBAN, *supra* note 38, at 187.

55. *See* State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) (stating that only the client can waive attorney-client privilege); *see also* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (John T. McNaughton rev. ed. 1961) (explaining waiver).

56. *See* Hawkins v. Stables, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (noting that a client may either expressly or impliedly waive the attorney-client privilege).

57. *See* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 893–94 (1998).

58. *See infra* Part I.C.

59. Model Rule 3.3 states, "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal." MODEL RULES OF PROF'L CONDUCT r. 3.3. (AM. BAR ASS'N 2016); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-1.2(b) (AM. BAR ASS'N 1993).

60. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 5.

61. *See id.* r. 3.3 cmt. 4 ("A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.").

62. *See id.*

63. *See* JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY 310–11 (2d ed. 2016) (concluding that the Model Rules "generally defer to an attorney's obligation to be

Commentators have acknowledged that defense counsel's duty of candor often directly conflicts with her duties of loyalty, zealous advocacy, and confidentiality.[64] Consequently, if the judge inquires into defense counsel's personal opinions about a client, defense counsel may have an incentive as a zealous advocate to spin observations so that they are favorable to the client.[65] As emphasized earlier, judges may in turn be aware of defense counsel's duty of zealous advocacy and not give credit to her representations, even if such credit is deserved.[66] The tension between defense counsel's duty of loyalty, confidentiality, and candor is acutely apparent when defense counsel adopts the role of quasi witness.

C. Uncovering the Quasi Witness

There is a litany of instances during a criminal trial when defense counsel may assume the role of quasi witness, either voluntarily or through a judge's invitation. Often, when defense counsel assumes this role, no ethical dilemmas appear.[67] When ethical dilemmas do appear, however, they have dire consequences on the attorney-client relationship and can jeopardize a defendant's chances of mounting an effective defense. This section considers in the aggregate several instances when defense counsel's representations have the potential to betray a client's trust or confidence or unintentionally thwart the truth-seeking process.

1. Motions to Withdraw and Motions for Substitute Counsel

During a criminal trial, if an attorney-client relationship breaks down or a conflict of interest arises, defense counsel may file a motion to withdraw from the case. Alternatively, the defendant may file a motion for substitute counsel.[68] In either instance, counsel may have to provide observations and

truthful to the tribunal over an attorney's (sometimes) conflicting obligation to keep a client's confidences").

64. *Id.*; *see also* 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 10.45, at 10-186 (4th ed. 2015) (illustrating how this conflict occurs when a defendant has failed to appear in court and defense counsel knows of his whereabouts).

65. *See infra* Part I.C.

66. *See infra* Part I.C (providing examples of when a judge may not credit defense counsel's truthful representations because of a perceived bias).

67. *See, e.g.*, United States v. Gauger, No. 2:10-CR-1070 TS, 2012 WL 3155134, at *4 (D. Utah June 11, 2012) ("Judge Stewart held a status conference where Defense counsel represented that Gauger was well enough to go ahead with a plea.").

68. *See, e.g.*, United States v. Kowalczyk, 805 F.3d 847, 853 (9th Cir. 2015).

opinions about the client and counsel's relationship with the client.[69] When she does so, she becomes a quasi witness.[70]

a. Motions to Withdraw

When defense counsel files a motion to withdraw or argues for withdrawal at the bench, she must provide an explanation to the judge for why she can no longer represent her client.[71] Indeed, the decision to grant a motion to withdraw is a discretionary one residing with the judge, and lawyers cannot freely sever an attorney-client relationship.[72]

In most jurisdictions, a judge will require a showing of "good cause" when deciding a motion to withdraw.[73] Neither case law nor the Model Rules specifically define what defense counsel must reveal in her showing of good cause, although the Model Rules and ethics opinions proscribe attorneys from initially offering client confidences.[74] In particular, there is minimal guidance about what defense counsel may reveal if the motion is filed immediately before, after, or during trial, when the judge will naturally be

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69. *See, e.g.*, United States v. Reyes, 352 F.3d 511, 516 (1st Cir. 2003) (describing the district court judge's request that defense counsel confirm his client's reasons for wanting new counsel); United States v. Richardson, 894 F.2d 492, 497 (1st Cir. 1990) ("The court questioned both [defense counsel] and [the defendant] that morning."); Frazier v. State, 15 S.W.3d 263, 265–66 (Tex. App. 2000) ("Neither did [defense counsel] offer any facts to demonstrate 'irreconcilable differences' as alleged in the pretrial motion.").

70. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 3 (AM. BAR ASS'N 2016) (arguing that "the lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient" to avoid disclosing confidential information); 1 HAZARD, HODES & JARVIS, *supra* note 64, § 21.17, at 21-40 to -41 (stating that a lawyer must provide reasons for her motion to withdraw and, in doing so, may reveal confidences).

71. *See supra* note 70; *see also In re* Jamieko A., 597 N.Y.S.2d 72, 73 (App. Div. 1993) (denying counsel's motion because "no sound reason was provided why counsel should be allowed to withdraw"); McKelvey v. Oltmann, 222 N.Y.S.2d 900, 902 (Sup. Ct. 1961) ("[A]n attorney may terminate his relationship with a client at any time for a good and sufficient cause and upon reasonable notice."), *aff'd*, 229 N.Y.S.2d 814 (App. Div. 1962); 1 HAZARD, HODES & JARVIS, *supra* note 64, § 21.02 ("[T]he client's investment in the lawyer may be repudiated only for compelling reasons."); WOLFRAM, *supra* note 26, at 550 ("A lawyer clearly may not withdraw without a reason if to do so would materially prejudice the client's interests . . . .").

72. MODEL RULES OF PROF'L CONDUCT r. 1.16(c) ("A lawyer must comply with applicable law requiring . . . permission of a tribunal when terminating a representation."); *see also* United States v. Oberoi, 331 F.3d 44, 47 (2d Cir. 2003) (describing the deferential standard appellate courts use to review decisions regarding motions to withdraw).

73. *See In re* Dunn, 98 N.E. 914, 916 (N.Y. 1912); Battani, Ltd. v. Bar-Car, Ltd., 299 N.Y.S.2d 629, 631 (Civ. Ct. 1969) ("The attorney may terminate the relation upon good cause."); *McKelvey*, 222 N.Y.S.2d at 902; MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(7); *see also* Lindsey R. Goldstein, Note, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 FORDHAM L. REV. 2665, 2672–73 (2005) (describing the challenge of defining "good cause").

74. *See* Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 522 (Mich. Ct. App. 1975) (stating that there is no general rule for what an attorney must reveal in her motion to withdraw); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 3 (reasoning that lawyers "should be mindful" of their duty to keep client confidences); Or. State Bar, Formal Op. 2011-185 (2011) ("Lawyer's obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client.").

less inclined to replace counsel.[75] In *United States v. Trevino*,[76] for example, the court denied a federal defender's motion to withdraw, refusing to accept "counsel's assertion of a conflict of interest in the absence of any evidence that the asserted conflict exists."[77] In *United States v. O'Connor*,[78] the Second Circuit upheld the district court's denial of defense counsel's motion to withdraw, despite defense counsel's unabashed assertion that his "conviction would not be behind" any defense he made on behalf of his client.[79]

When defense counsel files a motion to withdraw near, during, or immediately after a conviction (but before sentencing), defense counsel has an incentive to assert representations about the client and the attorney-client relationship. Judges often are disinclined to grant motions to withdraw at such critical stages in the proceeding, so defense counsel may make representations in an attempt to further persuade the judge to grant the motion.[80] If defense counsel provides a minimal amount of information relating to the client, she risks a denial of the motion and an order requiring continued representation of the defendant, despite the existence of conflict or the deterioration of the attorney-client relationship.[81] If defense counsel divulges client confidences to persuade the judge to grant the motion, defense counsel not only violates a revered ethical rule, but she also jeopardizes the trial by prejudicing the client in front of the judge who will be hearing the case.[82] Finally, should defense counsel provide only an impression of the

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75. *See* United States v. Trevino, 992 F.2d 64, 66 (5th Cir. 1993) (denying counsel's motion to withdraw because defense counsel did not provide sufficient evidence that a conflict existed); *see also* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192 (2015) (stating that a dearth of authority makes it difficult to "categorically opine" whether defense counsel should provide information relating to the representation of a client when a court orders her to do so); Memorandum & Order at 4, United States v. Ashburn, No. 11-CR-0303 (NGG) (E.D.N.Y. May 8, 2015), ECF No. 480 (denying defense counsels' motions to withdraw immediately postconviction despite conflicting testimony from defense counsel and defendant). *But see* Or. State Bar, Formal Op. 2011-185 (stating that an attorney may reveal information relating to the representation of a client if ordered to do so by a judge but "may only do so to the extent 'reasonably necessary' to comply with the court order").

76. 992 F.2d 64 (5th Cir. 1993).

77. *Id.* at 65.

78. 650 F.2d 839 (2d Cir. 2011).

79. *Id.* at 849.

80. *See, e.g.*, *id.*; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1057 (2015) (stating that judges may require more information "when withdrawal is sought on the eve of trial or there has been a history of dilatory tactics"); *see also* Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 124 (1985) (describing how judges may deny motions to withdraw because "trial may be imminent, because the confrontation may not take place until after the trial has started, or because no other counsel is available").

81. *See, e.g.*, Aceves v. Superior Court, 59 Cal. Rptr. 2d 280, 281 (Ct. App. 1996) (reversing trial court's decision to deny defense counsel's motion to withdraw after he stated that he could not reveal the nature of the conflict without divulging client confidences); State v. Harter, 340 P.3d 440, 449 (Haw. 2014) (reversing the trial court's decision to deny defense counsel's motion to withdraw).

82. *See infra* Part I.C.2 for examples of when defense counsel, moving to withdraw, reveals to the judiciary a defendant's intent to commit perjury.

attorney-client relationship to the judge—by describing reasons for withdrawal in vague terms—defense counsel may still violate attorney-client confidences, albeit less blatantly, and risk further losing the client's trust.[83] This would be especially detrimental if the motion for withdrawal is denied and defense counsel has to continue representing the defendant.[84]

b. Motions for Substitute Counsel

In motions for substitute counsel, a defense attorney may have to provide information about a client in response to allegations made against defense counsel.[85] Judges often view such motions with skepticism, particularly when made by indigent defendants.[86] The trial judge, however, cannot deny a motion for substitute counsel without first inquiring into the defendant's complaint.[87] Logically, this generates the risk that defense counsel will be obliged to respond to the defendant's allegations and, in so doing, become a quasi witness. Defense counsel may have to submit observations about her relationship with the client.[88] Defense counsel also may risk revealing client confidences and appearing disloyal to the client.[89] As with motions to withdraw, this is particularly concerning if the motion for substitute counsel is denied and defense counsel must resume representation.

When defense counsel becomes a quasi witness because of a motion to withdraw or in response to a defendant's allegations, additional concerns emphasized by this Note arise—i.e., the reliability of defense counsel's representations and the credence given those representations by the judge. Defense attorneys may be inclined to exaggerate the extent of the conflict or

83. *See* Or. State Bar, Formal Op. 2011-185 (2011) (prohibiting phrases such as "[m]y client won't listen to my advice" and "[m]y client won't cooperate with me" to be used in withdrawal motions because they are based on information relating to the representation of a client, which is confidential).

84. *See, e.g.*, *Harter*, 340 P.3d at 446 (demonstrating that defense counsel felt that if the motion were denied, she would be impaired in her "ability to prepare [the defendant] or advise her regarding her potential or her rights to testify in her own defense").

85. *See, e.g.*, United States v. Kowalczyk, 805 F.3d 847, 852–53 (9th Cir. 2015) (describing the trial court's decision to hold a status conference with both the defendant and defense counsel to discuss defendant's motion for substitute counsel); United States v. Allen, 789 F.2d 90, 92 (1st Cir. 1986) (inquiring into the federal defender's views after receiving a letter from the defendant expressing dissatisfaction with his attorney).

86. *See* United States v. Francois, 715 F.3d 21, 28 (1st Cir. 2013) ("Though the right to counsel is fundamental, the right of an indigent criminal defendant to demand new appointed counsel is not unlimited."); United States v. Teemer, 394 F.3d 59, 67 (1st Cir. 2005) ("A defendant has no automatic right to replace counsel and, as trial approaches, the balance of considerations shifts ever more toward maintaining existing counsel and the trial schedule.").

87. *See* United States v. John Doe No. 1, 272 F.3d 116, 122 (2d Cir. 2001); *Allen*, 789 F.2d at 92 ("[T]he appellate court should consider . . . the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense.").

88. *See* United States v. Avendano-Ramirez, No. 00-2932, 2000 WL 1852626, at *1 (8th Cir. Dec. 19, 2000) (citing defense counsel's representations that "he had met with Avendano-Ramirez several times, he was prepared to go to trial, and Avendano-Ramirez was merely dissatisfied with the attorney's assessment of the strength of the prosecution's case").

89. *See id.*

deterioration if they have a desire to cease representation. Judges may be aware of these inclinations and, consequently, may not issue due weight to defense attorneys' representations.[90] Evidently, this dynamic can be self-reinforcing; knowing the judge's skepticism, defense counsel may be seduced to embellish further, and, anticipating such embellishment, the judge may unfairly discount a truthful and measured account. Therefore, a skeptical judge may deny a motion when one is warranted, but a trusting judge may unnecessarily sever representation based on exaggerated representations made by the defense attorney.

2. Defendant Intends to Commit Perjury

Another context where defense counsel may become a quasi witness is when a client confesses an intent to commit perjury or to call a witness who will commit perjury.[91] Here, defense counsel has to navigate two rules: the maintenance of attorney-client confidences and the prohibition against knowingly presenting false evidence.[92] In deciding what to reveal to the court about the client's intent, defense counsel transforms into the quasi witness.

When a defendant or witness has presented evidence to the tribunal that defense counsel knows to be false, the Model Rules qualify defense counsel's duty of confidentiality and advocate for disclosure to the tribunal if defense counsel is unable to mitigate the effect of the false evidence.[93] In this instance, the court determines "what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."[94]

What, however, should defense counsel do when a defendant has not yet committed perjury but merely expressed intent to do so? Here, the principal ethics concerns involved in this Note arise again. Defense counsel, in debating what to reveal, risks jeopardizing client confidences, betraying the client, or appearing disloyal to the court. One option for defense counsel is to withdraw, but this is unsatisfactory because defense counsel would still

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90. *See, e.g.*, Memorandum & Order, *supra* note 75, at 4 (denying defense counsel's motion to withdraw despite their assertion of the existence of a conflict).

91. *See, e.g.*, United States v. Litchfield, 959 F.2d 1514, 1517 (10th Cir. 1992) ("Counsel was concerned . . . that the testimony he would elicit during his direct examination would include untruths . . . ."); Fla. Bar v. Rubin, 549 So. 2d 1000, 1003 (Fla. 1989) (Shaw, J., dissenting) ("Rubin was confronted with a client who intended to lie when placed on the stand."); Monroe H. Freedman, *But Only if You "Know," in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 135 (Rodney J. Uphoff ed., 1995).

92. *See* BURKOFF, *supra* note 63, at 263–64; *see also* People v. Johnson, 72 Cal. Rptr. 2d 805, 810 (Ct. App. 1998) (describing the conflict "between the defendant's constitutional right to testify . . . and the attorney's ethical obligation not to present perjured testimony").

93. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 10 (AM. BAR ASS'N 2016); *see also* Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 954 (2002).

94. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 10. In this rare instance, the Model Rules have answered the challenging ethical dilemmas posed by the quasi witness, determining that a duty of candor trumps any duty of confidentiality. *See id.*

face a question of what to reveal in a motion to withdraw.[95] Even if the attorney manages to avoid explicitly revealing attorney-client confidences, the hint of an ethical dilemma may signal to the judge that the defendant has suspect intentions.[96] Furthermore, if the judge denies counsel's motion to withdraw because the conflict was not made explicit enough or because the trial date is nearing, defense counsel may have to act as a quasi witness when explaining at an in camera hearing why defense counsel is opposed to the defendant testifying, a right guaranteed to defendants under the Constitution.[97]

3. Testifying to a Defendant's Competency

Defense attorneys may have to make impromptu representations about defendants when arguing competency questions before judges. This may occur in two distinct contexts: defense counsel may need to explain to the judge her belief that a defendant is incompetent to proceed with trial[98] or defense counsel may be asked about whether a client is sufficiently competent to proceed without an attorney.[99]

a. Defense Counsel's Representations About a Defendant's Competency to Proceed with Trial

The U.S. Supreme Court has held that a defendant's competency to stand trial depends on whether the defendant "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."[100] As defense counsel's perception of a client is

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95. *See infra* Part I.C.1.a.

96. 1 HAZARD, HODES & JARVIS, *supra* note 64, § 21.16, at 21-39 (arguing that vague language "will become a euphemism for such misconduct, and lawyers who wish to withdraw for reasons that do not adversely reflect on a client will have no vocabulary with which to do so").

97. *See, e.g.*, *Johnson*, 72 Cal. Rptr. 2d at 806 (describing that defense counsel in an in camera hearing "told the court he had 'an ethical conflict' with Johnson about Johnson's desire to take the stand and testify").

98. *See* United States v. Widi, 684 F.3d 216, 220 (1st Cir. 2012) (granting significant weight to defense counsel's representation that defendant was competent enough to proceed with trial); United States v. Ghane, 490 F.3d 1036, 1038 (8th Cir. 2007) ("[F]ive days before trial was scheduled to begin, Ghane's attorney contacted the district court with concerns about his competency."); *see also* Sarah Hur, Note, *An Attorney's Dilemma: Representing a Mentally Incompetent Client Who Does Not Wish to Raise Mental Illness in Court*, 27 GEO. J. LEGAL ETHICS 555, 558 (2014) ("Generally, defense counsel must act affirmatively to bring a client's possible incompetency to the court's attention, otherwise the client may appeal, contending that counsel was ineffective."). For a discussion of whether defense counsel has the affirmative duty to raise the competency issue, see Rodney J. Uphoff, *Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 83–97.

99. *See, e.g.*, People v. Mitchell, No. A133094, 2014 WL 3707995, at *8 (Cal. Ct. App. July 28, 2014) (citing transcript where defense attorney states that he does not have doubts about the defendant's competency and the defendant is "intelligent" and that he "understands the issues in the case").

100. Dusky v. United States, 362 U.S. 402, 402 (1960).

intimately tied to this standard, it is likely that counsel will become a quasi witness either when fielding a judge's inquiries about a client's competence or when moving for a competency hearing.

When the court or prosecutor moves for a competency evaluation, the American Bar Association (ABA) has stated that the court "may properly inquire of defense counsel about the professional attorney-client relationship and the client's ability to communicate effectively with counsel."[101] Thus, under the ABA's recommendations, defense counsel may become a quasi witness when fielding questions from a judge about a defendant's ability to communicate with counsel and to understand the proceedings.[102]

As the ABA Criminal Justice Mental Health Standards are currently written, defense counsel must move for a competency evaluation if she believes her client cannot proceed with trial. It does not matter if the defendant objects.[103] The Mental Health Standards state that, "counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence."[104] Thus, when defense counsel moves for a competency evaluation, she becomes a quasi witness because she has to reveal information about her client to the judge and the prosecutor.[105]

The ABA has stated that "[d]efense counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose confidential communications or violate the attorney-client privilege."[106] This seemingly violates Model Rule 1.6, which would prohibit revealing any confidential information relating to the representation, not just communications.[107] Additionally, exposing personal observations to the court and becoming a quasi witness strains defense counsel's relationship with the client. If a client objects to a competency

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101. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS standard 7-4.8(b)(ii) (AM. BAR ASS'N 1989).

102. *See, e.g.*, United States v. Kowalcyzk, 805 F.3d 847, 853 (9th Cir. 2015) (quoting defense counsel's statement that "I don't believe in good faith that I can represent in my opinion that he is not competent"); *Widi*, 684 F.3d at 220 (holding that the trial judge did not commit clear error in finding the defendant competent, especially because his defense counsel represented that the defendant "could adequately assist in his defense"); United States v. Muriel-Cruz, 412 F.3d 9, 11 (1st Cir. 2005) (stating that it is within the trial judge's discretion to consider "defense counsel's personal observation that Muriel-Cruz had appeared to her to be mentally astute during their recent consultations"); State v. Meeks, 666 N.W.2d 859, 865 (Wis. 2003) (defense counsel provided her "opinions, perceptions, and impressions of a former client's mental competency").

103. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS standard 7-4.2(c).

104. *Id.*

105. *See supra* note 98.

106. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS standard 7-4.8(b)(i). Model Rule 1.14 similarly proscribes defense counsel from revealing client confidences when representing a mentally impaired defendant. MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016). The only time that defense counsel is allowed to reveal information relating to representation is when pursuing "protective action," which does not mean raising the question with the court, but rather consulting family members, or "support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client." *Id.* r. 1.14 cmt. 5.

107. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3.

evaluation and defense counsel ignores the objection, defense counsel has become the client's adversary, destroying the relationship. This is exacerbated when the defendant hears defense counsel expressing her own opinions about the attorney-client relationship.

b. Defense Counsel's Representations About a Defendant's Competency to Proceed Without an Attorney

Courts apply a separate competency standard for defendants seeking to waive their right to counsel and represent themselves at trial. A defendant may be competent enough to stand trial but may "still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[108] Defense counsel may become a quasi witness in this scenario because—if defense counsel was appointed—a judge may rely on counsel's opinions about whether a defendant is competent enough to proceed without an attorney.[109] Defense counsel also may decide to highlight for the judge evidence suggesting the defendant is severely mentally impaired and cannot proceed to trial absent representation.[110]

In such a scenario, defense counsel first risks appearing disloyal to an already wary client if she states to the judge that she believes the client cannot proceed without an attorney. Second, she risks revealing client confidences in explaining why she believes her client can or cannot proceed without an attorney.[111] Third, whatever representations defense counsel makes to a judge may be biased; if defense counsel is eager to remove herself from the case, she may exaggerate a defendant's ability to represent himself. She may also do so because, as a zealous advocate, she is obligated to advance her client's interests.

4. Waivers

Judges often ask defense attorneys to make representations about their clients, without realizing that they are using them as quasi witnesses and placing them in an ethical bind. In particular, there are two occasions when judges ask attorneys to verify whether defendants have understood certain proceedings: when assessing whether a guilty plea is knowing and voluntary and when assessing whether a defendant's decision to waive conflict-free counsel was knowing and voluntary.

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108. Indiana v. Edwards, 554 U.S. 164, 178 (2008).

109. *See, e.g.*, People v. Mitchell, No. A133094, 2014 WL 3707995, at *8 (Cal. Ct. App. July 28, 2014).

110. *See, e.g.*, *Ex parte* Panetti, 326 S.W.3d 615, 617 (Tex. Crim. App. 2010) ("The State and defense counsel also stated that they preferred that Panetti not waive his right to counsel.").

111. *See, e.g.*, *Mitchell*, 2014 WL 3707995, at *8 (citing defense counsel's statement that his client is intelligent and that, based on their communications, he believes his client understands the facts of the case and can proceed pro se).

a. Guilty Pleas

When a defendant pleads guilty, he waives important constitutional rights, including his right to proceed to trial.[112] The gravity of such a decision requires the defendant make it knowingly and voluntarily.[113] In federal courts, judges are required to explain to the defendant the rights he is forgoing by pleading guilty.[114] They also are expected to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises."[115] In addressing whether a defendant's guilty plea was knowing and voluntary, judges may rely on the representations of defense counsel.[116] They might ask whether defense counsel explained to the defendant the elements of the charge, as well as the available defenses.[117] They also might ask whether defense counsel believes that the defendant understood the charges.[118]

Here, variations of the three ethical tensions highlighted in Part I arise again.[119] First, defense counsel will have an incentive to assert that the defendant understood the charge because, otherwise, counsel might instill doubt as to whether the plea was knowing and voluntary. Second, the judge may too heavily rely on defense counsel's representations and, therefore, conduct a less thorough examination of the defendant.[120] Finally, defense counsel risks exposing client confidences in responding to the judge's inquiries; indeed, defense counsel may find it pertinent to explain the defendant's underlying conduct or representations that led counsel to believe the defendant understood the charges.

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112. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (holding that, by pleading guilty, a defendant waives "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers").

113. *See id.* ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

114. *See* FED. R. CRIM. P. 11(b)(1)(F). Many state courts have similar procedural requirements. *See, e.g.*, State v. Brown, 716 N.W.2d 906, 916 (Wis. 2006).

115. FED. R. CRIM. P. 11(b)(2).

116. *See, e.g.*, *Brown*, 716 N.W.2d at 913 (citing the transcript of a plea colloquy where the trial court judge relied on defense counsel's representations that the defendant understood the elements of the charges against him).

117. *See id.*; *see also* People v. Dukes, 993 N.Y.S.2d 411, 413 (App. Div. 2014) ("[D]efense counsel stated that he had discussed the potential defense with defendant and that defendant was waiving it in order to accept the plea offer . . . ."); State v. Sanders, No. 2007AP1469-CR, 2008 WL 4133549, at *3 (Wis. Ct. App. Sept. 9, 2008) (defense counsel represented that he had explained to defendant what the state would have to prove in each charge against the defendant).

118. *See, e.g.*, *Brown*, 716 N.W.2d at 919 ("[T]he state may present the testimony of the defendant and defense counsel to establish the defendant's understanding."); *see also* United States v. Evans, 243 F. App'x 538, 539 (11th Cir. 2007) (discussing the magistrate judge's reliance on defense counsel's lack of objections to infer that the defendant understood the charges against him).

119. *See supra* Part I.B.

120. *See Brown*, 716 N.W.2d at 921 (holding that "a court cannot rely very heavily upon mere statements from defense counsel that he or she has reviewed the nature of the charges with a defendant" and must conduct its own inquiry).

b. Waiving the Right to Conflict-Free Counsel

Judges may ask defense counsel whether the defendant has understood the proceedings in other contexts outside of guilty pleas. This includes when the defendant has requested representation from his retained defense attorney despite a potential conflict of interest.[121] The right to conflict-free counsel "is a problem of constitutional, and not simply ethical, dimension."[122] In fact, counsel with divided loyalties may be unable to meet the Sixth Amendment standard of effective assistance of counsel.[123] There are occasions, however, when defendants may prefer to work with counsel of their choosing regardless of the conflict of interest.[124] On these occasions, defense counsel may become a quasi witness when explaining to the judge that a client understands the extent of the conflict and has waived the constitutional right to be represented by conflict-free counsel.[125]

In *United States v. Rahman*,[126] for example, three codefendants retained the same private defense counsel—civil rights lawyers well known for representing high-profile, controversial clients.[127] Judge Michael Mukasey, concerned that the defendants did not understand the conflicts that may arise when codefendants are represented by the same counsel, temporarily appointed separate defense attorneys to explain to each defendant how his case may be compromised by sharing counsel.[128] Judge Mukasey then asked the new attorneys whether, in their opinions, the defendants understood the consequences of waiving the right to conflict-free counsel.[129] Here, both the original defense counsel and the temporarily appointed attorneys became quasi witnesses when testifying to the extent of the comprehension of the codefendants.[130]

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121. *See, e.g.*, United States v. Youngblood, 576 F. App'x 403, 408 (5th Cir. 2014) (citing the trial court's questioning of the defendant's two attorneys, as well as a federal public defender appointed to explain the conflict of interest to the defendant).

122. Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1204 (1989).

123. *Id.*

124. *See e.g.*, *Youngblood*, 576 F. App'x at 408; United States v. Rivera, 571 F. App'x 55, 60 (2d Cir. 2014) (affirming the district court's decision to disqualify the defendant's counsel, despite the defendant's desire to waive right to conflict-free counsel); United States v. Rahman, 837 F. Supp. 64, 66 (S.D.N.Y. 1993) ("[Defense counsel] objected, stating immediately in open court, without consulting either defendant, that, '[t]hey are perfectly willing to be represented here by me and they are here and they are willing to waive any alleged conflict of interest.'"). Joint representation also may occur because the defendants have developed a unique relationship of trust with defense counsel. *See, e.g.*, United States v. Curcio, 680 F.2d 881, 883 (2d Cir. 1982) (demonstrating that defense counsel had an established relationship with the defendants because he represented them on previous criminal charges).

125. *See Curcio*, 680 F.2d at 883 ("After hearing from the attorneys, the court questioned Gus Curcio."); *see also Youngblood*, 576 F. App'x at 408.

126. 837 F. Supp. 64 (S.D.N.Y. 1993).

127. *Id.* at 65; Lynette Holloway, *Kunstler's Widow Sues over Use of Firm's Name*, N.Y. TIMES (Dec. 5, 1996), http://www.nytimes.com/1996/12/05/nyregion/kunstler-s-widow-sues-over-use-of-firm-s-name.html [https://perma.cc/TFT2-NE96].

128. *See Rahman*, 837 F. Supp. at 66.

129. *See id.*

130. *See id.* at 66–67.

Defense attorneys and courts face several hurdles in representing and assessing a defendant's understanding of a conflict of interest. A defense attorney may overstate the extent of a client's understanding because, as a zealous advocate, she has to advance the interests of the client who wants her services. Her statements also may be unreliable because she might have a pecuniary interest in retaining the case. On the other hand, if the judge discounts defense counsel's representations out of distrust and finds a "serious potential for conflict," the constitutional "presumption in favor of counsel of choice" may be overcome, leaving the defendant in search of another attorney to defend his interests.[131] Additionally, as was the case in *Rahman*, an attorney assigned to assess a defendant's understanding may find herself torn between her duties of zealousness and candor, as well as how to relay information without violating attorney-client confidentiality.[132]

5. Trials in Absentia

Judges may ask defense attorneys for information about a client for efficiency purposes without realizing that such reliance puts counsel in an ethically precarious position. One example is when a defendant has failed to appear for trial and the judge needs to determine whether the defendant was alerted to the trial date and whether his absence was voluntary.[133]

In federal and state courts, when a defendant fails to appear at trial, the judge must make an inquiry into whether the defendant's absence was voluntary.[134] If the defendant's absence is determined to be voluntary, many courts will hold—subject to a balancing test—that the court can proceed in the defendant's absence.[135] Defense counsel becomes a quasi witness when responding to the judge's inquiries about the client's whereabouts. If she speaks to her client and repeats to the court the client's explanation for his absence, she has obtained her client's consent and is acting as a mere conduit.[136] If, however, defense counsel has not received consent from her client, she risks revealing confidential information.[137] When the defendant becomes aware of defense counsel's representations, he may believe his

131. Wheat v. United States, 486 U.S. 153, 160 (1988).

132. *See supra* 129 and accompanying text.

133. *See, e.g.*, United States v. Yannai, 791 F.3d 226, 234 (2d Cir. 2015) (relying in part on defense counsel's representations about his client's whereabouts).

134. *See* FED. R. CRIM. P. 43(c)(1)(A) (stating that a defendant waives the right to be present at trial "when the defendant is voluntarily absent after the trial has begun"); *see also* People v. Price, 240 P.3d 557, 560 (Colo. App. 2010); State v. Finnegan, 784 N.W.2d 243, 245 (Minn. 2010); Bottom v. State, 860 S.W.2d 266, 266 (Tex. Ct. App. 1993).

135. *See, e.g.*, State v. Thomson, 872 P.2d 1097, 1101 (Wash. 1994) (describing a three-prong voluntariness inquiry that "ensures the court will examine the circumstances of the defendant's absence and conclude the defendant chose not to be present at the continuation of the trial.").

136. *See, e.g.*, *Yannai*, 791 F.3d at 234 ("We spoke to [the defendant] on the phone from his hospital bed in White Plains. He told us that he did not intentionally overdose on any medications. He certainly did not intend to kill himself.").

137. *See* San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-1 (2011) (acknowledging the ethical bind an attorney is in when she has prejudicial information about a client's absence and is asked by a judge about her client's whereabouts).

attorney has been disloyal by revealing personal information absent his consent.

How the judge should treat defense counsel's representations is equally problematic. How much credit should the judge give a defense attorney's statement that her client's absence is involuntary? There is a convincing argument that any representations defense counsel makes about her client's absence will be biased in favor of the client because defense counsel cannot easily shed her ethical duty to be a loyal and zealous advocate.

6. Discussing a Defendant's Criminal Record

Defense counsel is turned into a quasi witness when asked about a client's criminal record. This inquiry may occur during sentencing.[138] A judge may believe it harmless to ask a defense attorney about a client's criminal history because defense counsel would appear to be merely articulating information retrievable by the prosecutor. But, defense counsel also may be aware that the defendant was convicted of a crime under a different name or in another jurisdiction.[139] Such an inquiry places the defense attorney in a harmful bind.[140] If she provides an answer in front of her client, she risks exposing confidential information about him. His trust in her, in turn, might deteriorate and, as a result, he might be less forthcoming.

Therefore, defense counsel must make the challenging decision of whether to betray her client or the court.[141] This decision is further complicated should the prosecutor and the judge fail to discover a defendant's prior convictions—such a scenario may even amount to defense counsel obstructing justice by refusing to disclose her client's prior convictions.[142]

The ABA has recognized that if defense counsel discloses information about a client's previous criminal history, she is violating Model Rule 1.6 by relaying information related to the representation of her client.[143] Therefore, defense attorneys are advised not to answer a judge who inquires into a client's criminal history, unless the client has committed perjury.[144] The ABA guidelines, however, are not binding law. Thus, this problem is still

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138. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2004).

139. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1986-87 (1986) (discussing how defense counsel should respond when a judge inquires into a defendant's criminal history).

140. *See id.* (discussing the tension between defense counsel's duty of candor to the court and duty of confidentiality to the client); *see also* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 287 (1953) (analyzing three hypotheticals when defense attorneys may feel pressure to disclose a defendant's prior conviction).

141. *See* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 287 (arguing that the lawyer "should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth").

142. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987) (resolving this issue by determining that, under Model Rule 3.3, a defense attorney need not disclose a client's prior convictions due to a mistake on the part of the government and the judge but must do so if the client lied about his prior convictions).

143. *See id.*

144. *See id.*

relevant and illustrates the ethical conflicts that arise when defense counsel is forced to walk the line between zealous advocate and witness.

II: INADEQUATE GUIDANCE, INADEQUATE SOLUTIONS: RULES THAT (DON'T) APPLY AND JUDICIAL IMPROVISATION TO ADDRESS THE PROBLEMS POSED BY THE QUASI WITNESS

There have always been ethical concerns with attorneys being called as witnesses on behalf of, or against, their clients and with attorneys presenting their personal opinions at trial. Such concerns have been addressed in Model Rule 3.7 and 3.4(e), respectively.[145] Part II.A and Part II.B analyze these rules and conclude that they fail to categorically bar defense counsel from acting as a quasi witness and from representing her own personal opinions to the judge on collateral matters. Part II.C then returns to Model Rule 1.6 and assesses whether defense counsel may disclose client confidences on collateral matters. It asks the following questions: Does defense counsel possess implied authorization to make disclosures under Model Rule 1.6? If so, is there any guidance on the extent of information defense counsel can disclose? Part II.D analyzes the bench's treatment of defense attorneys in the role of quasi witness. Lacking a clear awareness of the problem—much less clear guidelines with which to address it—judges have improvised an arsenal of ad hoc strategies to handle the individual ethical concerns posed by defense counsel as quasi witness, particularly the risk that defense counsel will overdisclose information relating to her client or be biased in her representations.

A. ABA Model Rule 3.7

Model Rule 3.7(a) states, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."[146] It provides a limited number of exceptions for when an attorney can serve as a witness in the same proceeding: (1) when the testimony "relates to an uncontested issue," (2) "relates to the nature and value of legal services rendered in the case," or (3) "disqualification of the lawyer would work substantial hardship on the client."[147] Model Rule 3.7 does not differentiate between attorneys acting as witnesses on behalf of their clients and attorneys called as witnesses by opposing counsel.[148]

There are several reasons why Model Rule 3.7 does not apply to defense attorneys who, in a collateral proceeding, provide a judge with information

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145. *See infra* Part III.A–B.

146. MODEL RULES OF PROF'L CONDUCT r. 3.7(a) (AM. BAR ASS'N 2016).

147. *Id.* An earlier version of Model Rule 3.7 appears in the ABA Canon of Ethics 19 and states, "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel." CANONS OF PROFESSIONAL ETHICS canon 19 (AM. BAR ASS'N 1908).

148. *See* MODEL RULES OF PROF'L CONDUCT r. 3.7; *see also* Richard C. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 U.C. DAVIS L. REV. 651, 653–57 (1982).

about a client based on personal knowledge. Before parsing its language, this section proceeds to analyze the concerns Model Rule 3.7 addresses.

Model Rule 3.7 is a codification of the attorney-witness concern that first appeared "in American court decisions in the nineteenth century as courts expressed their discomfort with lawyers serving as both advocate and witness."[149] Courts and the drafters of the Model Rules were concerned that an attorney in the position of witness would be partisan toward her client,[150] placed in the "unseemly and ineffective" position of arguing her own credibility,[151] difficult to cross-examine because of professional courtesy,[152] and would unduly sway the jury—either the jury would give the attorney's testimony too much credit or would view the attorney as biased and, therefore, discount the client's case altogether.[153] Model Rule 3.7 also describes the potential for a conflict of interest to develop if the attorney's testimony differs substantially from her client's.[154] For these reasons, state courts that have adopted Model Rule 3.7 instruct that when an advocate becomes a "necessary witness," she should withdraw or be disqualified.[155]

Nevertheless, some of the concerns addressed by Model Rule 3.7 do loosely apply to defense attorneys acting as quasi witnesses. As Part I demonstrated, there are times when defense counsel may be partisan toward her client[156] or may have to argue her credibility in front of the judge because the judge may perceive defense counsel to be biased and, therefore, may unnecessarily discredit defense counsel's representation.[157] Despite the seeming applicability of Model Rule 3.7(a), there are several reasons why it does not forbid defense counsel from making representations to the judge based on her own beliefs or knowledge.

Because defense counsel is testifying about a collateral matter, which may be considered an "uncontested" issue, thus falling within an exception to the rule, Model Rule 3.7 can be interpreted not to apply to the quasi witness scenario.[158] But, there are times when defense counsel's testimony is not

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149. Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945, 950 (2001).

150. *See* Wydick, *supra* note 148, at 660.

151. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-9 (AM. BAR ASS'N 1980); Wydick, *supra* note 148, at 661; *see also* Ramey v. Dist. 141, Int'l. Ass'n of Machinists and Aerospace Workers, 378 F.3d 269, 282 (2d Cir. 2004) (listing the concerns implicating the advocate-witness rule).

152. *See* Wydick, *supra* note 148, at 662.

153. *See id.* at 660, 662.

154. *See* MODEL RULES OF PROF'L CONDUCT r. 3.7 cmt. 6 (AM. BAR ASS'N 2016).

155. *See, e.g.*, United States v. Evanson, 584 F.3d 904, 914 (10th Cir. 2009) (affirming disqualification of defense counsel on the grounds that if the defendant were to make an advice-of-counsel defense, the government would likely call defense counsel as a witness); United States v. Santiago, 916 F. Supp. 2d 602, 618 (E.D. Pa. 2013) ("Attorney Crisp's status as a potential government witness at the trial of Melvin Santiago creates a serious potential conflict of interest which supports disqualification of Attorney Crisp.").

156. *See supra* Part I.C.5.

157. *See supra* Part I.C.5.

158. *See* MODEL RULES OF PROF'L CONDUCT r. 3.7(a)(1); Wydick, *supra* note 148, at 669 (interpreting the meaning of "uncontested" within the Model Code provision addressing the attorney-witness prohibition).

"uncontested."[159] A defendant may vigorously contest defense counsel's testimony that the defendant intends to commit perjury, or the prosecutor may contest defense counsel's representation that her client is incompetent to proceed with trial.[160] Therefore, Model Rule 3.7(a)(1) would, in many instances, appear to prohibit defense counsel from adopting the role of quasi witness.

Even if Model Rule 3.7(a)(1) would appear to proscribe defense counsel from presenting her own personal beliefs to a judge, Model Rule 3.7(a)(3) provides a separate exception: a defense attorney may testify if disqualifying her would "work substantial hardship on the client."[161] This is a more convincing explanation for why Model Rule 3.7 does not apply to defense attorneys acting as quasi witnesses. There exists no avenue for completely avoiding an attorney acting as a quasi witness in many situations that would otherwise result in substantial hardship to the client, and, indeed, there are moments throughout both civil and criminal trials when an attorney will have to make representations about her client. For example, a judge may ask a defense attorney how she knows that her client is not a flight risk, and the attorney may explain to the judge that her client intends to surrender his passport.[162] Another example of when disqualification would result in substantial hardship is when a judge asks the defense attorney why her client failed to appear in court, and the defense attorney explains that her client was recently arrested in a different jurisdiction.[163] In all of these scenarios, disqualifying defense counsel would work a substantial hardship on the client and lead to an impractical and absurd result, as almost all attorneys would have to withdraw or risk disqualification.

Finally, Model Rule 3.7 appears to target attorneys in the position of a formal witness testifying in front of the trier of fact.[164] Two of the rule's principal concerns are that an attorney testifying as a witness will unduly sway the jury and that opposing counsel will be unable to properly cross-examine her.[165] Quasi witnesses make representations to the judge, often out of the earshot of the jury. Consequently, the concern that defense counsel's representations will unduly sway the jury is less relevant, and the need for rigorous cross-examination is concurrently less prevalent.

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159. *See supra* Part I.C.3 (describing defense counsel's representations of a defendant's competency, which may be dispositive to the defendant's case).

160. *See supra* Part I.C.2.

161. MODEL RULES OF PROF'L CONDUCT r. 3.7(a)(3).

162. *See* People *ex rel.* Tannuzzo v. New York City, 571 N.Y.S.2d 230, 231 (App. Div. 1991) (setting surrender of passport as a bail condition).

163. *See* United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir. 1977) (accepting defense counsel's statement that the defendant had been rearrested as reason for his absence from trial).

164. *See* People v. Donaldson, 113 Cal. Rptr. 2d 548, 556 (Ct. App. 2001) (expressing concerns that a prosecutor who testifies will unduly sway jurors, who will be impressed by the prosecutor's prestige).

165. *Id.*

B. ABA Model Rule 3.4(e)

Model Rule 3.4(e), which provides that attorneys may not "assert personal knowledge of facts in issue except when testifying as a witness," also theoretically bars defense attorneys from acting as quasi witnesses.[166] But, as with Model Rule 3.7, there are several reasons why Model Rule 3.4(e), despite its seemingly applicable language, does not apply to attorneys in the position of quasi witness. First off, defense counsel, when making representations to the judge, may be interpreted to be "testifying as a witness," even though defense counsel is not acting as a formal or unsworn witness.[167] Thus, defense counsel would fall under the exception to the rule. Secondly, Model Rule 3.4(e) is aimed at preventing an attorney from disadvantaging her opponent by unfairly persuading the trier of fact, especially during opening and closing arguments.[168] But quasi witnesses do not aim to unfairly persuade the trier of fact, nor are they doing so during opening or closing arguments.[169] Rather, as this Note has demonstrated numerous times, they provide facts to a judge who is considering a ruling on a collateral issue.[170] Therefore, it appears defense attorneys acting as quasi witnesses fall beyond the scope of Model Rule 3.4(e) and, correspondingly, are not barred by the rule from asserting their personal beliefs or observations.

C. Implied Authorization

Although Model Rules 3.7 or 3.4(e) do not proscribe defense counsel from sharing personal beliefs and observations with a judge, Model Rule 1.6, at least on its face, appears to bar defense counsel from disclosing "information relating to the representation of a client."[171] However, Model Rule 1.6 states in particular that defense counsel may disclose confidential information if doing so is "impliedly authorized in order to carry out the representation."[172] Defense counsel may, therefore, have "implied authorization" to reveal

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166. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (stating that a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused"). This rule also is echoed in the standards for defense attorneys, published by the ABA. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-7.7(b) (AM. BAR ASS'N 1993) ("Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.").

167. MODEL RULES OF PROF'L CONDUCT r. 3.4(e); *see supra* note 16.

168. *See* 1 HAZARD, HODES & JARVIS, *supra* note 64, § 33.13, at 33-31 ("The second half of Rule 3.4(e) bars an advocate from asserting personal knowledge or opinions in litigation, except when he is testifying as a witness . . . ."); Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 10 (2006) ("Rule 3.4(e) appears principally concerned with 'allusions' and statements by counsel during opening and closing arguments . . . .").

169. *See supra* Part I.A.

170. *See supra* Part I.A.

171. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 4.

172. *Id.* r. 1.6(a).

confidential information when substantiating her own motion or responding to a court's inquiries on a collateral issue.[173]

The comment to Model Rule 1.6 provides no definition of and only minimal guidance on "implied authorization." It merely states that "in some situations . . . a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter."[174] Professor Geoffrey C. Hazard Jr. has argued that fulfilling representation "may require making statements to a third party, such as during negotiations conducted by the lawyer."[175] He argues that there are "many situations in which a lawyer's statements are made 'on behalf of a client' in this sense, and are therefore 'impliedly authorized' by the client, even though the client did not literally issue any instructions in the matter, and did not even specifically advert to the question of disclosure."[176] He further argues that "impliedly authorized" also refers to disclosures where the client "has no genuine choice in the matter," specifically referring to civil matters where a lawyer has an obligation to disclose certain client confidences to regulatory agencies.[177] Thus, it would appear that the "implied authorization" language of Model Rule 1.6 is generally not interpreted to apply to lawyers confronting whether to disclose information during proceedings collateral to a criminal case.[178]

Defense attorneys in the position of quasi witness are accordingly left with only unsatisfactory options: make disclosures to the court and potentially harm the defendant by relying on a tenuous interpretation of "impliedly authorized" or avoid making disclosures, risking skepticism by the court and potentially adverse decisions. In *United States v. Trevino*,[179] for example, defense counsel's motion to withdraw was denied because she refused to reveal client confidences and submit evidence explaining her inability to represent her client, an indigent defendant whose codefendant had been represented by the same public defender office.[180] Under the rule, it is unclear if defense counsel would have been "impliedly authorized" to reveal her client's confidences in this instance. Such revelations would have been damaging to the defendant, divulging aspects of the imminent criminal trial to the judge. By not revealing confidences, however, defense counsel was forced to continue representation despite the genesis of a conflict of interest.

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173. *See supra* Part I.C.1 (discussing motions to withdraw and motions to substitute counsel).

174. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 5.

175. 1 HAZARD, HODES & JARVIS, *supra* note 64, § 10.21, at 10-113 to -114.

176. *Id.* § 10.21, at 10-114.

177. *Id.*

178. *Id.* § 10.22, at 10-118. Tellingly, Professor Hazard concludes the discussion of "implied authorization" by stating, "In any event, the generalization that a lawyer has an *unqualified* duty of confidentiality to a client is simply incorrect in most contexts. Indeed, the generalization is essentially accurate only when the representation involves defense of a criminal accused." *Id.*

179. 992 F.2d 64 (5th Cir. 1993).

180. *See id.*

D. Judicial Attempts to Address Ethics Concerns Posed by Defense Counsel as Quasi Witness

The Model Rules are unhelpful to defense attorneys thrust into the role of quasi witness because they provide minimal or conflictual guidance. Courts are not blind to the unhelpfulness of the rules and the tricky position defense counsel is in when asked to reveal personal opinions and knowledge about a client. Consequently, some courts have adopted ad hoc approaches that attempt to balance a need for information with a need to safeguard client confidences. This section attempts to categorize for the first time the ad hoc strategies adopted by judges to address the individual ethics concerns posed by defense counsel in the role of quasi witness. It analyzes the effectiveness of these strategies, as well as their shortcomings.

1. Rely Exclusively on Information from the Defendant and Other Sources

Judges avoid placing defense counsel in the position of quasi witness by relying exclusively on information provided by the defendant himself. Therefore, instead of inquiring from defense counsel whether she believes her client has a thorough understanding of the nature of the charges or the extent of the rights he is waiving, judges engage in a colloquy with the defendant.[181] This practice occurs when a defendant accepts a guilty plea and waives constitutional rights associated with proceeding to trial.[182] This approach is a facially nonabrasive mechanism for avoiding disclosures from defense counsel; she becomes irrelevant and, therefore, does not need to express her opinions.

Aside from defense counsel and the defendant, judges also rely on other sources for information gathering. Indeed, in competency hearings, they rely on testimony from psychiatrists and family members.[183] When a defendant fails to appear at trial, judges rely on information provided by the prosecutor and, if the client is absent due to a medical emergency, by doctors.[184] However, problems for judges still can arise in many situations because a

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181. *E.g.*, United States v. Carreto, 583 F.3d 152, 156, 158 (2d Cir. 2009) (trial court engaged in an extensive colloquy with the defendants to ensure that they understood the consequences of their guilty pleas, especially because defendants had decided to plead guilty at the "eleventh hour"); *see also* United States v. Curcio, 680 F.2d 881, 888–90 (2d Cir. 1982) (holding that, in evaluating whether defendants have waived the right to conflict-free counsel, judges must advise the defendant about potential conflicts, determine whether the defendant understands the risks of those conflicts, and give the defendant time to contemplate the risks, with the aid of independent counsel if wanted).

182. *See Carreto*, 583 F.3d at 158.

183. *See* Medina v. California, 505 U.S. 437, 455–56 (1992) (O'Connor, J., concurring) ("[C]ompetency determination is based largely on the testimony of psychiatrists."); James A. Cohen, *Attorney-Client Privilege, Ethical Rules and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 544 (1997) ("Despite its legal character . . . competency determinations have been virtually delegated to mental health professionals, whose opinions are given little scrutiny by the courts.").

184. *E.g.*, United States v. Yannai, 791 F.3d 226, 232 (2d. Cir 2015) ("[S]oon thereafter, the government reported that Yannai was unconscious and that the medical personnel were unsure of the nature of his problem.").

defendant's representations may be unreliable[185] and defense counsel may be the only other source of the needed information. For example, when defense counsel first moves for a competency hearing,[186] moves to withdraw,[187] or is the only person who knows whether defendant has fled trial.[188] Relying solely on a defendant's representations or on sources outside of the attorney-client relationship may appear as an easy solution but, in many cases, is cumbersome and thwarts the truth-seeking process by limiting the information available to judges.

2. Accept Defense Counsel's Representations Without Further Inquiry

Judges also avoid placing defense counsel in situations necessitating the disclosure of information—particularly confidential information—about her client and the attorney-client relationship by accepting defense counsel's representations absent additional inquiries. For instance, they may grant a motion for withdrawal at defense counsel's request,[189] a mistrial when a defense counsel represents his client's absence is involuntary,[190] or separate counsel whenever a defendant or his counsel claims the existence of a conflict of interest.[191] Although accepting defense counsel's representations without further inquiry may appear as a disclosure-limiting construct, it is in fact inefficient; if every motion or request is granted in attempt to circumvent disclosures, defendants and defense counsel will gain considerable control over court proceedings and might create constant delays and slow down the trial calendar.[192]

185. *See, e.g.*, *Carreto*, 583 F.3d at 156; United States v. Rahman, 837 F. Supp. 64, 66 (S.D.N.Y. 1993) (distrusting defendants' statements that they wished to retain counsel with a clear conflict of interest).

186. *See, e.g.*, United States v. Maxton, No. 13-cr-00411-PAB, 2013 WL 6800695, at *2 (D. Colo. Dec. 24, 2013) (denying defense counsel's motion for a competency hearing despite defense counsel's argument that he could not substantiate his belief about his client's competency due to ethical concerns).

187. *See supra* notes 73–77.

188. *See, e.g.*, United States v. Latham, 874 F.2d 852, 854–55 (1st Cir. 1989) (discussing defense counsel's representation that his client had overdosed on cocaine).

189. *See, e.g.*, United States v. Kowalczyk, 805 F.3d 847, 852 (9th Cir. 2015) (accepting the withdrawal motions of eight separate defense attorneys without inquiring further into their motions).

190. *C.f.* United States v. Yannai, 791 F.3d 226, 234 (2d. Cir 2015) (distrusting defense counsel's representation that the defendant's absence was involuntary).

191. *C.f.* United States v. Trevino, 992 F.2d 64, 66 (5th Cir. 1993) (denying defense counsel's motion to withdraw due to a conflict of interest because she failed to provide sufficient evidence of the conflict, despite her representations that providing such evidence would violate ethics rules).

192. *See* United States v. Barrow, 287 F.3d 733, 738 (8th Cir. 2002) (cautioning that courts must avoid abusive delay tactics when evaluating a motion to substitute counsel); Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact of Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 571 (1988) (expressing courts' concerns with delay and keeping a criminal case on the trial calendar for longer than necessary).

3. Defer to the Appellate Court

In some contexts, trial judges may decide not to explore an issue fully at the trial stage to avoid making extensive inquiries of defense counsel.[193] Thus, defendants are forced to raise the disputed issue on appeal or in an ineffective assistance of counsel claim. For example, in the motion to withdraw context, a judge, concerned about delay, could deny a motion to withdraw and avoid further inquiry.[194] This leaves the defendant to either file an appeal (if possible)[195] or raise any arguments regarding counsel in a postconviction ineffective assistance of counsel claim.[196]

Deferring to an appellate court or the court presiding over a collateral attack[197] is undesirable because, although such action avoids the disclosure of confidential information by the defense attorney, it is detrimental to the defendant, who may be forced to plead guilty before being able to appeal the issue or may have to pay for counsel and wait in jail while his appeal or postconviction motion is litigated and decided. Moreover, the reviewing court will decide the issue under a different standard.[198] Defendants, for example, must meet a high standard in ineffective assistance of counsel claims, making it unlikely that any problematic behavior on the part of defense counsel will be remedied through such a claim.[199]

4. Find a Creative Solution: The Narrative Approach

Although not applicable to all contexts, some courts minimize the need for disclosures from defense counsel by permitting counsel to pursue a middle ground between explicitly revealing to the judge client confidences and betraying a duty of candor to the court. This might occur when defense counsel strongly believes that a client will commit perjury and, as a result,

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193. *See* People v. Berroa, 782 N.E.2d 1148, 1150–51 (N.Y. 2002) (overturning the trial judge's decision to allow defense counsel to stipulate to adverse comments made by defense witnesses to avoid forcing counsel to withdraw and appear as an adverse witness).

194. Defense counsel may move to withdraw because of breakdown in the attorney-client relationship but may not be able to reveal more without exposing client confidences. *See, e.g.*, Aceves v. Superior Court, 59 Cal. Rptr. 2d 280, 281 (Ct. App. 1996).

195. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.2(b), at 1295 (5th ed. 2009) (explaining interlocutory appeals in criminal cases).

196. *See generally id.* § 11.7(e), at 640–41 (explaining procedures for raising ineffective assistance of counsel claims).

197. A collateral attack is a procedure "through which defendants can present post-appeal challenges to their convictions on at least limited grounds." *See id.* § 28.1(a), at 1333; *see also* Thomas H. Gabay, *Using* Johnson v. United States *to Reframe Retroactivity for Second or Successive Collateral Challenges*, 84 FORDHAM L. REV. 1611, 1613 n.7 (2016).

198. *See, e.g.*, Frazier v. State, 15 S.W.3d 263, 265 (Tex. App. 2000) (stating that appellate courts will review motions to dismiss under an abuse of discretion standard).

199. *See* Newmark, *supra* note 42, at 704 ("It is extremely difficult and uncommon for one to prevail on an ineffectiveness claim . . . ."); *see also* Elizabeth Gable & Tyler Green, Wiggins v. Smith*: The Ineffective Assistance of Counsel Standard Applied Twenty Years After* Strickland, 17 GEO. J. LEGAL ETHICS 755, 758 (2004) (discussing the "great deal of deference" given to decisions made by defense counsel and the general reluctance "to find that an attorney has rendered ineffective assistance").

only allows the client to testify in narrative form.[200] This approach allows the client to testify, but defense counsel does not engage in questioning the client, nor does defense counsel mention the testimony in closing.[201] By following this approach, defense counsel avoids stating outright that a client intends to commit perjury, even though counsel subtly signals to the judge and the prosecution her belief that the client is lying. Moreover, under this approach, judges avoid having to ask a defense attorney to reveal client confidences,[202] even if those confidences are revealed anyway because the judge, prosecutor, and perhaps even the jury all recognize that if a defendant is testifying but not being questioned by counsel, the defendant is most likely lying on the stand.[203] While this might seem like a viable solution, commentators have argued that this approach is unsatisfactory because, while it avoids explicit disclosures by the defense counsel about why she believes her client should or should not testify, it prejudices the client if he testifies truthfully.[204]

5. In Camera Hearings

Another ad hoc approach judges adopt when they cannot avoid asking defense counsel for information based on her own personal beliefs about a client is to hold a hearing outside of the presence of the jury.[205] This

200. *See* People v. Johnson, 72 Cal. Rptr. 2d 805, 810–11 (Ct. App. 1998) (endorsing the narrative approach as the appropriate path for defense counsel to take if she believes her client intends to commit perjury). *But see* Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821, 829 (2006) (critiquing the narrative approach).

201. *See* Slipakoff & Thayaparan, *supra* note 93, at 951.

202. *See* People v. Jennings, 83 Cal. Rptr. 2d 33, 36 (Ct. App. 1999) (describing that the trial court did not inquire further when the defense attorney stated in vague terms that conflicts would arise if he were to question the defendant during his testimony and would, therefore, ask the defendant to testify in free narrative form); *see also* People v. Guzman, 755 P.2d 917, 932 (Cal. 1988) (recounting that defense counsel informed the court that his client would testify in free narrative form and the court questioned the defendant, but the court conducted no further inquiries of defense counsel).

203. *See Guzman*, 755 P.2d at 932; *see also* Gillers, *supra* note 200, at 829–30 (arguing that even if the jury does not recognize that defense counsel is signaling that the defendant is lying on the stand, there is still the additional harm that the defendant's testimony is not referenced during summation). In some cases, defense counsel has explicitly revealed to the judge that a client intends to commit perjury. *See, e.g.*, Commonwealth v. Mitchell, 781 N.E.2d 1237, 1241–42 (Mass. 2003) (explaining the defendant's argument that his counsel provided ineffective assistance of counsel by advising the judge that the defendant intended to commit perjury). If defense counsel reveals to the judge the basis for denying a defendant his constitutional right to testify, she violates client confidences, and the narrative approach would have no impact on limiting the information received by the judge. *See* Butler v. United States, 414 A.2d 844, 852 (D.C. 1980) (arguing that telling a judge that a defendant intends to commit perjury compromises the neutrality of the judge).

204. *See* Jay Sterling Silver, *Truth, Justice, and the American Way: The Case* Against *the Client Perjury Rules*, 47 VAND. L. REV. 339, 421 (1994) ("[The narrative] method, however, is generally understood to telegraph to the factfinder counsel's belief in the defendant's guilt . . . .").

205. *See* United States v. Long, 857 F.2d 436, 446–47 (8th Cir. 1988) (holding that the trial judge acted correctly when he discussed "the conflict with only the attorney and his client present," but that "[s]uch inquiries . . . are best made at an evidentiary hearing"); Witherspoon

approach has been used when defense counsel must substantiate either her good faith belief that her client is incompetent[206] or the basis for her motion to withdraw.[207] Revealing information in camera may seem like a painless way to avoid revealing information that may prejudice defendants in front of the trier of fact.

Courts and commentators have proposed several types of in camera hearings to permit disclosures by defense counsel.[208] They have contemplated formal interlocutory evidentiary hearings where the defendant is afforded "all rights accorded under the Confrontation Clause and with the [same] 'reasonable doubt' standard of proof."[209] They have proposed more informal hearings, attended only by the judge, defense counsel, and the defendant.[210] They also have proposed in camera hearings before a new judge to avoid prejudicing the defendant in front of the judge sitting on his case.[211]

Despite the variety of in camera hearings available to judges confronted with a quasi-witness defense counsel worried about disclosing information about her client, none successfully limits the risk of destruction to the attorney-client relationship, especially if the judge denies defense counsel's motion to withdraw and defense counsel must resume representation.[212] A defendant might be reluctant to share information with his attorney, knowing

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v. United States, 557 A.2d 587, 593 (D.C. 1989) (holding that "the trial judge should have inquired whether there was a reasonable possibility that defense counsel's personal conflict might impair his ability to represent appellant effectively"). *But see* People v. Bartee, 566 N.E.2d 855, 857 (Ill. App. Ct. 1991) (declining to adopt a procedure where the trial court has to conduct a hearing to determine the basis for defense counsel's belief).

206. *See, e.g.*, CAL. R. CT. 4.130(b)(2) ("The opinion of counsel, without a statement of specific reasons supporting that opinion, does not constitute substantial evidence. The court may allow defense counsel to present his or her opinion regarding the defendant's mental competency in camera if the court finds there is reason to believe that attorney-client privileged information will be inappropriately revealed . . . .").

207. *See, e.g.*, State v. Chambers, 994 A. 2d 1248, 1251 (Conn. 2010) (describing the lower court's decision to hold an in chambers hearing with the defense counsel, the defendant, and a senior assistant state's attorney, where defense counsel stated his intention to withdraw from the case for ethical reasons).

208. *See* Silver, *supra* note 204, at 396 (describing the weaknesses in the different proposals for in camera hearings suggested by courts in the context of perjury accusations).

209. *Id.* at 397–99 (discussing that if the court conducts a trial-like evidentiary hearing, the defendant may be forced to try her case twice, "once in [a] hearing before the trial judge and once again to the jury at trial"); *see also Witherspoon*, 557 A.2d at 592 n.4 (describing the "delicate problem" of providing the defendant with a full blown evidentiary hearing disputing the perjury allegation because his defense attorney would be unavailable to assist him); Rieger, *supra* note 80, at 155–60 (arguing that "the hearing to determine whether the client is entitled to the assistance of counsel in telling his story should not be an adversarial proceeding" and, as a result, should not be a full blown evidentiary hearing with the defendant represented by separate counsel).

210. *See* Rieger, *supra* note 80, at 151 (proposing an informal, interlocutory, in camera hearing attended only by the defendant, defense counsel, a new judge, and a court reporter whose recording of the hearing will remain under seal).

211. *Id.* at 151–52; *see also Witherspoon*, 557 A.2d at 594 (Ferren, J., concurring) (suggesting that the only way to protect a client's confidences and secrets and avoid "tainting the trial judge with adverse information about the client-defendant . . . is to have a different judge hear and decide the withdrawal motion").

212. *See supra* notes 81–84 and accompanying text.

that the attorney had recently disclosed information against his interests in a collateral proceeding.[213] Furthermore, some of the proposed in camera hearings risk prejudicing the client in front of the prosecution and the judge.[214] If an in camera hearing is not conducted ex parte, the prosecutor will be present and may be influenced by the information revealed by defense counsel. And, if the in camera hearing is conducted ex parte, but held before the same judge deciding the charge, defense counsel's disclosures may influence the judge and prejudice the defendant.[215] Some hearings also leave the defendant to argue for himself, while his assigned counsel has temporarily become his adversary, raising significant constitutional concerns.[216] It is easy to see, therefore, that in camera hearings may raise more problems than they solve.

6. Assign Separate Counsel During the Collateral Proceeding

In conflict of interest cases, courts have attempted to avoid relying on defense counsel's potentially biased personal opinions by appointing separate, independent counsel for the defendant during the collateral proceeding.[217] This counsel's duty is to explain to the defendant the existence of the conflict and the consequences it could have on the defendant's case.[218]

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213. *See supra* notes 81–84 and accompanying text. *But see* Rieger, *supra* note 80, at 158 (stating that an in camera ex parte hearing will not erode the attorney-client relationship to an unworkable extent because such a hearing will not be adversarial and will "simply be a means for a neutral party to resolve a dispute between lawyer and client").

214. In *People v. Cardenas*, No. 12CA1536, 2015 WL 4312496 (Colo. App. July 16, 2015), the trial court conducted an in camera hearing with defense counsel, outside the presence of the defendant. *Id.* at *3. The appellate court held that the defendant's right to a fair trial was compromised because of his absence from the hearing. *Id.* at *6.

215. *See* United States v. Long, 857 F.2d 436, 447 (8th Cir. 1988) (holding that defense counsel's disclosure to the trial judge that he was worried about client perjury would significantly prejudice the defendant); Aceves v. Superior Court, 59 Cal. Rptr. 2d 280, 286 (Ct. App. 1996) (arguing that forcing defense counsel to disclose confidential information in an in camera hearing "would pit the right to conflict-free representation against the preservation of client confidences, exert a chilling effect on the constitutional guarantee of effective assistance and free flow of attorney-client communications, and leave the public defender with a Hobson's choice no attorney should have to make."); Rieger, *supra* note 80, at 153 n.171 (stating that because the judge ultimately decides the sentence, he should know as little about the conflict between the lawyer and defendant).

216. *Compare* Rieger, *supra* note 80, at 160 (arguing that if the judge conducts an ex parte in camera hearing, the defendant does not have to be represented by counsel because "[a]llowing the defendant to be represented by independent counsel at this hearing would unnecessarily accentuate the conflict and make further representation by the original lawyer difficult"), *with* Silver, *supra* note 204, at 398 (arguing that a more convincing case can be made that a defendant did not intend to commit perjury if the defendant is appointed independent counsel).

217. United States v. Youngblood, 576 F. App'x 403, 406 (5th Cir. 2014) ("In the light of this conflict, the district court assigned the Federal Public Defender's Office (FPD) to advise Youngblood of the potential conflict of interests . . . .").

218. *See, e.g.*, United States v. Rahman, 837 F. Supp. 64, 66 (S.D.N.Y. 1993) (appointing two lawyers "to explain to [the defendants] the hazards of joint representation"); *see also*

The appointment of counsel for the collateral proceeding assuages two concerns from the bench: the defendant's original defense counsel might provide biased representations to the judge about the defendant's awareness of counsel's conflict of interest and defense counsel might not have adequately explained the nature of the conflict of interest to his client.[219] Yet, this approach still fails to address two important ethical concerns that course through this Note.

First, counsel for the collateral proceeding may be less biased than the original defense counsel, but it does not necessarily follow that she is completely bias free—her duty is still to represent her client zealously, even during a collateral proceeding.[220] Hence, if the defendant wants to retain his initial counsel, the attorney representing the client during the collateral proceeding may manipulate her representations to the judge and overstate the client's understanding of the conflict of interest to help him retain his original defense attorney.[221]

Second, there still persists the risk that counsel for the collateral proceeding will experience pressure to expose client confidences, as the judge may make explicit inquiries into the basis for counsel's belief about a defendant's understanding.[222] A judge in this instance conflates the newly appointed independent counsel with a guardian ad litem.[223] Essentially, in the conflict of interest context, assigning separate, independent counsel attempts to ameliorate the problem of a quasi witness by relying on another quasi witness.

III. PROPOSED SOLUTIONS TO AN OFTEN OVERLOOKED PROBLEM

Part I of this Note highlighted an important but previously unidentified ethical quandary confronting judges and defense counsel: the quasi witness.

United States v. Curcio, 680 F.2d 881, 883 (2d Cir. 1982) (establishing that defendants must be fully informed of the hazards of joint representation).

219. *See Rahman*, 837 F. Supp. at 66 (expressing concern that the defendants' answers sounded rehearsed and prepared by retained defense counsel, creating difficulties in determining whether defendants fully understood the conflict of interest).

220. *See supra* Part I.B.1 (explaining defense counsel's duty of loyalty).

221. In *Rahman*, Judge Mukasey appointed two independent defense attorneys to explain to each codefendant the constitutional right to conflict-free counsel. *Rahman*, 837 F. Supp. at 66. One defense attorney represented to the judge that, in his opinion, his client understood the possible conflict. *Id.* Another attorney, however, expressed no view about her client's understanding, sending a signal to the judge that the defendant had unknowingly waived his right to conflict-free counsel. *Id.*

222. *See, e.g.*, United States v. Liszewski, No. 06-CR-130 (NGG), 2006 WL 2376382, at *2 (E.D.N.Y. Aug. 16, 2006) (citing counsel's representations that the defendant "thinks the conflicts, potential conflicts, are really moot given the nature of his defense in this case").

223. A guardian ad litem has the authority to reveal client confidences, but counsel appointed to explain to the defendant the hazards of retaining a conflicted defense attorney does not. *See* Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 687, 687–88 (2002) ("Unlike a court-appointed attorney, who is an advocate for the client, a guardian ad litem acts as the 'eyes of the court' to further the 'best interests' of the alleged incompetent." (quoting *In re* Mason, 701 A.2d 979, 983 (N.J. Super Ct. Ch. Div. 1997))).

Part II concluded that ABA Model Rules 3.7 or 3.4(e) do not prohibit defense attorneys from disclosing their opinions about a client. However, it identified instances in which the defense counsel's role as a quasi witness can harm the client or damage the attorney-client relationship. While acknowledging that it is impossible to categorically prevent defense counsel from acting as a quasi witness, Part III proposes methods of limiting such occurrences and calls for clearer guidelines for defense counsel placed in such a position. Part III.A cautions that defense counsel should limit expressing personal opinions about a client, despite motivations to do the contrary. Next, Part III.B argues that judges should credit defense counsel's initial representations without soliciting more witness-like statements from them, which risks the disclosure of client confidences and additional damage to the attorney-client relationship, a touchstone of the adversarial system. Finally, Part III.C calls upon the ABA to specify how defense attorneys and the bench should proceed when defense attorneys are privy to information necessary to a decision on a collateral matter.

A. Defense Attorneys Should Limit Expressing Their Personal Opinions or Knowledge About Clients

There is an array of situations—from motions to withdraw to discussions of a defendant's decision to waive conflict-free counsel—when defense counsel will have an incentive to disclose information about a client to a judge.[224] In these instances, defense attorneys may not recognize that they are being disloyal to their clients or may believe that they have implied authorization to make such disclosures, especially if requests for information are made at a judge's behest.[225] This section argues that defense counsel, despite incentives to the contrary, should never disclose personal opinions or beliefs about a client, absent client consent or a court order.

If a judge asks defense counsel to make representations about a client, defense counsel should first seek to obtain the client's consent, even if the information asked for is not per se confidential or privileged.[226] Seeking consent is the correct course of action in circumstances where defense counsel must corroborate a belief to a judge that a defendant is incompetent to proceed with trial or that a defendant fully understands the rights being waived.[227] Consent also should be a required initial step in instances when defense counsel must inform a judge of a defendant's whereabouts[228] or offer

224. *See supra* Part I.C.

225. *See supra* Part II.C (posing the question of whether Model Rule 1.6(a) grants defense counsel implied authorization to make disclosures about her client during collateral proceedings); *see, e.g.*, Memorandum & Order, *supra* note 75, at 4 (requesting counsel explain their reasons for wanting to withdraw).

226. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192 (2015) (advising counsel to seek consent from the client to disclose information in camera).

227. *See supra* Part I.C.3–4.

228. *See supra* Part I.C.5; *see also* San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-1 (2011) (instructing defense counsel to state that, "due to applicable ethical rules[,] she is not at liberty to answer" why her client is absent from court).

details about a defendant's prior criminal convictions.[229] If the client gives informed consent, then defense counsel does not risk violating Model Rule 1.6, which prohibits the disclosure of client confidences.[230] Defense counsel also avoids appearing disloyal to the defendant and, therefore, can proceed without compromising the attorney-client relationship.[231] If a defendant, however, is incapable of supplying consent, then defense counsel should not reveal personal opinions or knowledge about the representation for risk of prejudicing the defendant and tarnishing the attorney-client relationship.

When defense counsel has motives for making witness-like statements that are prejudicial to the defendant, defense counsel also should be aware that there is no implied authority permitting such statements, even if the judge invites or encourages them.[232] If a judge requests information from defense counsel, defense counsel should first explain that making further statements would jeopardize the attorney-client relationship and force the disclosure of client confidences. Moreover, defense counsel should pursue procedural means to avoid providing further detail.[233] This implies that, for example, if asked or ordered by a judge to substantiate a motion to withdraw, as occurred in *United States v. Trevino*,[234] *Aceves v. Superior Court*,[235] and *People v. Cardenas*,[236] defense counsel should refuse to reveal confidential information and possibly move the court to appoint a neutral, second counsel to ameliorate the situation.[237] Defense counsel also can seek an appeal or further review of the decision, as was suggested by the State Bar of California.[238]

B. Judges Should Limit Disclosures from Defense Counsel About Her Client or the Attorney-Client Relationship

There is no shortage of motivations for a judge to place defense counsel in the position of quasi witness. Defense counsel is often the sole person privy to information necessary to a judge's decision on a collateral matter, and receiving information directly from defense counsel seems efficient and avoids delay.[239] Furthermore, judges may be more inclined to trust and rely

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229. *See supra* Part I.C.6.

230. *See supra* Part I.B.3.a.

231. *See supra* Part I.B.2.

232. *See supra* Part II.C; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2016).

233. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192 (2015).

234. 992 F.2d 64 (5th Cir. 1993).

235. 59 Cal. Rptr. 2d 280 (Ct. App. 1996).

236. No. 12CA1536, 2015 WL 4312496 (Colo. App. July 16, 2015).

237. *See, e.g.*, United States v. Rahman, 837 F. Supp. 64, 66 (S.D.N.Y. 1993) (appointing temporary counsel "to explain to [the defendants] the hazards of joint representation"); Goldstein, *supra* note 73, at 2705 (suggesting judges appoint an independent lawyer to act as temporary cocounsel when the attorney-client relationship has suffered a breakdown).

238. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192; *see also Aceves*, 59 Cal. Rptr. 2d at 281 (granting a writ of mandate to reverse the trial court's denial of defense counsel's motion to withdraw).

239. *See supra* Part I.A.

on defense counsel's judgment rather than that of a criminal defendant.[240] Judges, however, should be cognizant of the ethical risks of making seemingly necessary inquiries about the attorney-client relationship. They should be aware of the challenges attorneys face in building productive attorney-client relationships and how a court order mandating even limited disclosure might eviscerate this hard-earned trust. Judges also need to be mindful that any representation defense counsel makes likely will be biased because it conflicts with a duty of loyalty and zealous advocacy.[241]

One strategy to avoid placing defense counsel in the precarious position of quasi witness is to grant deference to defense counsel and accept initial representations without further inquiry. If defense counsel moves to withdraw, a statement proclaiming "irreconcilable differences" should be sufficient.[242] The California, Oregon, and Arizona state bar associations have drawn similar conclusions, with the State Bar of California stating that "ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship."[243] The same principle applies when defense counsel requests a competency evaluation: a judge should not pry into underlying reasons, unless the client has granted defense counsel consent to disclose counsel's own knowledge or opinions. If a judge feels compelled to make further inquiries to avoid undue delay or "the needless expenditure of judicial resources," then the judge must do so with an intense awareness of the risks to the attorney-client relationship.[244]

There are occasions when a judge wishes to know whether a defendant has understood a right he is waiving, as occasionally occurs when determining whether a defendant is aware of the dangers of retaining an attorney with a conflict of interest.[245] Here too, the judge, while questioning counsel, may unwittingly force counsel to walk the line between witness and advocate.[246] To minimize this, the judge should ask whether counsel has explained the potential conflict to a client but not inquire further, because the act of providing evidence of understanding pushes counsel to expose client confidences.[247] This, once again, risks alienating the client and forcing defense counsel to set aside the long-taught duty of zealous advocacy and loyalty.[248]

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240. *See, e.g.*, Memorandum & Order, *supra* note 75, at 4; *see also supra* Part I.A.

241. *See supra* Part I.

242. *See supra* note 71 and accompanying text (providing an example of when defense counsel asserted "irreconcilable differences").

243. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192; *see* State Bar of Ariz. Rules of Prof'l Conduct Comm., Formal Op. 09-02 (2009); Or. State Bar, Formal Op. 2011-185 (2011); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) cmt. 15 (AM. BAR ASS'N 2016).

244. Memorandum & Order, *supra* note 75, at 14 (quoting United States v. Fleurimont, 401 F. App'x 580, 582 (2d Cir. 2010)).

245. *See supra* note 124 and accompanying text; *see also* United States v. Curcio, 680 F.2d 881, 883 (2d Cir. 1982).

246. *See, e.g.*, United States v. Rahman, 837 F. Supp. 64, 66 (S.D.N.Y. 1993).

247. *See id.*

248. *See supra* Part II.D.6.

C. The ABA Should Provide Guidelines for Defense Attorneys Asked to Disclose Information About Their Client or the Attorney-Client Relationship

This Note has identified the ethical problems triggered when defense counsel acts as a witness in proceedings unrelated to the merits of a criminal case. It demonstrates that there are no model rules or guidelines that directly govern defense attorneys at risk of becoming quasi witnesses.[249] Accordingly, this Note calls for a vigorous debate about how to best fill the evident gap between the Model Rules and the reality of when judges need defense counsel's opinions about a client and defense counsel feels compelled to provide them. It may be impossible to provide one rule that fits all instances in which defense counsel risks becoming a quasi witness; nonetheless, the profession owes itself a clear set of guidelines recognizing that the practice of relying on defense counsel's representations raises grave ethical concerns. These guidelines also should provide the judge and defense counsel with a protocol to refer to, rather than relying on the ad hoc approaches that are pursued today.

CONCLUSION

Defense attorneys and judges should be aware of the ethics concerns that appear when defense counsel, during a collateral proceeding, discloses either information about or her own personal opinions regarding her client or the attorney-client relationship. In particular, they should recognize that, despite motivations to make such revelations, doing so can violate established principles of professional responsibility and erode the crucial relationship between counsel and her client. Vigilance and guidance in this realm are needed. Defense counsel should invoke procedural means to avoid having to make disclosures, judges should avoid making unnecessary inquiries of defense counsel, and organizations—such as the ABA—should create better guidelines to assist defense counsel and judges in avoiding the ethical conundrum of defense counsel as quasi witness.

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249. *See supra* Part II.