1988

Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court

Rodney J. Uphoff
University of Missouri School of Law, UphoffR@missouri.edu

THE ROLE OF THE CRIMINAL DEFENSE LAWYER IN REPRESENTING THE MENTALLY IMPAIRED DEFENDANT: ZEALOUS ADVOCATE OR OFFICER OF THE COURT?

RODNEY J. UPHOFF*

This Article examines a difficult question in the representation of mentally impaired criminal defendants: should counsel be obligated to inform the court of doubts about a client's competency to stand trial even though doing so may be contrary to the client's wishes or best interests? Professor Rodney J. Uphoff analyzes authorities that impose such an obligation on defense lawyers, including an American Bar Association Criminal Justice Standard and a recent decision of the Wisconsin Supreme Court, *State v. Johnson*. Uphoff concludes that these authorities needlessly undercut the mentally impaired defendant's right to zealous representation. He proposes an alternative ethical model for defense attorneys, in which counsel would make a case-by-case determination.

I. INTRODUCTION

The role of the criminal defense lawyer is to provide zealous representation within the bounds of law.[1] In theory, the criminal defense lawyer, as vigorous advocate, will use any legitimate means of securing a favorable result for a client, constrained only by counsel's competing responsibilities as an officer of the court.[2] In practice, however, defense

* Associate Clinical Professor of Law, University of Wisconsin Law School. B.A. 1972, University of Wisconsin; M. Sc. 1973, London School of Economics; J.D. 1976, University of Wisconsin. I wish to thank Ted Schneyer, Frank Remington, Booth Fowler and Ben Kempinen for their comments and criticisms. I would also like to thank Hiram Puig-Lugo, Lorna Hemp and Donna Fogell for their assistance in the preparation of this Article.

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981). Canon 7 of the Model Code of Professional Responsibility broadly outlines the scope of zealous representation. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). Hereinafter, the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) and provisions thereof will be cited as MODEL CODE; the MODEL RULES OF PROFESSIONAL CONDUCT (1983) and provisions thereof will be cited as MODEL RULE(S).

2. "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." STANDARDS FOR CRIMINAL JUSTICE 4-1.1 (2d ed. 1980) and commentary. Hereinafter, the STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) and provisions thereof will be cited as ABA STANDARD(S). As Chief Justice Burger indicated in Nix v. Whiteside, 475 U.S. 157 (1986), however, the lawyer's "overarching duty" to advocate and advance the client's interests is limited by the lawyer's "equally solemn" responsibilities and duties as an officer of the court. *Id.* at 166-68. In addition, as numerous commentators have observed, a host of variables both individual and systemic affect the behavior and practices of criminal defense lawyers. For a discussion of the divergence between theory and practice in the local criminal justice

counsel often faces considerable uncertainty in determining what constitutes appropriate advocacy in a given situation.[3] Nonetheless, counsel regularly must make tough choices among conflicting ethical norms. Most criminal practitioners, lacking clear answers and being pressed for time, will base such decisions largely on their understanding of what is expected of a lawyer representing a "man in trouble."[4] Not only do most criminal defense lawyers view their role as requiring unwavering loyalty to their clients, but this client-above-all perspective shapes their resolution of hard ethical issues.[5]

The ethical issues become more difficult to resolve, however, when the criminal defense lawyer finds herself representing a mentally impaired defendant. Unable to establish a normal lawyer-client relationship and unsure of the client's competency,[6] defense counsel struggles

---

systems, see, e.g., Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. at 15 (1967); A. DERSHOWITZ, THE BEST DEFENSE (1982).

3. As the Pennsylvania Superior Court observed in overturning the convictions of two lawyers who failed to turn over a murder weapon: "Attorneys face a distressing paucity of dispositive precedent to guide them in balancing their duty of zealous representation against their duty as officers of the court." Commonwealth v. Stenhach, 356 Pa. Super. 5, 27, 514 A.2d 114, 125 (1986). *See also* J. BURKOFF, CRIMINAL DEFENSE ETHICS ch. 6 (1986). For a lengthy discussion of the difficult ethical dilemmas confronting the criminal practitioner, see M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

4. For an eloquent defense of the position that a lawyer's willingness to zealously defend his client—the "man-in-trouble"—is essential to our system of justice, see D. MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973). *See also* M. FREEDMAN, *supra* note 3; Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-1984); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). Others, however, have criticized the adversary system and the lawyer's reliance on the "adversary system excuse." *See, e.g.*, Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (D. Luban ed. 1983); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). A defense or critique of the adversary system examining the lawyer's role as a zealous advocate is beyond the scope of this Article. Assuming the legitimacy of the existing ethical rules requiring the criminal defense lawyer to be a zealous advocate, therefore, this Article focuses on whether the mentally impaired defendant is also entitled to zealous representation. It is clear that most criminal defense lawyers view representing their clients zealously as their primary responsibility. Freedman, *Professional Responsibility in D.C.: A Survey*, 1972 RES IPSA LOQUITUR 60. Empirical support for the proposition that this client-above-all perspective shapes the way lawyers resolve ethical issues can be found in K. MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985). It is also true that knowing how lawyers behave does not help us answer how they ought to behave. Schneyer, *Getting from "Is" to "Ought" in Legal Ethics: Mann's* Defending White-Collar Crime, 1987 AM. B. FOUND. RES. J. 903.

5. *See supra* note 4; Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505, 515 (1972). This observation, as are many in this Article, is also based on my experiences as a public defender and Chief Staff Attorney of the Milwaukee office of the Wisconsin State Public Defender, conversations with other criminal defense lawyers and the responses of the students handling criminal cases in the clinical program I direct at the University of Wisconsin Law School.

6. In Wisconsin, a defendant is incompetent to stand trial if he suffers from a mental illness which renders him incapable of understanding the proceedings against him or assisting in

with difficult questions regarding her proper role. Should the defendant's irrational choices be respected, or may counsel make choices based on her assessment of the client's best interest? Does a client's mental impairment alter the responsibilities or role of defense counsel? Is there a point at which the defendant's mental disability ought to change the lawyer's role from that of advocate to that of guardian or friend of the court?

As a vehicle for exploring the role of defense counsel when representing a mentally impaired defendant, this Article focuses on a specific issue: is defense counsel obligated to inform the trial court of her doubts about her client's competency to stand trial even though doing so is contrary to her client's best interests or wishes? Section II of the Article discusses the difficulties the competency issue poses for the criminal practitioner. Section III reviews the efforts of an experienced criminal defense lawyer who resolved those difficulties by not raising the issue of the competency of his mentally impaired client, Oliver Johnson, charged with first degree murder. In *State v. Johnson,*[7] however, the Wisconsin Supreme Court rejected that lawyer's decision and found his representation deficient. The court held that defense counsel has an affirmative duty to raise the competency issue whenever counsel has some reason to doubt the defendant's competency.

Section IV examines the *Johnson* decision and Standard 7-4.2 of the American Bar Association's *Standards for Criminal Justice* (ABA Standards), which imposes a similar obligation upon defense counsel.[8] The Article concludes that both Standard 7-4.2 and *Johnson* should be reconsidered because they needlessly undercut the mentally impaired defendant's right to zealous representation. Finally, the Article proposes that defense counsel be permitted to make a case-by-case determination whether to raise competency and discusses the critical factors counsel must analyze in making that determination.

---

his defense. WIS. STAT. § 971.13(1) (1985-1986). This competency standard, based on Dusky v. United States, 362 U.S. 402 (1960), is substantially followed in all jurisdictions. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 410 (rev. ed. 1971). For a detailed discussion of the historical development of the competency doctrine, see Winick, *Incompetency to Stand Trial: Developments in the Law,* in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 3 (J. Monahan & H. Steadman eds. 1983).

7. 133 Wis. 2d 207, 395 N.W.2d 176 (1986) (reversing State v. Johnson, 126 Wis. 2d 8, 374 N.W.2d 637 (Ct. App. 1985)).

8. ABA STANDARD 7-4.2(c) states:

> Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

II. THE COMPETENCY ISSUE

In the normal lawyer-client relationship, the lawyer is called upon to establish a relationship of trust and confidence founded on the lawyer's pledge of confidentiality.[9] Reassured by this pledge, the client relates facts to defense counsel and listens to counsel's advice. A criminal defense lawyer has a clear duty to consult with her client and to keep that client informed of case developments.[10] As a trusted counselor, the lawyer's role is to assist the client in making informed decisions about the case, not to unilaterally decide what is in the client's best interest.[11] Although authorities disagree as to whose decision should control[12] in

9. ABA STANDARD 4-3.1 and commentary; MODEL CODE EC 4-1. *See also* MODEL RULE 1.6 comment.

10. ABA STANDARD 4-3.8; MODEL RULE 1.4. *See also* MODEL CODE EC 7-8 AND EC 9-2.

11. ABA STANDARD 4-5.2; MODEL CODE EC 7-7 and EC 7-8. *See also* MODEL RULE 1.2 and comment.

12. ABA STANDARD 4-5.2 provides:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his or her own behalf.
>
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.
>
> (c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, the lawyer's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

There is considerable disagreement as to whether particular decisions are strategic or fundamental. Compare, e.g., Chief Justice Burger's view in Jones v. Barnes, 463 U.S. 745, 749 (1983) (appellate counsel need not raise every issue a defendant requests) with that of Justice Brennan dissenting in *Jones*, 463 U.S. at 758 (Brennan, J., dissenting) (function of appellate counsel is to protect the dignity and autonomy of the client by assisting him in making informed choices). Brennan draws support from MODEL CODE EC 7-7, which states that "the authority to make decisions is exclusively that of the client" except for decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client." Further, EC 7-8 states that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client." *See also* EC 7-1. Similarly, Model Rule 1.2(a) indicates that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." As the comment to Rule 1.2 observes, however, "a clear distinction between objectives and means sometimes cannot be drawn." The ethics codes simply do not define the ultimate allocation of decision-making responsibility in many instances. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1052-56 (1984). *See generally* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); DeFoor & Mitchell, *Hybrid Representation: An Analysis of a Criminal Defendant's Right to Participate as Co-Counsel at Trial*, 10 STETSON L. REV. 191 (1981); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

certain matters, the criminal defendant clearly is to make all fundamental case decisions.[13]

A criminal defense lawyer representing a mentally impaired client, however, may find it difficult to establish a normal lawyer-client relationship. The difficulties frequently begin at the initial meeting between lawyer and client. Defendants may be hostile, abusive and physically threatening, or they may sit silently, totally unresponsive to any inquiries. Some defendants babble incoherently. Others intermittently talk sense and then nonsense. Whatever the nature of the problem, the lawyer's inability to engage the defendant in a normal lawyer-client colloquy creates tension in the relationship.

Communication difficulties raise other concerns for defense counsel. The lawyer may be unsure whether the client appreciates the pledge of confidentiality or understands that the lawyer is serving as the client's advocate. Defense counsel may be uncertain whether the client trusts her. Thus, even if the client is capable of talking about the facts of the case, the lawyer may be wary of relying on the client as a source of information.[14] Moreover, the lawyer may be unsure whether the client understands any of the advice or information the lawyer is giving. If the client cannot process information or understand the lawyer's advice, then he may not be able to weigh options intelligently and make informed decisions. The client's inability to make informed fundamental decisions forces defense counsel to assume decisionmaking responsibility for the client or to raise the issue of the client's competency.[15]

---

13. At a minimum, the fundamental decisions reserved for the criminal defendant are the plea to be entered, whether to waive a jury trial, whether the client will testify and whether to appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); MODEL RULE 1.2; ABA STANDARD 4-5.2 and commentary.

14. Indigent defendants often mistrust the lawyers appointed to represent them. Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). *See generally* Burt, *supra* note 12. In my experience, mentally impaired clients, especially schizophrenics, often are more mistrustful of counsel. Counsel must be careful, therefore, in relying on information supplied by a mentally impaired client.

15. For an excellent discussion of the role problems confronting the civil practitioner with a marginally impaired client, see Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515. Tremblay examines six options the civil lawyer has for dealing with a client whose decisionmaking capacity is impaired: (1) follow the client's wishes even though disastrous; (2) seek a guardian; (3) rely on next of kin as proxy decisionmaker; (4) act as de facto guardian; (5) seek to persuade the client to do what the lawyer feels is appropriate; (6) withdraw. Although Tremblay sees ethical and other problems with each option, he concludes that guardianship should be pursued in extreme cases; some reliance on family is appropriate; noncoercive persuasion is justified in less extreme cases; and unilateral usurpation of client autonomy is never warranted except in emergencies. *Id.* at 584.

Tremblay acknowledges that the defense lawyer's role may be different in the criminal context. *Id.* at 518. Differences in criminal practice and constitutional mandates limit the viability of Tremblay's proposed options in the criminal setting. *See also infra* note 168 and accompanying text.

To be competent, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as a factual understanding of the proceedings against him."[16] Clearly, many mentally ill defendants are legally competent to stand trial.[17] Despite their mental illness, such clients can interact adequately with defense counsel and possess a sufficient understanding of the proceedings. If, however, defense counsel finds that the defendant's mental impairment is impinging upon the lawyer-client relationship or causing her to doubt the client's understanding of the proceedings, counsel must carefully consider the competency issue.[18]

Careful consideration of the issue may, nonetheless, leave defense counsel in a confusing bind. The lawyer may recognize that the defendant's mental condition is adversely affecting the lawyer-client relationship and the client's decisionmaking ability. Thus, the mentally impaired client may be making very poor decisions or be unable to decide at all. Committed to the principle of client decisionmaking, counsel may find it difficult to respect the choices, particularly irrational ones,

16. Dusky v. United States, 362 U.S. 402, 402 (1960). *See also supra* note 6; ABA STANDARD 7-4.1 and commentary. In making a competency determination, it is useful to address three questions: (1) is the defendant suffering from a mental disorder serious enough to justify a finding of incompetency? (2) is the defendant's mental state causing an incapacity relevant to the proceedings he is to participate in? (3) does the defendant appear to manifest a sufficient degree of incapacity as to render him incompetent for a given proceeding? Drob, Berger & Weinstein, *Competency to Stand Trial: A Conceptual Model for its Proper Assessment*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 85, 85-89 (1987).

17. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 924-32 (1985); ABA STANDARDS at 7-175. *See also* State *ex rel.* Haskins v. Dodge County, 62 Wis. 2d 250, 264-66, 214 N.W.2d 575, 582-83 (1974) (more is required than just mental illness to support a finding of incompetency to stand trial).

18. ABA Standard 4-4.1 requires the defense lawyer to investigate the circumstances of the case promptly, exploring all avenues leading to facts relevant to the merits of the case and the possible penalty. Many jurisdictions have adopted this Standard. *See, e.g.*, State v. Felton, 110 Wis. 2d 485, 329 N.W.2d 161 (1983) (defense lawyer found ineffective for failing to investigate an insanity defense).

Unquestionably, defense counsel must investigate and analyze the competency issue if the defendant's appearance, action or statements suggest he is incompetent. *See infra* notes 88 and 97 and accompanying text. *See also* Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); Brennan v. Blankenship, 472 F. Supp. 149, 156-57 (W.D. Va. 1979), *aff'd*, 624 F.2d 1093 (4th Cir. 1980); Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982); People v. Howard, 74 Ill. App. 3d 138 (1979).

of an impaired decisionmaker.[19] In practice, many lawyers are reluctant to permit an impaired client to make harmful decisions.[20]

This reluctance stems from defense counsel's loyalty to the "man in trouble," her desire to secure a favorable disposition for the client, a commitment to challenging the State's case and her sense of professional worth. Further, the uncertain nature of the decision or of the process the client used to reach that decision may deter counsel from following a client's harmful decision. As the client's irrationality becomes more pronounced, the lawyer feels pressure either to assume a more paternalistic role or to raise the issue of the client's competency.[21]

Raising competency, however, may have serious costs for the defendant.[22] Competency evaluations are usually done on an inpatient basis and may lead to lengthy hospitalization.[23] This hospitalization

19. The principle of client decisionmaking—the client has the right to make crucial decisions about his life—finds support in both ethics codes. *See supra* note 12. In order to maximize this principle and the value of client autonomy, a number of commentators have promoted the concept of client-centered advocacy. *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978). The client-centered approach is a method of practice involving empathetic listening designed to enable the client to exercise his right to choose based on his own values, free of lawyer dominance. *See also* Ellmann, *Lawyers and Clients,* 34 UCLA L. REV. 717 (1987). Other commentators have stressed the importance of structuring the lawyer-client relationship to foster client autonomy. *See, e.g.,* Fried, *supra* note 4; M. FREEDMAN, *supra* note 3. While it may be true that in different legal contexts and with different clients the client-centered model may be inappropriate, the serious potential consequences, specific constitutional protections and the indeterminacy of the potential injury to the public suggest that client decisionmaking and client autonomy are particularly appropriate for the criminal defendant. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients,* 34 UCLA L. REV. 781, 795 (1987).

20. Chernoff & Schaffer, *supra* note 5, at 526. *See also* Tremblay, *supra* note 15, at 521-26.

21. The paternalistic lawyer acts to obtain a result which the lawyer perceives to be in the client's best interest regardless of the client's expressed desires. For a description of this paternalistic approach, see Luban, *Paternalism and the Legal Profession,* 1981 WIS. L. REV. 454; Wasserstrom, *supra* note 4. In practice, some lawyers regularly adopt a paternalistic approach and set objectives as well as make decisions based on their assessment of their clients' interests. *See* Maute, *supra* note 12, at 1050; Skolnick, *Social Control in the Adversary System,* in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS 89, 101 (J. Robertson ed. 1974).

22. The commentary to ABA Standard 7-4.2 acknowledges the serious costs and injustices visited on some defendants as a result of the competency process. ABA STANDARDS at 7-179. *See also infra* notes 23-25 and accompanying text. Although the drafters of these Standards suggest that full implementation of all the Standards on competency would eliminate many of the negative aspects of the process, that ideal jurisdiction does not yet exist.

23. R. Miller & E. Germain, Inpatient Versus Outpatient Evaluation of Competency to Stand Trial: A Survey and an Analsyis 1-3 (unpublished paper presented at meeting of the American Academy of Psychiatry and the Law) (Oct. 17, 1987). *See also* Winick, *supra* note 17, at 941-42; Chernoff & Schaffer, *supra* note 5, at 513. Raising competency may jeopardize a defendant's pretrial release. Although section 971.14(2) of the Wisconsin Statutes provides for both inpatient and outpatient competency evaluations, most are done on an inpatient basis. WIS. STAT. § 971.14(2) (1985-1986). The evaluations generally take several weeks to complete. If there is to be a contested hearing, scheduling will extend the defendant's incarceration. If, following the hearing, the defendant is found incompetent, he may be committed to a mental institution for a period not

usually takes place in a maximum-security institution with minimum treatment.[24] Such hospitalization is often unnecessary and unduly stigmatizing. Additionally, prolonged hospitalization may jeopardize the defendant's right to a fair trial.[25] For many defendants, particularly those charged with minor offenses, raising competency subjects the defendant to a far greater deprivation of his liberty than if he were convicted of the crime with which he is charged.

Given their client-above-all perspective, most defense lawyers will balk at taking action against their clients' interests.[26] Hence, many lawyers will be reluctant to raise competency if they believe that doing so will be detrimental to their clients. This is especially true if the client also expresses a clear desire not to raise the competency issue. Moreover, raising competency may require the lawyer to disclose confidential communications and destroy an already fragile lawyer-client relationship.[27] While in some cases the severity of the client's impairment dictates that the issue be raised,[28] in many other cases the lawyer is under strong pressure not to raise competency.

There are, however, countervailing pressures on the defense lawyer. Many of the lawyers representing mentally impaired defendants are public defenders or court-appointed lawyers.[29] To cope with high case loads, low hourly rates and inexperience, these lawyers may find raising competency an attractive means of dealing with a difficult client. Raising competency sometimes represents a form of defensive lawyering. Unsure of how to proceed, the lawyer plays it safe by raising the

---

to exceed 18 months or the maximum sentence for the offense charged, whichever is less. WIS. STAT. § 971.14(5) (1985-1986). A defendant who is restored to competency, but later becomes incompetent, may be committed for the difference between 24 months and his previous commitment, or 18 months, whichever is less. WIS. STAT. § 971.14(5)(d) (1985-1986). Finally, a defendant who is unlikely to regain competency may be the subject of civil commitment proceedings. WIS. STAT. § 971.14(6)(b) (1985-1986).

24. Winick, *supra* note 17, at 942-43. Moreover, inpatient confinement in some cases may actually decrease the defendant's level of competence. Chernoff & Schaffer, *supra* note 5, at 513.

25. Winick, *supra* note 17, at 947-49.

26. My own experience bears this out as do K. MANN, *supra* note 4 and M. FREEDMAN, *supra* note 3. *See also* Chernoff & Schaffer, *supra* note 5, at 515 (suggesting that defense lawyers will have to violate ethical and professional obligations in order to secure just results for their mentally ill clients). Moreover, various provisions of the Model Code and Model Rules prohibit taking action contrary to the client's interest. *See, e.g.*, MODEL CODE DR 7-101(A)(3) (a lawyer shall not prejudice or damage a client except as required by DR 7-102(B)). As note 114 *infra* and the accompanying text indicate, DR 7-102(B) does not require disclosure of counsel's doubts about a client's competency.

27. *See infra* notes 112-23 and accompanying text.

28. *See infra* note 174 and accompanying text.

29. Winick, *supra* note 17, at 941. In Wisconsin, the overwhelming majority of criminal defendants, including the mentally impaired, are represented by public defenders or private attorneys appointed by the State Public Defender.

issue in the hope that the client will be restored to mental health and be capable of responding like a "normal" client.[30]

Under conflicting pressure on the competency issue and uncertain about respecting the choices of a mentally impaired defendant, the lawyer may adopt a paternalistic role and assume decisionmaking responsibility for the client. This role may look particularly inviting when the client's disability prevents him from clearly expressing any choices or when those choices clash with the client's apparent best interest. There is considerable pressure on the lawyer to play such a role. The lawyer, as helper and friend,[31] feels a strong need to render assistance and guidance to a helpless client. Many clients encourage this paternalistic feeling by asking their lawyer to make decisions for them.[32] For a variety of reasons, other actors in the system will often prod defense counsel to adopt this role.[33] The lawyer's lack of patience, the press of time, financial considerations or the ease of unilateral decisionmaking may also push counsel to make decisions for the client based on the lawyer's perception of the client's best interest.

Nevertheless, many defense lawyers will hesitate to assume this paternalistic role. Criminal defense lawyers are trained and socialized to believe that their role in the adversarial system requires them to assist their clients in making fundamental choices, not to make those choices for them.[34] The concept of lawyer-knows-best has been largely repudiated and replaced by the principle of informed client decisionmaking.

---

30. It is important to note that in some cases raising competency will result in a quick positive recovery for the client. It may also enable a mentally ill client with high bail to spend his pretrial incarceration in a more desirable setting than jail. Thus, the conscientious lawyer may see some real benefit in raising the issue for a particular client.

31. Fried's notion of the lawyer as a special-purpose friend accurately describes the manner in which some lawyers relate to their clients. Fried, *supra* note 4. As a friend, the lawyer may be tempted to take protective action. This may be particularly true of public defenders or legal services lawyers with a strong ideological commitment to working with disadvantaged clients. Moreover, the client-centered advocacy model, *supra* note 19, with its emphasis on empathetic listening, greater rapport, and heightened trust, serves to reinforce the natural sympathy and loyalty the lawyer feels toward someone who has turned to her in a time of trouble. *See also* Wasserstrom, *supra* note 4, at 22.

32. For a variety of reasons, clients will push their lawyers to make important decisions for them. *See* D. BINDER & S. PRICE, *supra* note 19, at 153; Chilar, *Client Self-Determination: Intervention or Interference?*, 14 ST. LOUIS U.L.J. 604 (1970).

33. Prosecutors and judges, sometimes pressured by the defendant's family members, will often call upon defense counsel to assist them to "help" the defendant. Defense counsel may be encouraged to convince her client to plead guilty rather than force the prosecutor to try a weak case because the client's best interest—mental treatment leading to a healthy mental state—will be served by a guilty plea.

34. "The American lawyer's professional model is that of zeal: a lawyer is expected to 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." C. WOLFRAM, MODERN LEGAL ETHICS 578 (1986). This view is reflected in major textbooks used to teach criminal law. *See, e.g.*, W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE 24-25 (1985). Similarly, both Morris, *supra* note 19, at 782, and Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-*

The lawyer, therefore, may feel uncomfortable assuming a role that has been widely criticized.[35]

This feeling is likely to be exacerbated by the lawyer's own sense of uncertainty as to what constitutes the client's best interest. Many decisions a criminal defendant must make involve close calls or tough choices among unattractive alternatives. Unsure of the decision she would make in a particular situation and aware that this decision would ultimately turn on her own value system, the lawyer may want to avoid making fundamental decisions for her client.

The lawyer may feel bound, therefore, to raise competency to protect the client's right to make fundamental decisions even though raising the issue is detrimental to the client. Counsel may also be uncomfortable withholding information from the court about the client's impaired mental condition. Aware of her role as an officer of the court and concerned about not misleading the court, counsel may seriously question the propriety of allowing her marginally competent client to act, such as pleading guilty, when the competency issue remains unresolved.[36]

Given the difficulties with each role, it is not surprising that criminal defense lawyers do not have a settled, clear understanding of their role when representing a mentally impaired defendant. This role confusion also stems from a lack of training; law schools devote little attention to the representation of the mentally ill.[37] For many lawyers, their limited exposure to the mentally impaired defendant provides negligible opportunity to develop a well-defined role. The criminal practitioner is also unlikely to receive satisfactory answers from fellow lawyers since they too share this role confusion. Thus, the criminal practitioner may turn to the norms of the profession for guidance.[38]

Centered Advocacy in the Negotiation Context, 34 UCLA L. REV. 811, 819 (1987), acknowledge the widespread acceptance of the model of client-centered advocacy in clinical education.

35. *See* Tremblay, *supra* note 15, at 521-22; Wasserstrom, *supra* note 4, at 19. *See generally* Spiegel, *supra* note 12; D. BINDER & S. PRICE, *supra* note 19; Ellmann, *supra* note 19; Blumberg, *supra* note 2; Luban, *supra* note 21. As most of these commentators point out, however, many lawyers continue to dominate the lawyer-client relationship and either make decisions or manipulate their clients' choices.

36. Paul Chernoff and William Schaffer, *supra* note 5, at 519, raise the question of whether defense counsel's failure to alert the trial court to the client's possible incompetence could constitute a fraud upon the court. *See also* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 383-84 (1985) (suggesting, without authority or argument, that Model Code provisions EC 7-25 and DR 7-102 require defense counsel's disclosure). *But see infra* notes 107-19 and accompanying text.

37. The Legal Assistance to Institutionalized Persons program at the University of Wisconsin Law School, a clinical program providing students the opportunity to work with mentally ill clients, represents a notable exception.

38. Undoubtedly, some lawyers muddle along making hard decisions without really thinking about their role or ethical responsibilities. In my experience, however, many lawyers do look to the ethics code and professional standards in an effort to behave in a professionally correct

Although the Model Code of Professional Responsibility (Model Code) recognizes that a lawyer's responsibilities may vary according to the intelligence or mental condition of a client,[39] it offers no real answer to the question of the proper role of the criminal practitioner with a mentally impaired client. The lawyer is directed to obtain all possible aid from the client, to consider all circumstances, and to safeguard and advance the client's interests.[40] Moreover, where the impaired client has no guardian, the lawyer may be compelled to make decisions on the client's behalf.[41] It is unclear, however, which, if any, decisions those might be since Model Code provision EC 7-12 also warns that "a lawyer cannot perform any act or make any decision which the law requires his client to perform or make. . . ."[42]

The new Model Rules of Professional Conduct (Model Rules) offer somewhat more direction. When a client's ability to make "adequately considered decisions" is impaired, the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[43] As the comment to Model Rule 1.14 observes, a client lacking legal competence often retains the ability to understand, weigh options, and reach conclusions about matters affecting his well-being.[44] The drafters of this Rule also acknowledge that there are degrees of competence which render some impaired clients capable of making some decisions but not others.[45] Accordingly, the lawyer is directed to treat the mentally disabled client with respect and to allow the client as much autonomy as possible. Nevertheless, some seriously impaired clients are simply incapable of making any decision. Hence, the lawyer is permitted to take "protective . . . action . . . when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[46]

This broad principle leaves the criminal defense lawyer without much guidance. Is it appropriate protective action for a lawyer to raise competency over the client's objection? Is it proper for the lawyer to override the strategically unwise decision of a mentally impaired client who wants to testify? Or is entering a guilty plea in a misdemeanor case for a marginally competent defendant to secure a client's immediate release from custody the sort of protective action contemplated by this

way. This is particularly so when the lawyer is unable to get guidance from other, more experienced lawyers.

39. MODEL CODE EC 7-11.
40. MODEL CODE EC 7-12.
41. *Id.*
42. *Id.*
43. MODEL RULE 1.14.
44. MODEL RULE 1.14 comment.
45. *Id.*
46. *Id.*

Rule? Model Rule 1.14 does not provide clear answers to these difficult questions.

The comment to Model Rule 1.14, however, does discuss briefly the issue that is at the core of the *Johnson* decision: whether a criminal defense lawyer is obligated to disclose her belief that a client is mentally disabled when that disclosure can adversely affect the client's interests. The drafters do not provide an answer; rather, they conclude that "the lawyer's position in such cases is an unavoidably difficult one."[47] The comment ends by suggesting that the lawyer "may seek guidance from an appropriate diagnostician."[48] It is difficult to understand how a diagnostician is going to provide guidance to the lawyer struggling with what is a tough legal decision. The suggestion is particularly unhelpful since the decision is inextricably tied to normative questions about the proper role of a lawyer, which the lawyer, not the diagnostician, must address. The ethics codes leave the criminal practitioner stuck in this "unavoidably difficult" position.

Prior to 1984, the ABA Standards for Criminal Justice did not help the lawyer caught in this position. Indeed, the Standards did not even mention any special responsibilities or additional duties for counsel when representing a mentally impaired criminal defendant. Similarly, commentators paid limited attention to the ethical difficulties facing criminal defense lawyers with mentally ill clients.[49] Such representation admittedly posed "particularly thorny ethical problems,"[50] but the criminal practitioner largely was left to hack through the thorns by herself.[51]

The criminal lawyer no longer hacks unguided. In August 1984, the ABA approved a major addition to the Standards for Criminal Justice when it adopted the Criminal Justice Mental Health Standards.[52] The new Standards include a lengthy section on competency to stand

47. *Id.*

48. *Id.*

49. Golten, *Role of Defense Counsel in the Criminal Commitment Process*, 10 AM. CRIM. L. REV. 385 (1972), and Chernoff & Schaffer, *supra* note 5, represent two significant exceptions.

50. J. BURKOFF, *supra* note 3, at 6-24.

51. One excellent exception which provides considerable guidance to the criminal defense lawyer is A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (1984). Amsterdam identifies a number of factors that defense counsel should weigh in deciding whether to raise competency in a particular case. He does not discuss or acknowledge any duty on defense counsel's part to raise competency. Rather, counsel is urged to balance the costs and benefits to the client of raising the issue before reaching a decision. *See also supra* note 49.

52. The Mental Health Standards were added as Chapter 7 of the ABA Standards for Criminal Justice. This Chapter contains 96 standards and is broken into 10 parts. For a discussion of the development of this Chapter, see ABA STANDARDS at 7-xiv to 7-xx.

trial.[53] Standard 7-4.2 bears special attention because it directly addresses the question of defense counsel's role in raising competency.

Standard 7-4.2 requires defense counsel to raise competency whenever counsel has a good faith doubt about her client's competency. The commentary to Standard 7-4.2 recognizes that defense counsel's duty to represent effectively a client's best interest may conflict with her obligations to the court.[54] Standard 7-4.2 resolves this conflict in favor of the court by mandating that defense counsel disclose doubts about a defendant's mental condition regardless of the client's wishes or apparent best interests.[55] Before exploring this Standard and the implications of this new duty, however, a closer look at defense counsel's difficult position is warranted.

III. *State v. Johnson*

In November 1982, the State of Wisconsin charged Oliver Johnson with the murder of Debra White. David Kagan-Kans, an experienced staff attorney with the Milwaukee office of the State Public Defender, was assigned to represent Johnson.[56] Kagan-Kans went immediately to the Milwaukee County Jail to interview his client. Based on his observations of the defendant's mental state[57] and the brutal details of the murder as described in the criminal complaint, Kagan-Kans promptly retained Dr. Kenneth Smail, a clinical psychologist.[58] Kagan-Kans asked Smail to evaluate Johnson's mental condition and to advise him regarding the viability of an insanity defense.[59] Aware of Johnson's service in Vietnam and the grisly nature of the murder, Kagan-Kans

53. ABA STANDARDS 7-4.1 to 7-4.15. Chapter 7 also includes a section entitled Competence on Other Issues, ABA Standards 7-5.1 to 7-5.4.

54. ABA STANDARDS at 7-179.

55. *Id.* at 7-181. *See also supra* note 8.

56. Kagan-Kans had been an assistant district attorney, a supervisor in a clinical program at the University of Wisconsin Law School and a private practitioner before becoming a public defender. As of July 1983, he had handled well over 100 felony cases. At least a dozen of these cases involved a competency issue. *See* Record of Post-Conviction Hearing, State v. Johnson, No. K-4803 at 64-65 (Wis. Cir. Ct. Aug. 15, 1984) [hereinafter Record].

Kagan-Kans, an active member of the National Association of Criminal Defense Lawyers, became the Chief Staff Attorney of the Milwaukee Public Defender office in 1984.

57. Kagan-Kans testified that Oliver Johnson "appeared quiet, depressed, somewhat confused" during their initial interview. *See* Record, *supra* note 56, at 66 (No. K-4803).

58. Dr. Smail had been employed since April 1980 at the Forensics Unit of the Milwaukee County Medical Health Complex. He regularly performed court-ordered competency evaluations as well as examinations on the insanity issue. At the time he evaluated Johnson, Dr. Smail had evaluated approximately 300 individuals and had testified in court between 50 and 75 times. Brief of Respondent at 15, State v. Johnson, 133 Wis. 2d 207, 395 N.W.2d 176 (1986) (No. 84-2143-CR).

59. *See* Record, *supra* note 56, at 67-68 (No. K-4803).

was particularly interested in Smail's opinion as to whether Johnson was suffering from post-traumatic stress disorder.[60]

Having represented numerous defendants with mental health problems, Kagan-Kans was very familiar with Wisconsin law on competency and insanity.[61] Competency focuses on the defendant's present mental state whereas the insanity defense turns on the defendant's mental condition at the time of the commission of the offense.[62] Johnson did exhibit some mental illness, but Kagan-Kans felt he could communicate with Johnson and that Johnson understood his legal predicament. Thus, Kagan-Kans had no initial concern about his client's competency to proceed.

Given the seriousness of the charge facing his client and the lack of other possible defenses, Kagan-Kans realized that insanity was a defense that had to be fully explored. He further understood the value and importance of a prompt evaluation.[63] Accordingly, Kagan-Kans arranged to have Dr. William Crowley, a psychiatrist and the head of the

---

60. The American Psychiatric Association defines the post-traumatic stress disorder as an "adjusted disorder with anxious mood" based on the following criteria:

A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost anyone.

B. Re-experiencing of the trauma as evidenced by at least one of the following:

(1) recurrent and intrusive recollection of the event.

(2) recurrent dreams of the event.

(3) sudden acting or feeling as if the traumatic event were recurring, because of an association with an environmental or ideational stimulus.

C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

(1) markedly diminished interest in one or more significant activities.

(2) feeling of detachment or estrangement from others.

(3) constricted affect.

D. At least two of the following symptoms that were not present before the trauma:

(1) hyperalterness or exaggerated startle response.

(2) sleep disturbance.

(3) guilt about surviving when others have not, or about behavior required for survival.

(4) memory impairment or trouble concentrating.

(5) avoidance of activities that arouse recollection of the traumatic event.

(6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 249-51 (3d ed. 1987).

61. *See supra* note 56.

62. In Wisconsin, a defendant is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law." WIS. STAT. § 971.15(1) (1985-1986). This was the definition of insanity at the time of the *Johnson* case.

63. *See* Record, *supra* note 56, at 67, 72 (No. K-4803). *See also* A. AMSTERDAM, *supra* note 51, at 203, 207 (recommending a prompt psychiatric evaluation but preferably by an expert retained by the defense). For a general discussion of the importance of defense access to a mental evaluation of the defendant, see ABA STANDARD 7-3.3 and commentary.

Forensic Unit of the Milwaukee County Mental Health Complex, examine Johnson. He also retained three other experts specializing in post-traumatic stress disorders to assist in Johnson's defense.[64] After consulting with all of these experts, however, Kagan-Kans determined that there was no basis for raising an insanity plea.

Kagan-Kans's strategy now focused on challenging the prosecution's proof that Johnson intended to kill White.[65] Kagan-Kans devised a two-pronged attack. First, he would argue that Johnson was suffering from a dissociative reaction that precluded the defendant from forming the specific intent to kill. Second, he would claim that Johnson had acted in the heat of passion, which again negated the defendant's specific intent to kill. Kagan-Kans's plan envisioned conceding that Johnson killed White. His goal, however, was to convince the trial judge to give lesser included instructions and persuade the jury that Johnson was guilty of manslaughter, or possibly second degree murder, but not first degree murder.[66]

In the month before trial, Kagan-Kans found it increasingly difficult to discuss case strategy rationally with Johnson. Nothing in the record suggests that Kagan-Kans or any of his experts had any doubts about Johnson's competency prior to Kagan-Kans's disagreements with Johnson over case strategy. To Kagan-Kans, the strength of the State's evidence left the defense no viable approach other than arguing that Johnson lacked the requisite intent to commit first degree murder.[67] Despite repeated efforts, however, Kagan-Kans was unable to convince Johnson of the wisdom of his proposed defense.[68] During their discussions, Johnson's thinking became increasingly delusional. Rather than focusing on the State's evidence against him, Johnson fixated on irrelevant details while insisting that inadmissible, irrelevant

64. The additional experts were Dr. Sheldon Chicks, Dr. Tom Williams and Dr. John Janos. *See* Record, *supra* note 56, at 96 (No. K-4803).

65. *See* II Wis. Jury Instructions-Criminal 1100 (1980), which provides in part:

> Before the defendant may be found guilty of murder in the first degree, the State must prove by evidence which satisfies you beyond a reasonable doubt that there were present the following two elements of this offense:
>
> First, that the defendant intended to kill. . . . Second, that the defendant caused the death of. . . .
>
> Under the Criminal Code, the phrase "intent to kill" means the mental purpose to take the life of another human being. This intent to kill is the element of this offense that distinguishes it from all other degrees of murder.

66. *See* Record, *supra* note 56, at 68-69, 94-95 (No. K-4803).

67. *Id.* at 92, 93. Johnson gave two detailed confessions in which he admitted stabbing White. His confessions were corroborated by three citizen eyewitnesses who saw Johnson knock White down and then repeatedly stab her. Complaint, State v. Johnson, No. K-4803 (Wis. Cir. Ct. Nov. 22, 1982).

68. The record shows that Kagan-Kans met between 20 and 25 times with Johnson and on several other occasions with his client and one of the experts to discuss the case. *See* Record, *supra* note 56, at 70, 73, 76, 80, 92 (No. K-4803).

evidence would vindicate him. He was unwilling at times even to concede that White was actually dead.[69]

Up to this point, Kagan-Kans had sought to maintain a normal lawyer-client relationship and to play his usual role, that of zealous advocate. He had diligently evaluated and investigated all possible defenses in the case. He finally focused on a defense which, in his professional judgment, provided the only possible means of securing a favorable outcome for his client. Johnson wanted a trial and clearly did not want to be convicted of first degree murder. Yet, for reasons that appeared contradictory and irrational, Johnson refused to go along with Kagan-Kans's proposed strategy.[70]

Kagan-Kans was in an unavoidably difficult position, uncertain of his role. He felt that defending the case as Johnson wanted—arguing that the defendant never killed White or that he acted in self-defense—was tantamount to pleading guilty. His loyalty to Johnson, his desire to minimize harm to his client, his desire to put the State to its proof, and his own perception of his role as a lawyer pushed Kagan-Kans to resist respecting Johnson's choice. Moreover, Johnson's choice of defense conflicted with Johnson's desire to avoid conviction and thereby reinforced Kagan-Kans's decision not to honor Johnson's choice.

Nonetheless, Kagan-Kans was reluctant simply to decide himself which defense to pursue. The amount of time he spent trying to persuade Johnson to follow his proposed defense evinces Kagan-Kans's commitment to the principle of informed client decisionmaking. Kagan-Kans realized the importance of the decision whether to submit jury instructions on the lesser included offenses of second degree murder and manslaughter. He was unsure, however, whether this decision ultimately rested with the client.[71]

---

69. *Id.* at 78.

70. *Id.* at 80, 91-94. *See also infra* notes 74-76 and accompanying text.

71. *See* Record, *supra* note 56, at 81, 82 (No. K-4803). In Jones v. Barnes, 463 U.S. 745 (1983), Chief Justice Burger indicated that, with the exception of the three fundamental decisions set forth in ABA Standard 4-5.2, all other decisions are for counsel. *Id.* at 751. Arguably, therefore, the lesser included decision is a strategic or tactical decision within the exclusive province of defense counsel. In fact, in State v. Felton, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), the court found an attorney ineffective for failing to inform himself about and then investigate a lesser included defense. The *Felton* court implied that the decision to pursue this lesser included defense was counsel's. *Felton*, 110 Wis. 2d at 505-07, 329 N.W.2d at 170-71. *See also* State v. Green, 38 Wis. 2d 361, 156 N.W.2d 477 (1968) (holding that a defendant is bound by defense counsel's decision to waive a lesser included instruction). On the other hand, the commentary to Standard 4-5.2 indicates that the client ultimately should decide a lesser included instruction issue. "Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses." ABA STANDARDS at 4-68. No authority, however, is provided in support of this proposition. *See also* III Wis. Jury Instructions-Criminal, SM6 (1980), which indicates that the lesser included decision should be the client's. Given the opportunity to make an informed, reflective decision and the importance of the decision to the client, the lesser included instruction deci-

If it were Johnson's choice to request lesser included jury instructions, Johnson's irrationality would interfere with Kagan-Kans's ability to present a defense. If Johnson chose not to pursue the only possible defense available, Kagan-Kans felt Johnson would no longer be assisting in his own defense—he would be thwarting it. Johnson's inability to make a rational choice involving a fundamental case decision would require Kagan-Kans to raise Johnson's competency.[72] However, if the decision to request lesser included instructions was the lawyer's to make, Kagan-Kans could simply take whatever step he deemed consistent with Johnson's best legal interest. Raising competency would be unnecessary. To Kagan-Kans, therefore, the question of Johnson's competency was inextricably linked to the resolution of the lesser included instruction decision.[73]

Prior to making any decision, Kagan-Kans met with Dr. Crowley and Johnson on July 5, 1983 and with Dr. Smail and the defendant on the following day to discuss Johnson's options at trial. Following these meetings, each doctor wrote to Kagan-Kans expressing concern about Johnson's competency.[74] For each doctor, Johnson's unwillingness to appreciate and accept the strategic course Kagan-Kans had mapped out suggested that the defendant's mental condition was sufficiently impaired so that he no longer could assist counsel.[75] The doctors agreed,

---

sion is a "fundamental" decision that ought to rest with the client. *See also* Faretta v. California, 422 U.S. 806 (1975). A full exploration of this issue is, however, beyond the scope of this Article.

72. *See* Record, *supra* note 56, at 82, 92 (No. K-4803). Kagan-Kans also stated that if Johnson refused to testify, he would have viewed that decision as disastrous and tantamount to pleading guilty. Given Johnson's desire to fight the charge and in light of the State's case, the defense case, the doctors' opinions and his own observations, Kagan-Kans would have raised competency rather than respect Johnson's decision not to testify. *Id.* at 92, 93.

73. *Id.* at 82, 86.

74. Dr. Smail wrote to Kagan-Kans on July 7, 1983. He concluded that Johnson's "thinking impinges on his ability to rationally aid in the preparation of his defense in an adversarial setting." This conclusion was based on Johnson's paranoid delusions about the facts and the strength of the State's case; his attention to marginal details rather than important matters; his unwillingness to accept the fact of the victim's death; and his threat not to participate in the trial. Brief and Appendix for Respondent at 101, State v. Johnson, 126 Wis. 2d 8, 374 N.W.2d 637 (Ct. App. 1985) (No. 84-2143-CR) [hereinafter Brief and Appendix for Respondent]. Dr. Crowley agreed with Smail in a letter dated July 11, 1983. He advised Kagan-Kans that he had "serious doubts about his [Johnson's] competency to stand trial." Dr. Crowley's opinion was based on Johnson's inability to focus on the State's evidence and a fixation on irrelevant matters; his insistence on controlling the evidence presented by the State; and an unwillingness to participate at trial if his concerns were not addressed. Crowley described Johnson as "virtually impervious to reason." Brief and Appendix for Respondent, *supra*, at 102-03 (No. 84-2143-CR). Neither doctor gave a definitive opinion regarding Johnson's competency because both were employed by the Milwaukee County Forensic Unit, the agency responsible for conducting court-ordered competency evaluations. State v. Johnson, 133 Wis. 2d 212, 395 N.W.2d 179 (1986).

75. *See* Record, *supra* note 56, at 82-83, 101 (No. K-4803). Neither doctor expressed concerns about Johnson's ability to understand the proceedings against him. Rather, each focused on the defendant's capacity to assist counsel. See Brief and Appendix for Respondent, *supra* note 74, at 101-03 (No. 84-2143-CR).

however, that Johnson's impairment was significant only if the lesser included instruction decision was his to make.[76] The doctors' reasoning mirrored that of Kagan-Kans: there was only one viable defense, and Johnson's mental condition apparently precluded him from appreciating that fact. Thus, if it were Johnson's choice whether to request lesser included instructions, then, before respecting Johnson's irrational decision to frustrate his own defense, Kagan-Kans would have to raise the issue of his client's competency.

Failing to find clear authority on the lesser included jury instruction question, Kagan-Kans still hesitated to raise the issue of Johnson's competency. He was reluctant because doing so would trigger an inpatient psychiatric evaluation that would give the State's experts an opportunity to examine Johnson.[77] Kagan-Kans was concerned that this evaluation would enable the prosecution to blunt the proposed testimony of his experts.[78] Since it was strategically unwise to raise competency, Kagan-Kans as zealous advocate did not want to pursue this course unless he had no other alternative. Instead, he approached the trial judge and requested an ex parte hearing to secure the judge's opinion on the lesser included instruction decision.[79] When the judge indicated that he felt such a decision was for defense counsel to make, Kagan-Kans no longer felt it necessary to raise competency.[80] Although Johnson was mentally impaired, his mental impairment did not materially affect Johnson's ability to assist counsel, prevent Johnson from understanding the nature of the proceedings against him, or interfere with Kagan-Kans's ability to prepare a defense. In Kagan-Kans's opinion, an opinion supported by his experts, Johnson was competent.

Thus, at a pretrial hearing shortly before trial, Kagan-Kans chose not to raise the competency issue despite the trial judge's direct question concerning Johnson's competency. Kagan-Kans fully discussed raising

---

76. *See* Record, *supra* note 56, at 82, 89, 93 (No. K-4803).

77. *See id.* at 86-89. Although section 971.14(2) of the Wisconsin Statutes provides for both inpatient and outpatient evaluations, Johnson's high bail would have dictated an inpatient evaluation. Given Crowley's and Smail's involvement in the case, Johnson would have been sent to Winnebago State Hospital for an examination. *See also* A. AMSTERDAM, *supra* note 51, at 203-09 (warning of the dangers of permitting the state's experts to examine the defendant); Chernoff & Schaffer, *supra* note 5, at 509-10 (describing the lack of impartiality and pro-prosecution bias of experts in state institutions).

78. *See* Record, *supra* note 56, at 86 (No. K-4803). Kagan-Kans also expressed concern about not violating the attorney-client privilege if it were not necessary to do so. *Id.* at 90.

79. Since the prosecutor was fully aware of the nature of this ex parte hearing, it was not violative of the prohibitions of Model Code provision DR 7-110(B). *See* Record, Ex Parte Proceedings in State v. Johnson, No. K-4803 at 1 (July 12, 1983). It appears that Kagan-Kans was attempting to carry out the command of ABA Standard 4-5.2(c) which recommends that defense counsel make a record of any significant disagreement between lawyer and client on a matter of strategy. The Standard also states that the record should be made in a manner protective of confidentiality.

80. *See Johnson*, 133 Wis. 2d at 215, 395 N.W.2d at 180.

the issue with Johnson who agreed that the issue should not be raised.[81] The trial proceeded as scheduled and Kagan-Kans pursued his intended strategy. The trial court gave a lesser included instruction on second degree murder but refused to instruct the jury on manslaughter.[82] The jury rejected the defense theory and convicted Johnson of first degree murder.

IV. THE *Johnson* DECISION AND ABA STANDARD 7-4.2: DEFENSE COUNSEL'S AFFIRMATIVE DUTY TO RAISE COMPETENCY

In post-conviction motions, Johnson's appellate counsel claimed that Kagan-Kans provided ineffective assistance of counsel in failing to raise the competency issue. The trial court, the court of appeals, and the Wisconsin Supreme Court[83] all agreed. Applying the two-prong test set forth in *Strickland v. Washington,*[84] the supreme court found that Kagan-Kans's performance was deficient and that this deficient performance prejudiced Johnson's defense. The court concluded, therefore, that Johnson was denied his sixth amendment right to effective assistance of counsel.[85]

In reviewing the facts of the case, the Wisconsin Supreme Court focused on the letters from Dr. Crowley and Dr. Smail. The court held that these letters gave, or should have given, Kagan-Kans a reason to doubt Johnson's competency.[86] Yet, despite the trial court's explicit inquiry about Johnson's competency, Kagan-Kans neither raised competency nor disclosed the existence of the Crowley and Smail letters.

The court questioned whether Kagan-Kans's failure to raise competency in light of these letters constituted representation below an objective standard of reasonableness. The answer, according to the court,

---

81. At the ex parte hearing, the trial court asked Kagan-Kans and Johnson whether the defense intended to raise the competency issue. Johnson acknowledged discussing the issue with defense counsel and stated he did not want competency raised. Brief for Appellant at 6, State v. Johnson, 126 Wis. 2d 8, 374 N.W.2d 637 (Ct. App. 1985) (No. 84-2143-CR) [hereinafter Brief for Appellant].

82. Brief for Appellant, *supra* note 81, at 8 (No. 84-2143-CR). Kagan-Kans sought to introduce testimony from Crowley and Smail concerning Johnson's mental condition at the time of the offense in support of this manslaughter theory. The trial court barred the testimony citing Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (1980) (expert testimony on the defendant's capacity to form intent to kill is excludable from the guilt phase of a bifurcated trial). Nonetheless, Kagan-Kans's reliance on State v. Felton, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), to introduce expert testimony appears warranted. Not only does *Felton* seemingly permit such testimony, counsel's failure in *Felton* to adduce expert testimony or raise a heat of passion manslaughter defense constituted ineffective assistance. *Felton,* 110 Wis. 2d at 510-14, 329 N.W.2d at 173-74.

83. See *Johnson,* 133 Wis. 2d at 211, 221, 395 N.W.2d at 179, 183.

84. 466 U.S. 668 (1984) (a defendant claiming ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial to the defense).

85. *Johnson,* 133 Wis. 2d at 211, 221, 395 N.W.2d at 179, 183.

86. *Id.* at 220, 395 N.W.2d at 182-83.

turned on the point at which defense counsel is required to raise competency. Although it acknowledged that the Wisconsin Statutes do not spell out if or when defense counsel must act,[87] the court observed that other courts have found that counsel must bring competency to the trial court's attention whenever there is "reasonable" or "substantial doubt" about the defendant's competency.[88] The court reasoned that the protection afforded the incompetent defendant is illusory if neither the trial court nor defense counsel uses the statutory procedures regarding competency. In the court's view, the letters from Smail and Crowley constituted reliable evidence creating a reason to doubt Johnson's competency to stand trial. By failing to bring these letters to the trial court's attention, thereby enabling the court to ensure that Johnson was indeed competent, Kagan-Kans performed deficiently.

Turning to the second prong of the *Strickland* test, the court questioned whether Kagan-Kans's deficient performance cast doubt on the reliability of the trial. An incompetent defendant, the court noted, should not be subject to trial.[89] Since Kagan-Kans failed to alert the trial court to evidence raising a doubt about Johnson's competency, the court never reached the question of the need for a competency hearing. Hence, Kagan-Kans's failure was particularly serious because it caused Johnson to be subjected to a trial even though he may have been incompetent. The court concluded that Johnson was denied his right to a fair trial and remanded the case to the trial court for a competency hearing.[90]

The *Johnson* decision marked the first time that the Wisconsin Supreme Court recognized that defense counsel has an affirmative duty to raise the competency issue. Therefore, it is surprising that Kagan-

87. Section 971.14(1) of the Wisconsin Statutes indicates that the court should proceed under this section whenever there is a reason to doubt a defendant's competency, but it is silent as to if or when counsel must act. The drafting notes to this provision suggest that when neither party moves for a competency inquiry, the court may be required to do so where the evidence raises a sufficient doubt. *See* Judicial Council Committee's Note to WIS. STAT. § 971.14 (1981).

88. *Johnson*, 133 Wis. 2d at 219, 395 N.W.2d. at 182. The court relied on three federal cases to support its decision: Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967) (an incompetent defendant cannot waive the right to stand trial nor may counsel do it for him by failing to move for a competency hearing when there was reasonable doubt about defendant's competence); Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966) (a defendant is deprived of right to effective assistance of counsel when lawyer fails to present evidence showing doubt about defendant's competency); and Speedy v. Wyrick, 702 F.2d 723 (8th Cir. 1983) (counsel's failure to request competency hearing when evidence raises substantial doubt about defendant's competency may be ineffective assistance of counsel).

89. *Johnson*, 133 Wis. 2d at 223, 395 N.W.2d at 184. The court looked to Drope v. Missouri, 420 U.S. 162 (1975) for this proposition.

90. *Johnson*, 133 Wis. 2d at 224, 226, 395 N.W.2d at 184, 185. On remand, the trial court held a hearing to determine the defendant's competency at the time of trial. The court determined that Johnson had been competent and upheld his conviction. State v. Johnson, No. K-4803 (Wis. Cir. Ct. Jan. 29, 1987).

Kans's performance should be deemed "outside the wide range of professionally competent assistance," especially in view of the strong presumption usually accorded counsel's professional judgments.[91] It is difficult to fault Kagan-Kans for failing to anticipate a duty not found in the Wisconsin Statutes or case law nor recognized at the time in the ABA Standards or any of the leading defense texts. In fact, his analysis of the issue and tactical decision not to raise competency represented the carefully thought out, individualized approach suggested in the *Trial Manual for the Defense of Criminal Cases.*[92]

Moreover, there was authority supporting Kagan-Kans's decision.[93] The *Johnson* court acknowledged that the United States Court of Appeals for the Fifth Circuit had held, in *Enriquez v. Procunier,*[94] that defense counsel could, for tactical reasons, decide not to raise the competency issue. The *Enriquez* court had concluded that a measure of investigation followed by a reasonable tactical decision did not constitute deficient representation.[95] Kagan-Kans thoroughly investigated Johnson's defenses, including the question of competency. Moreover, his decision not to raise competency was reasonable in view of his proposed defense and his resolution of the lesser included instruction issue. Nonetheless, the Wisconsin Supreme Court summarily declined to follow *Enriquez,* stating that "considerations of strategy are inappropriate in mental competency situations."[96]

The court offered no explanation, marshalled no arguments, and cited no authority for this conclusion. Early in its opinion, the court did cite three federal cases holding that defense counsel must bring the competency issue to the trial court's attention when counsel has a rea-

---

91. *Johnson,* 133 Wis. 2d at 217, 395 N.W.2d at 181. In Strickland v. Washington, 466 U.S. 668 (1984), the Court stressed that a lawyer's judgment should not be second-guessed as long as it falls within the sphere of professional reasonableness. *Id.* at 689. Since most commentators at the time agreed that a defense lawyer should raise competency only if it were in the client's best interest, Kagan-Kans's performance hardly seems unreasonable. *See, e.g.,* Golten, *supra* note 49, at 389; Eizenstat, *Mental Competency to Stand Trial,* 4 HARV. C.R.-C.L. L. REV. 379, 383-84 (1969); Note, *Incompetency to Stand Trial,* 81 HARV. L. REV. 454, 467 (1967). It is particularly hard to characterize Kagan-Kans's thoughtful and vigorous representation as outside the bounds of professionally competent work when it is compared with other representation deemed acceptable under the *Strickland* standard. *See, e.g.,* Burger v. Kemp, 107 S. Ct. 3114 (1987), *reh'g denied,* 108 S. Ct. 32 (1987); *see also* Mitchell v. Kemp, 107 S. Ct. 3249 (1987) (Marshall, J., dissenting from denial of certiorari to review habeas corpus proceeding), *cert. denied,* 108 S. Ct. 14 (1987) (denying certiorari to review denial of stay of execution).

92. *See* A. AMSTERDAM, *supra* note 51, at 1-203 to 1-204.

93. *See* O'Beirne v. Overholser, 193 F. Supp. 652, 661 (D.D.C. 1961), *rev'd on other grounds,* 302 F.2d 852 (D.C. Cir. 1961) (defense counsel under no duty to request a mental examination or raise an insanity defense for a defendant of questionable competency when to do so is not in the defendant's best interests).

94. 752 F.2d 111 (5th Cir. 1984), *cert. denied,* 471 U.S. 1126 (1985).

95. *Enriquez,* 752 F.2d at 114.

96. *Johnson,* 133 Wis. 2d at 221, 395 N.W.2d at 183.

sonable or substantial doubt about the defendant's competency. Yet the three cases relied on by the court in imposing this duty on defense counsel all involved instances in which defense counsel failed to adequately explore or investigate the issue of the defendant's mental state despite obvious indications of mental illness.[97] Unlike the *Johnson* case, none of these cases involved a considered decision by defense counsel not to raise competency. The cases instead stand for the proposition that defense counsel's unexplained failure to explore competency when circumstances clearly warrant action constitutes ineffective assistance of counsel. These cases, however, simply do not address the issues raised in *Johnson*.

The *Johnson* decision also mentioned but neglected to discuss Kagan-Kans's primary reason for not raising competency: his belief that Johnson's impairment did not affect Johnson's ability to assist in his own defense because the lesser included instruction decision was for counsel, not Johnson, to make.[98] The opinion did not suggest that Kagan-Kans and the trial court were correct in concluding that the decision on the submission of a lesser included instruction is for the lawyer. Nor, however, did the opinion reject that conclusion. The court simply ignored the issue, leaving the practitioner without any guidance on this troublesome question.

In addition, the court failed to address Kagan-Kans's proposition that the competency issue is affected by the allocation of decisionmaking between the lawyer and client. Again, the opinion did not spe-

97. *See supra* note 88. In *Speedy*, the court observed that the trial lawyer appeared to be acutely aware of the defendant's incompetence and yet unaware of the legal possibility of a competency hearing. Speedy v. Wyrick, 702 F.2d 723, 727 (8th Cir. 1983), *cert. denied*, 471 U.S. 1019 (1985). In *Kibert*, the defense lawyer, retained only ten days earlier, allowed the defendant to plead guilty to two life sentences "solely on the basis of a mere nod of the prisoner's head when asked if he wanted such a plea entered on his behalf" despite serious questions about the defendant's mental condition. Kibert v. Peyton, 383 F.2d 566, 568 (4th Cir. 1967). In its initial decision, Owsley v. Peyton, 352 F.2d 804 (4th Cir. 1965), the Fourth Circuit held that the trial court erred in refusing to grant a hearing on incompetency or pay for a private psychiatric examination despite counsel's motion and presentation of evidence regarding incompetency. In its second decision, Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966), the court found that the competency hearing it had ordered revealed reasonable grounds for doubting the defendant's competency at the time of trial. Accordingly, the trial court should have granted the lawyer's motion. The lawyer was not ineffective because he did not move for a hearing, but because he failed to adduce other proof which was available. As in the *Speedy* and *Kibert* decisions, there was no indication in *Owsley* of any reasoned decisionmaking by defense counsel, only an absence of zealous representation.

98. *Johnson*, 133 Wis. 2d at 214-15, 395 N.W.2d at 180. The court also summarily affirmed the trial court's decision to bar expert testimony on the intent issue, stating that the exclusion was consistent with the principles of Steele v. State, 97 Wis. 2d 72, 97-98, 294 N.W.2d 2, 13-14 (1980) (expert opinion testimony on a defendant's ability to form requisite criminal intent is excluded from the guilt phase of a bifurcated trial). *But see supra* note 82; ABA STANDARDS at 7-121 (vast majority of courts hold that expert testimony on defendant's state of mind is admissible even if the defendant has not raised an insanity defense as long as the crime charged requires proof of specific intent).

cifically reject Kagan-Kans's reasoning; it just sidestepped it. The court focused on Smail's and Crowley's letters as the evidence demonstrating that Kagan-Kans had a reason to doubt Johnson's competency. The court simply glossed over the fact that these experts questioned Johnson's competency because of his inability to rationally decide the lesser included instruction issue.[99] If the experts' concerns were immaterial because the decision was not Johnson's to make, then how did Johnson's impairment affect his ability to assist counsel or understand the proceedings? *Johnson* offers no answer.

Moreover, the court never indicated why Kagan-Kans's assessment of Johnson's competency should be entitled to so little weight. Defense counsel is in the best position to make informed, comparative judgments about a particular client's understanding of the proceedings against him.[100] Counsel is also in the best position to assess that client's ability to make the decisions required of the client and to provide whatever assistance counsel deems necessary. Yet the court, in finding that there was reason to doubt the defendant's competency, completely discounted Kagan-Kans's opinion that Johnson was in fact competent. The *Johnson* court demands undue deference to the opinion of retained experts. Competency is not merely a question of ascertaining the defendant's mental condition.[101] It is defense counsel, not the psychiatrist, who is best able to apply the legal standard of competency to the facts of the defendant's case and to determine how the defendant's mental

99. *See supra* notes 74-76 and accompanying text. As many commentators have noted, competency determinations fluctuate depending on the differing demands placed on defendants in different proceedings. Drob, Berger & Weinstein, *supra* note 16, at 89; Winick, *supra* note 17, at 974; Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists,* 122 AM. J. PSYCHIATRY 616-23 (1965); Miller & Germain, *The Specificity of Evaluations of Competency to Proceed,* 14 J. PSYCHIATRY & L. 333-44 (1986). Using the analysis suggested by Drob, Berger and Weinstein, it is clear that if Kagan-Kans were correct on the lesser included decision issue, then there would have been no basis for questioning Johnson's competency because Johnson's delusional state did not affect any skill or function the defendant was required to perform. Drob, Berger & Weinstein, *supra* note 16, at 91. The ABA Standards reflect this functional approach. "A determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation. . . ." ABA STANDARDS at 7-175.

100. Chernoff & Schaffer, *supra* note 5, at 517. *See also* United States v. David, 511 F.2d 355, 360 (D.C. Cir. 1975); United States *ex rel* Rivers v. Franzen, 692 F.2d 491, 500 (7th Cir. 1982); United States *ex rel* Mireles v. Greer, 736 F.2d 1160, 1165-66 (7th Cir. 1984). *But see* Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems,* 45 U. CHI. L. REV. 21, 29 (1977), and Bishop v. Superior Court, 150 Ariz. 404, 724 P.2d 23 (1986), agreeing that defense counsel is in the best position to assess the defendant's competency but arguing that because of this superior position, defense counsel's testimony should be required regardless of the client's best interest.

101. ABA STANDARDS at 7-170 to 7-175. In State *ex rel.* Haskins v. Dodge County Court, 62 Wis. 2d 250, 214 N.W.2d 575 (1974), the court discussed the limited role that psychiatrists should play in competency determinations. Relying heavily on Dr. Karl Menninger's work, the court concluded that the lawyers and the judge are the best persons to decide "what is essentially a legal question." *Haskins,* 62 Wis. 2d at 264-66, 214 N.W.2d at 582-83.

condition affects the defendant's legal status.[102] Defense counsel should be free to disregard the opinions of counsel's retained experts when counsel does not feel the client is legally incompetent.

An even more troubling aspect of the *Johnson* decision was the court's failure to acknowledge the difficult ethical bind faced by the criminal defense lawyer. Defense counsel must respect client confidentiality and provide zealous representation while carrying out her responsibilities as an officer of the court.[103] These different responsibilities reflect different values that may clash in any given situation. The *Johnson* opinion provides no indication that the court balanced or weighed these values or even recognized Kagan-Kans's conflicting responsibilities. By obligating defense counsel to disclose client confidences even though this disclosure may cause serious adverse consequences for her client, the court forces the criminal defense lawyer to subordinate her role as advocate to that of officer of the court.[104] In order to protect the client's right to a fair trial, the lawyer must betray the client's confidences even though both counsel and client agree that such action is contrary to the client's best interest. The court inadequately explained what values or interests are served by requiring counsel to play such a role, yet its decision seriously undermines the value of confidentiality,

---

102. Although the *Haskins* opinion, *supra* note 101, refers to the judge and counsel as the best persons, it is defense counsel who best knows the defendant's case. Thus, it is defense counsel who is best able to decide, based in part on private communications and interactions with the defendant, how the defendant's mental state affects his ability to assist in his own defense. *See also supra* note 100.

103. *See supra* note 2. *See also* Chernoff & Schaffer, *supra* note 5, at 515. The interplay of these three conflicting ethical duties places the criminal defense lawyer in a difficult "trilemma." *See* M. FREEDMAN, *supra* note 3, ch. 3.

104. In a limited number of situations, courts have found that a criminal defense lawyer, as an officer of the court, must divulge to the court adverse information regarding a client. BURKOFF, *supra* note 3, at 6-49 to 6-60. *See, e.g.*, Evans v. Kropp, 254 F. Supp. 218, 220-21 (E.D. Mich. 1966) (critical information regarding a client's competency must be disclosed); Commonwealth v. Maguigan, 511 A.2d 1327, 1333-37 (Pa. 1986) (requiring disclosure of client's whereabouts). Other courts have been wary of obligating defense counsel to temper her advocacy because of any duty as an officer of the court. *See, e.g.*, United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (lawyer may not volunteer unsubstantiated opinion that client is committing perjury). For a brief look at the widely diverging views of a defense lawyer's responsibilities as an officer of the court, compare Chief Justice Burger's view in Nix v. Whiteside, 475 U.S. 157, 168 (1986) (emphasizing defense counsel's role as an officer of the court) with that of Justice Brennan in Jones v. Barnes, 463 U.S. 745, 761-62 (1983) (Brennan, J., dissenting) (stressing that counsel must function as an advocate as opposed to a friend of the court). *See also* Justice White in United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) (defense lawyer's mission not to ascertain or present the truth); Justice Black in Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948) (right to counsel demands undivided allegiance and service devoted solely to the interests of the client); COMMISSION ON PROFESSIONAL RESPONSIBILITY OF THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT Preamble (1982) ("It is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.").

strains the lawyer-client relationship, and compromises the defense lawyer's role as zealous advocate.

Unlike the *Johnson* opinion, the commentary to ABA Standard 7-4.2 explicitly acknowledges defense counsel's difficult position. The drafters freely admit that at times defense counsel correctly surmises that raising competency is not in the client's best interest.[105] To protect the client's interests, counsel will want to forego using a procedure that potentially causes greater hardship and injustice to the defendant. Arguably, therefore, the lawyer's duty to the court to protect the integrity of criminal proceedings must yield to the lawyer's obligation to serve her client.[106]

The commentary concludes, however, that the lawyer's duty to the court is paramount and overrides counsel's obligations to her client.[107] At various points in the commentary, the drafters use slightly different language to justify this result. Defense counsel's independent professional responsibility toward the court and the fair administration of justice provide the initial justification.[108] Later in the commentary, the drafters refer to the lawyer's duty to maintain the integrity of the judicial process as the basis for this disclosure requirement.[109] Additionally, the drafters stress that this requirement also provides protection for the incompetent defendant by ensuring that defense lawyers do not deprive defendants of their personal rights to make fundamental case decisions.

These justifications simply do not support converting defense counsel into a friend of the court. There are numerous instances in which defense counsel, as zealous advocate, can legitimately obstruct the truth or frustrate the efficient administration of justice.[110] Although truth and efficient, fair results are important systemic goals, the law-

105. ABA STANDARDS at 7-179.

106. *See* Bennett, *Competency to Stand Trial: A Call for Reform*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 569, 578 (1968). *See also infra* notes 110-42 and accompanying text.

107. ABA STANDARDS at 7-181.

108. *Id.* at 7-177.

109. *Id.* at 7-179 to 7-181. The commentary suggests that because incompetency cannot be waived it is a violation of due process to permit an incompetent defendant to be tried. Defense counsel's duty to maintain the integrity of judicial proceedings, therefore, requires that she advise the court of the defendant's possible incompetence. The drafters cite to Model Rule 3.3(9)(1) (lawyer shall not knowingly make a false statement of material fact or law to a tribunal) and a law review article by William Pizzi, *supra* note 100, at 30, as the authority for this obligation. ABA STANDARDS at 7-180.

110. "The procedural and legal system are supposedly designed to produce results based on just laws fairly applied on the basis of accurate facts; but a lawyer's objective within that system is to achieve a result favorable to the lawyer's client, possibly despite justice, the law, and the facts." C. WOLFRAM, *supra* note 34, at 585. As David Mellinkoff observes, "a substantial part of the major criticism of the lawyer—his presumed indifference to truth—is rooted in fundamental misconception of the lawyer's mission. The lawyer does not exist to spread the word of truth and goodness to the ends of the earth. Somewhat more limited, the lawyer's mission is the nonetheless

yer's role in the adversary system generally permits her to represent her client zealously even at the expense of these systemic goals. It is not enough to state in conclusory fashion that requiring defense counsel to assume an officer-of-the-court role serves these systemic goals. Rather, if defense counsel for a mentally impaired defendant is to play a different, lesser role than zealous advocate, it should be incumbent on those who wish to change counsel's role to provide the authority or to explain the policy warranting such a change.

The commentary to ABA Standard 7-4.2, however, offers little authority for its restricted view of defense counsel's role.[111] It suggests that defense counsel's failure to disclose a doubt about her client's competency constitutes a false statement of material fact.[112] Certainly counsel, as an officer of the court, has a duty to avoid perpetrating a fraud on the court. Yet, the ethics codes, acclaiming the virtues of the adversary system and the principle of zealous partisanship, generally permit a criminal defense lawyer to withhold information or even create a misleading impression.[113] The controversy surrounding the lawyer's duty to divulge a client's perjury reflects the limited scope of the criminal defense lawyer's obligation to disclose a client's fraud and the im-

---

awesome task of trying to make a reality of equality before the law." D. MELLINKOFF, *supra* note 4, at 272. *See also infra* note 113.

111. *See supra* note 109 and accompanying text.

112. ABA STANDARDS at 7-180 (citing MODEL RULE 3.3(a)(1)). *See also supra* note 36.

113. For a discussion of the limited extent to which the ethics codes impose restraints upon a defense lawyer's zealous advocacy, see C. WOLFRAM, *supra* note 34, at 588-89, 641, 650-51. *See also* A. AMSTERDAM, *supra* note 51, at 2-327; M. FREEDMAN, *supra* note 3, at 79-80.

Most commentators agree with Justice White's oft-quoted description of defense counsel's role:

> But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. . . . Defense eounsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can eonfuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convieting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe, but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-58, (1967) (White, J., dissenting in part and concurring in part). For examples of cases in which defense counsel's efforts may frustrate truth or efficiency, see State v. Brown, 644 S.W.2d 418, 421 (Tenn. Crim. App. 1982) (a lawyer may seek to cast blame on a co-defendant regardless of the lawyer's personal belief in the co-defendant's guilt); People v. White, 57 N.Y.2d 129, 440 N.E.2d 1310, 454 N.Y.S.2d 964 (1982) (defense counsel has no duty to produce alibi witness even though earlier revelation would have benefited the efficient administration of justice).

portance of the value of confidentiality.[114] While the Model Rules now require disclosure of a client's intention to commit perjury,[115] it is a major leap to equate nondisclosure of defense counsel's doubts about a client's competence with fraud.[116] Neither the Model Rules nor sound policy supports such a leap.

Although the *Johnson* opinion did not even discuss confidentiality, it is clear that a criminal defense lawyer such as Kagan-Kans often forms his opinion of a client's competency largely as a result of private communications with the client. The protection of the attorney-client privilege is not limited only to the client's words but may include the client's nonverbal communications.[117] A number of courts have held that a lawyer can be compelled to testify regarding counsel's opinion of a client's competency even though the lawyer's observations would involve privileged client communications,[118] but the better reasoned position is that a lawyer's opinion about a client's competence or state of mind is inextricably mixed with the client's private communications.[119] Accordingly, the lawyer should not be forced to raise competency and

---

114. Under Model Code DR 7-102(B)(1) as amended in 1974, disclosure of a client's fraud was prohibited if the lawyer knew of the fraud as a result of a privileged communication. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (extending this principle of nondisclosure to a client's secrets). If client perjury were protected from disclosure under the Model Code, a client's competency problems also would be protected. For a more detailed discussion of the problems the perjury issue poses for the criminal defense lawyer, see Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence and Constitutional Law*, 44 MO. L. REV. 601 (1979).

115. Under Model Rule 3.3(a), the lawyer must take remedial measures to rectify a situation where the lawyer "knows" of client deception before the court. *See also* Nix v. Whiteside, 475 U.S. 157 (1986) (lawyer did not provide ineffective assistance by refusing to allow his client to commit perjury). But this disclosure requirement under Model Rule 3.3(a) stands in stark contrast to the broad protection afforded the principle of confidentiality under Model Rule 1.6. *See* C. WOLFRAM, *supra* note 34, at 658-59, 670-72. The question still remains, however, whether failure to disclose doubts constitutes perpetrating a fraud. Arguably, "fraud" should be narrowly construed. *Id.*, at 673. *See also* Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976).

116. The drafters of Model Rule 1.14 recognized that the disclosure of a client's disability could adversely affect the client and thus concluded the lawyer is left in a difficult position. MODEL RULE 1.14 comment. By leaving open the possibility that counsel could decline to bring out the client's disability, Model Rule 1.14 clearly implies that nondisclosure is nonfraudulent.

117. C. WOLFRAM, *supra* note 34, at 257.

118. *Id.* at 258. *See* Darrow v. Gunn, 594 F.2d 767 (9th Cir. 1979), *cert. denied*, 444 U.S. 849 (1979); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964).

119. C. WOLFRAM, *supra* note 34, at 258. *See* Gunther v. United States, 230 F.2d 222 (D.C. Cir. 1956) (allowing government to call defense counsel to probe basis for opinion regarding client's competence violates attorney-client privilege and defendant's right to counsel). For a similar holding extending the attorney-client privilege to a lawyer's impressions regarding the voluntariness of the defendant's confession gained during confidential conversations, see State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). *But see* Pizzi, *supra* note 100, at 60-64.

thereby disclose privileged matters unless that disclosure is consistent with the client's interests or wishes.

Even assuming that the communications between Kagan-Kans and Johnson were not privileged, the question of Kagan-Kans's responsibility to protect the confidences and secrets of his client still remains. Under the Model Code of Professional Responsibility[120] and the Model Rules of Professional Conduct,[121] the lawyer's responsibility to protect a client's confidences or secrets is broader than the scope of the attorney-client privilege. Information in the letters from Smail and Crowley constituted a "secret" of the client.[122] Both ethics codes severely limit the circumstances in which a lawyer is permitted to betray a confidence or secret of a client. In fact, under both codes, confidentiality is valued so highly that a lawyer is not required to divulge a client's secret even though doing so would prevent serious harm to another.[123] It is unclear, therefore, why defense counsel should be required to divulge a client secret and raise competency when counsel believes that the disclosure will be adverse to the client. Again, neither the *Johnson* court nor the drafters of ABA Standard 7-4.2 provide adequate justification for overriding the mentally impaired client's right to confidentiality and to zealous representation.

The *Johnson* decision and ABA Standard 7-4.2 reflect the concern that mentally incompetent defendants not be subjected to trial. To achieve that laudable end, the Wisconsin Supreme Court and the ABA have selected a questionable means: obligating defense counsel to raise competency. This obligation is designed to serve several purposes. First, it provides defense counsel a bright-line rule to apply when con-

120. MODEL CODE DR 4-101 and EC 4-4.

121. MODEL RULE 1.6 and comment.

122. A "secret" includes information gained in the professional relationship which: (1) a client has requested to be kept confidential; or (2) would embarrass or likely be detrimental to the client if disclosed. MODEL CODE DR 4-101(A). The Model Rules expand the lawyer's duty to protect a client's confidences by extending confidentiality to any information relating to the representation of the client. MODEL RULE 1.6 and comment.

123. Under Model Code DR 4-101(C)(3), a lawyer is permitted but not required to reveal the intention of his client to commit a crime. Model Rule 1.6(b)(1) also permits a lawyer to disclose confidential information to prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. *See* C. WOLFRAM, *supra* note 34, at 671. *See also supra* notes 113-16 and accompanying text.

In its recent adoption of the Model Rules, the Wisconsin Supreme Court chose to amend Rule 1.6. The Wisconsin version mandates that a lawyer shall disclose information the lawyer reasonably believes necessary to prevent a client from committing a criminal or fraudulent act likely to result in death or substantial bodily harm or even substantial injury to the financial interest or property of another. *See* WIS. S. CT. R. 20:1.6 (effective Jan. 1, 1988). *See also* Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1144-72 (1985) (recognizing the overriding importance that the profession and the Model Rules place on confidentiality but arguing that the value of confidentiality is grossly overstated and that attorneys should be obligated to disclose client confidences to prevent harm).

fronted with a marginally competent defendant. Second, it creates a fail-safe device to ensure that the State does not prosecute an incompetent person. Third, it protects the rights of criminal defendants to make fundamental case decisions. The benefits gained by the creation of this obligation, however, are marginal when compared with the costs to the client, the lawyer-client relationship, and the adversary system.

Competency determinations are too indefinite and variable to be neatly resolved by an easily applied bright-line rule.[124] Despite this disclosure requirement, defense lawyers with mentally impaired clients will still struggle with tough judgment calls, and their decisions in turn will generate appellate litigation. Defense counsel's duty to raise competency will reduce neither the workload of the appellate court nor defense counsel's uncertainty. It will increase the workload of the trial courts because defense lawyers will be under increased pressure to raise competency even in marginal cases in order to avoid being labeled ineffective or unethical.

Although the Wisconsin Supreme Court and the ABA may be concerned that some defense lawyers are unable to make reliable judgments about their clients' competency, this bright-line rule is a drastic measure to deal with the problem. Most criminal defense lawyers share the concern that an incompetent defendant not be subjected to trial and will raise the issue in most cases in which they have any reason to doubt their client's competency. If a lawyer does not adequately investigate the issue or fails to raise competency without a legitimate reason, that lawyer's representation should be deemed inadequate. Yet it is neither unduly burdensome nor difficult to scrutinize trial counsel's reasons for not acting.[125]

---

124. In discussing competency, the United States Supreme Court observed that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." Drope v. Missouri, 420 U.S. 162, 180 (1975). While the competency test has been widely criticized as too vague, see, e.g., Appelbaum & Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY 1462, 1466 (1981); Bacon, *Incompetency to Stand Trial: Commitment to an Inclusive Test*, 42 S. CAL. L. REV. 444, 446-49 (1969), other commentators have observed that the competency test is necessarily indefinite. Bennett, *supra* note 36, at 375, 376-81. ABA Standard 7-4.1(b) does not formulate specific criteria but rather recognizes that a competency determination is necessarily imprecise requiring a judgment based on the defendant's level of functioning in relation to the complexity of the case. ABA STANDARDS at 7-170 to 7-175. *See also* Drob, Berger & Weinstein, *supra* note 16, at 85; Miller & Germain, *supra* note 99, at 344.

125. In reviewing other claims of ineffective assistance of counsel, the court must review counsel's reasons for particular decisions or behavior. The court clearly has the capacity to conduct such reviews. If the court is concerned about defense lawyers manufacturing reasons after the fact to explain their failure to raise a competency question, it could require defense counsel to file a sealed memo with the trial judge explaining why no competency issue was being raised. The memo would then be opened only in the event of a post-conviction motion challenging the lawyer's effec-

Appellate review of the limited instances in which counsel decides for strategic reasons not to raise competency is less costly overall to the criminal justice system than obligating defense counsel to act whenever she has a reasonable doubt. If defense lawyers strictly adhere to this duty, they will be raising competency in many cases in which the client ultimately will be found competent.[126] This will mean additional court hearings, unnecessary hospitalization, and increased costs for all of the major participants in the criminal justice system.

Moreover, even if counsel raises competency, the defendant still has a right to challenge the doctor's opinion.[127] At this hearing, the defense lawyer, whose request triggered the evaluation in the first place, will be representing the defendant. The defendant may be understandably reluctant to trust defense counsel in view of counsel's previous actions. Furthermore, defense counsel's role at this hearing will be impossibly complicated. She cannot act as an advocate while at the same time offering testimony, based in part on confidential communications, that is adverse to her client.[128]

---

tiveness. For a similar proposal, see Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 299-300 (1973).

126. Studies already show that in the vast majority of cases in whieh defense lawyers raise competency, the defendant is competent. Bennett, *supra* note 36, at 391. *See, e.g.*, R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL (1980); Bendt, Balcanoff & Tragellis, *Incompetency to Stand Trial: Is Psychiatry Necessary?*, 130 AM. J. PSYCHIATRY 1288 (1973); Steadman & Hartstone, *Defendants Incompetent to Stand Trial*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 39 (J. Monahan & H. Steadman eds. 1983).

127. *See* WIS. STAT. § 971.14(4)(b) (1985-1986); State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 204 N.W.2d 13 (1973). *See also* Chernoff & Schaffer, *supra* note 5, at 520.

128. MODEL CODE DR 5-102(B) requires a lawyer to withdraw if he may be called as a witness and his testimony is or may be prejudicial to his client. *See also* MODEL RULES 3.7 and 1.7. Thus, the defendant's first lawyer who has disclosed information adverse to the client will be required to withdraw. Presumably, a second lawyer will be provided and permitted to act as the defendant's advocate since the client has the right to challenge the competency opinion with the assistance of counsel at this hearing. State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 327, 204 N.W.2d 13, 18-19 (1973). The second lawyer may also find herself trapped in a dilemma should she also become privy to confidential communications leading her to believe that the client is incompetent. *Johnson* seemingly would require this second lawyer to communicate her doubts if at, or subsequent to, the hearing, she also believes her client is incompetent. *Johnson* could result in a client having to conduct his own challenge in a competency hearing.

ABA Standard 7-4.8 attempts to deal with this problem by limiting defense counsel's disclosures and the prosecutor's ability to cross-examine defense counsel. Nonetheless, counsel remains obligated to disclose certain information about her client's competency. ABA Standard 7-4.8(b) assumes that Model Rules 3.7(a) and 1.7 do not apply because the resolution of competency does not go to the merits of the case and because counsel does not play an adversary role at this hearing. ABA STANDARDS at 7-212 to 7-213. No authority supports the claimed inapplicability of Model Rules 3.7(a) and 1.7. I disagree strongly with this view of counsel's role at a competency hearing and question whether it comports with defendant's right to due process. *See* State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 327, 204 N.W.2d 13, 18-19 (1973). The commentary acknowledges, at least, that because of the strain placed on an attorney-client relationship when defendant sees defense counsel apparently testifying against him, counsel's "autonomous role should be preserved intact whenever possible." ABA STANDARDS at 7-213.

The *Johnson* court and the drafters of ABA Standard 7-4.2 ask much but expect little of defense counsel. Although both expect counsel to provide the mentally impaired defendant with zealous representation, neither seems willing to trust that advocate to protect the client's interests. Thus, the Wisconsin Supreme Court obligates defense counsel to raise competency so that the trial court can ensure that an incompetent defendant is not being unfairly prosecuted. But it is the defense lawyer, not the trial judge, who is in the best position to know the client's options and desires. It is defense counsel who is best able to assess the strengths and weaknesses of the defendant's case and the need for and ability of the defendant to assist counsel. Finally, it is defense counsel, committed to securing the best result possible for her client, who will ensure that competency is raised if it is in the client's interest.[129]

Similarly, the State's interest in not unfairly prosecuting an incompetent defendant is protected adequately without requiring defense counsel to act as a double agent. The State is concerned with ensuring

---

Johnson generates other practical problems. Section 971.14(4)(b) of the Wisconsin Statutes states that the burden of persuasion falls on the party seeking to establish that a defendant is not competent. If defense counsel raises competency, but the defendant objects, who has the burden of persuasion? Presumably the State does if it now agrees with defense counsel that the defendant is not competent. If, however, the State feels the defendant is competent, but the defendant now agrees with counsel and wishes to be found incompetent, section 971.14(4)(b) places the burden on the defendant. WIS. STAT. § 971.14(4)(B) (1985-1986). For decisions holding that it violates due process to require the defendant to prove his competency, see United States *ex rel.* S.E.C. v. Billingsley, 766 F.2d 1015 (7th Cir. 1985); Phillips v. Lane, 787 F.2d 208 (7th Cir. 1986); Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348 (2nd Cir. 1982); United States v. Hollis, 569 F.2d 199 (3rd Cir. 1977); People v. McCullum, 66 Ill. 2d 306, 362 N.E.2d 307 (1977); State v. Jones, 406 N.W.2d 366 (S.D. 1987).

129. In State v. Albright, 96 Wis. 2d 122, 291 N.W.2d 487 (1980), the court concluded that defense counsel, not the trial judge, should ensure that the defendant's constitutional right to testify is jealously guarded. Courts frequently have made defense counsel responsible for asserting the defendant's rights and found waiver even where counsel has appeared rather lax in protecting the defendant's rights. *See, e.g.*, Estelle v. Williams, 425 U.S. 501 (1976) (although due process precluded State from forcing defendant to be tried in prison garb, failure of defense counsel to object to defendant's prison clothes at trial negated any constitutional error). As the *Estelle* court noted, "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." *Id.* at 512. Increasingly, however, appellate courts are demanding that trial judges play a greater role in ensuring that the defendant's rights are fully protected. Remington, *The Changing Role of the Trial Judge in Criminal Cases — Ensuring that the Sixth Amendment Right to Assistance of Counsel Is Effective*, 20 U.C. DAVIS L. REV. 339 (1987). As Remington's article suggests, however, too much is asked of trial judges and not enough of defense counsel, who bears primary responsibility for safeguarding the defendant's interests. Greater responsibility is placed on the trial judge in large part because of a belief that counsel's efforts are often inadequate. *Id.* at 342. If the court's primary concern is that defense lawyers are not adequately exploring the competency issue, are not making sound tactical decisions or are usurping decisions that are properly the defendants', the court could require defense counsel to submit a sealed memorandum in any case in which the trial judge with questions about counsel's performance deems it appropriate. *See* Lee, *supra* note 125. Finally, if the trial judge believes there is a question about the defendant's competency, the judge is free to order an evaluation. *See infra* note 132.

accurate results, dignified proceedings, and the appearance of fairness.[130] In most cases involving a mentally impaired defendant, defense counsel will be able to conduct a sufficient investigation, enabling counsel to assess and challenge the prosecution's case. Defense counsel's efforts and the existence of strong evidence against the defendant generally obviate the need to raise competency to ensure accurate adjudications. If, however, counsel has concerns about the defendant's actual involvement in a crime or believes the defendant's incompetency is hampering the defense of a case, counsel may be compelled to raise competency.[131]

Moreover, the prosecutor and trial judge play the primary roles in protecting the State's interests. The prosecutor, through the exercise of discretion and the use of civil commitment proceedings, substantially controls the nature and continuation of the process. If the prosecutor or the trial court feels that the judicial process is being demeaned by proceeding against an incompetent defendant, either can raise competency.[132] Similarly, either can raise the issue if defense counsel appears to be inadequately protecting a mentally ill client. Further, the court can raise competency sua sponte if the defendant's conduct disrupts the orderly administration of justice. The ability of the trial court and prosecutor to act safeguards the State's interests adequately.

The *Johnson* court completely ignored the issue of the client's choice or desires when it obligated defense counsel to raise competency. ABA Standard 7-4.2 implies that counsel should discuss the competency issue with the client but concludes that counsel "may move for an evaluation over the client's objection." Moreover, even if counsel does not make such a motion, she must still disclose those facts giving rise to her doubt about the defendant's competence. The commentary to Standard 7-4.2 insists that crucial decisions must be made by the defendant but cannot be made by an incompetent defendant.[133] However, it does not follow that, simply because a defense lawyer has doubts about a defendant's competence, the defendant is incompetent. In fact, studies indicate that the vast majority of individuals evaluated for competency, usually at defense counsel's request, are competent.[134] Although the Standard purportedly promotes the principle of client decisionmaking,

130. ABA STANDARDS at 7-170; Note, *supra* note 91, at 457-59; Winick, *supra* note 17, at 953-57.

131. *See infra* notes 163-75 and accompanying text.

132. WIS. STAT. § 971.14(1) (1985-1986); ABA STANDARD 7-4.2 and commentary; Winick, *supra* note 17, at 948; Chernoff & Schaffer, *supra* note 5, at 507. Indeed, the trial judge has a duty to raise competency sua sponte if the judge has a bona fide doubt as to the defendant's competence. Drope v. Missouri, 420 U.S. 162, 180 (1975).

133. ABA STANDARDS at 7-180 to 7-181.

134. *See supra* note 126.

it adopts an unduly rigid view of that principle and of competency determinations.[135]

Standard 7-4.2 seemingly is based on the notion that a competency determination is an all-or-nothing, clear-cut proposition. If the defendant is competent, he makes all fundamental decisions and, if incompetent, he is incapable of any decisionmaking. Competency, as the Standards reflect in other sections,[136] is too indefinite, imprecise, and context-related to be reduced to such a simple formula.[137] Many mentally ill defendants are capable of discussing their cases and making decisions.[138] The decisions of the majority of mentally impaired defendants should not be overridden because some incompetent defendants are incapable of any decisionmaking. Requiring defense counsel to disclose a doubt about her client's competence in any case in which she has one does not necessarily enhance client decisionmaking or client autonomy. Rather, it may rob the mentally ill client of an opportunity to participate in what may be the most significant decision in his case.

In any case involving a mentally impaired defendant, therefore, defense counsel should discuss the competency issue with her client. If, after this discussion, the client feels that raising competency is not advantageous and defense counsel agrees, counsel should be permitted to respect the client's choice and decline raising competency.[139] Respect for the client's choice and the value of individual autonomy also demand nondisclosure of any doubts defense counsel may harbor. Admittedly, counsel is in a difficult position in trying to ascertain whether the client is capable of making an intelligent choice. The conscientious defense lawyer striving zealously to represent her client ought to be permitted to respect a client's choice when it coincides with the lawyer's judgment of what is in the client's best interest. Fairness to the incompetent defendant—the primary purpose of the incompetency doc-

135. *See supra* note 124 and accompanying text.

136. *See* ABA STANDARD 7-4.1 and commentary.

137. *See supra* note 124 and accompanying text.

138. *See supra* notes 44-45 and accompanying text. The comment to Model Rule 1.14 and my professional experience also bear this out.

139. In a variety of situations, the Supreme Court has recognized the defendant's right to waive important systemic protections even though by doing so the defendant may be affecting the accuracy of the process. As the Court observed in Faretta v. California, 422 U.S. 806 (1975):

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Id. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). *See also* North Carolina v. Alford, 400 U.S. 25 (1970) (defendant may plead guilty despite his continued assertion of his innocence). For a more detailed discussion of this waiver argument, see Winick, *supra* note 17, at 954-57.

trine—is not served by requiring a properly represented client to invoke a legal procedure which the client believes is contrary to his interests.[140]

A mentally impaired defendant will occasionally choose to face criminal prosecution rather than suffer the consequences of raising competency. Just as other criminal defendants are permitted to waive certain rights if they deem it appropriate, the mentally impaired defendant should be able to do so as long as he is represented by effective counsel.[141] By obligating defense counsel to take action which may be harmful to the mentally impaired client, the American Bar Association and the Wisconsin Supreme Court have seriously undercut the right of the mentally impaired to the same zealous representation guaranteed all other citizens by the sixth amendment.[142] In their effort to protect the incompetent, the ABA and the court have compromised confidentiality, the lawyer-client relationship, and individual autonomy. Both should rethink this duty and instead permit defense counsel to play the role counsel deems appropriate given the particular circumstances of her client's case.

V. Effective Representation: Case-By-Case Determinations

What, then, should be the role of the criminal defense lawyer when placed in the "unavoidably difficult" position of defending a mentally impaired client?[143] The answer, in short, is that the role varies from

140. The comment to Model Rule 1.14 insists that the fact of a client's disability does not diminish the client's right to be treated with attention and respect. The comment also recognizes that the mere presence of a mental disability does not render the impaired defendant incapable of making many important decisions. As Faretta v. California, 422 U.S. 806 (1975), makes clear, respect for a defendant's freedom of choice demands that even harmful decisions be honored. Similarly, respect for the impaired defendant as a person demands, to the fullest extent possible, that his decisions be honored. *See also* Frendak v. United States, 408 A.2d 364, 375-79 (D.C. 1979).

141. *See supra* note 139. As Bruce Winick persuasively demonstrates, the purposes of the incompetency doctrine do not justify forcing the defendant to bear the costs of raising competency. Winick, *supra* note 17, at 949-59. Assuming that the defendant can articulate a choice—a choice with which counsel agrees—Winick argues that the defendant should be permitted to waive competency just as "normal" defendants are permitted to waive other rights. *Id.* at 959-68. Finally, Pate v. Robinson, 383 U.S. 375 (1966), did not directly address the question of whether competency could be waived and thus does not bar honoring a defendant's choice to knowingly waive raising the competency issue. Winick, *supra* note 17, at 968-75.

142. "More specifically, the right to the assistance of counsel has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments." Herring v. New York, 422 U.S. 853, 857 (1975). Placing restrictions on the zealous efforts of a lawyer for a mentally impaired client to defend her client interferes with the traditional working of the adversary system and offends notions of equal protection.

143. This question, of course, assumes that the lawyer is not laboring under the *Johnson* mandate. For the Wisconsin lawyer, *Johnson* leaves few options. Counsel can seek a non-criminal disposition which may obviate the need to raise competency or counsel may legitimately question

case to case. The decision as to whether to respect a client's questionable decision, assume a more paternalistic role, or raise competency depends on the lawyer's careful analysis of the degree of the client's mental impairment, the importance of the decision being considered, the type of case, and the costs and benefits to the client of the alternative courses of action. After undertaking this analysis and fully discussing the matter with the client, defense counsel will have to make the hard choice of how to proceed given the circumstances in that particular case.

Defense counsel should begin this analysis by considering the extent to which the defendant's mental condition actually interferes with that person's ability to understand the proceedings or affects the client's capacity to assist counsel. Counsel must make a judgment regarding the client's ability to appreciate his legal predicament and to grasp the basic workings of the adversary system. Additionally, the client must be able to interact with counsel, process various information, make certain legal decisions, and participate appropriately in court. The lawyer should direct a series of questions to the client similar to those utilized by mental health experts when asked to render a competency opinion.[144] The questions to be asked should include the following:

1. Does the client understand the roles of the major participants in the adversary process?

2. Does the client appreciate defense counsel's function, and is he capable of trusting and working with counsel?

3. Does the client recognize the difference between a guilty plea and a trial?

4. Is the client aware of the nature of the charges he faces, the seriousness of such charges, and the possible consequences?

5. Is the client capable of discussing the factual basis of the charges, possible defenses, and problems with accounts given by prosecution witnesses?

6. Can the client testify in a relevant, coherent manner?

7. Is the client able to discuss likely outcomes and make choices regarding plea options or defense strategy?

8. Can the client control his motor and verbal behavior to the extent that court proceedings will not be disrupted?

---

whether there is a reasonable doubt about her client's competency and thus decide she is not required to act. But, if the defendant's mental state does raise a reasonable doubt, counsel's failure to raise the competency issue violates a clear directive of the Wisconsin Supreme Court. Few lawyers will knowingly take such a step.

144. *See generally* LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (1974); Robey, *supra* note 99. *See also* State v. Guatney, 207 Neb. 501, 299 N.W.2d 538 (1980) (proposing a list of criteria to apply in analyzing a defendant's competency).

A negative response to one or several of these questions does not necessarily mean that the client is incompetent. Many low-income, poorly educated or emotionally disturbed defendants will not fare well if similarly questioned.[145] Nonetheless, the more unsatisfactory the defendant's responses, the more doubtful is the defendant's competency.

The next step defense counsel should take is to assess the advantages and disadvantages to the client of raising the competency issue. This is not a task to be completed once, but an ongoing process that involves a skillful weighing of all of the particular circumstances of the case. Like the defendant's mental condition, this assessment may change rapidly and dramatically. Delay, for example, may initially work to the client's favor, but the prospect of a new prosecutor or judge being assigned to the case may mean that a speedy disposition is now advantageous.[146] Competency may be raised at any time in the proceeding[147] and defense counsel must be constantly alert to changes in the defendant's mental condition and in the cost-benefit analysis of raising competency.

In analyzing the merits of raising competency, counsel should recognize that some defendants improve significantly from the medication or treatment provided in a hospital setting.[148] In addition, pretrial incarceration in the county jail may be extremely hazardous, even deadly,

145. *See* Note, *supra* note 91, at 459; Winick, *supra* note 17, at 971.

146. ABA Standard 7-4.2(e) declares that it is improper for a lawyer to use a competency evaluation for any purpose unrelated to determining the defendant's competency, such as to obtain favorable plea negotiations or delay the proceedings to obtain an advantage. *See also* Bennett, *supra* note 36, at 382-83 (suggesting that obtaining delay is an inappropriate use of the incompetency process). The drafters of the Mental Health Standards suggest that the negative aspects and injustices of the competency process will be eliminated by the adoption of the Standards. Until that ideal state is obtained, however, defense counsel should raise competency if the client and lawyer feel it is in the client's best interest to do so even if the lawyer's primary reason for doing so is to obtain a favorable delay. *See infra* note 158. This assumes, of course, that there is some legitimate basis for questioning the client's competency. Given the imprecise nature of a competency determination, it is neither realistic nor sound policy to attempt to restrict defense counsel's ability to raise competency for the client's benefit.

147. Pate v. Robinson, 383 U.S. 375 (1966). Many state statutes have wording similar to that of section 971.14(1)(a) of the Wisconsin Statutes, which provides that the trial court "shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed." WIS. STAT. § 971.14(1)(a) (1985-1986). *See also* Chernoff & Schaffer, *supra* note 5, at 507.

148. As a public defender, I represented several clients whose severe impairments made it impossible for me to communicate at all with them. In several instances, these clients made dramatic improvements after only a short stint in a mental hospital. Clearly, however, inpatient treatment is frequently not required. While a client's competency may be restored by medication, that medication can be provided on an outpatient basis eliminating the need and expense of an inpatient competency evaluation. *See* ABA STANDARD 7-4.3 and commentary (condemning automatic commitment for inpatient evaluations and urging that competency examinations be done in the least-restrictive setting possible).

to the mentally ill defendant.[149] On the other hand, raising competency may adversely affect the defendant. For many defendants, hospitalization may be counterproductive.[150] A lengthy stay in such an institution may be far less therapeutic than the defendant's normal routine or outpatient relationship with a counselor. Moreover, for a defendant charged with a simple misdemeanor, raising competency may greatly increase the number of days that the defendant is institutionalized.

Raising competency may also alert the prosecution to the existence of a mental condition and may therefore lead to involuntary commitment proceedings against the defendant. Similarly, the judge may view the defendant more harshly, and, hence, may either increase or refuse to lower bail. Defense counsel's expression of concern about a defendant's mental condition is likely to lead the prosecutor or judge to insist on probation for a defendant who otherwise may have only been fined. For some clients, this is a substantial cost.[151]

Additionally, raising competency gives the State's experts the opportunity to assess the defendant. Their early assessment may cripple the defendant's opportunity to raise an insanity defense. Further, the defendant may provide damaging information during the evaluation that will be used against the client at trial or at sentencing.[152] In some cases, however, there are strategic advantages to be gained by raising competency. The State's experts may make observations and render opinions supportive of the defendant's insanity claims.[153] The State's experts may also agree that the defendant is incompetent and unlikely to regain competency during the pendency of the action. As a result, the

149. While confined in a county jail, the mentally ill defendant may harm himself or others. Moreover, other inmates may taunt or physically abuse the mentally ill inmate.

150. *See supra* note 24.

151. In my experience, mentally impaired clients frequently fare poorly on probation. Overworked probation agents generally lack the resources, time or skill to handle the mentally ill probationer. The clients' inability to follow through with the conditions placed upon them by their probation agents often results in detention holds, revocation proceedings and, finally, lengthy jail sentences.

152. *See* A. AMSTERDAM, *supra* note 51, at 1-209. The extent to which a defendant's statements made during a competency evaluation can be used against him is unclear. *See* Buchanan v. Kentucky, 107 S. Ct. 2906, *reh'g denied,* 56 U.S.L.W. 3164 (U.S. Aug. 26, 1987) (a defense request for a pretrial competency examination opened the door for the prosecution to present evidence at trial based on that examination to rebut other psychological evidence presented by the defense). Arguably *Buchanan* does not apply if counsel raises competency over the objection of the defendant. In Wisconsin, statements made during a competency evaluation are inadmissible in any proceeding except on the issue of the defendant's mental condition. WIS. STAT. § 971.18 (1985-1986). *See also* ABA STANDARD 7-4.6 and commentary (information gained during competency evaluation should be considered privileged and only used to determine competency).

153. *See supra* note 146 regarding the issue of the propriety of defense counsel's raising competency to secure other benefits for the client. *See also* Mitchell v. United States, 316 F.2d 354, 360 (D.C. Cir. 1963) (recognized purpose of competency evaluation is to obtain evidence to decide whether to raise insanity defense).

case may be dismissed.[154] Even if the case is not dismissed, the delay in the proceedings may work to the defendant's advantage in securing a favorable plea bargain or defusing adverse pretrial publicity. Of course, the delay of the criminal case may also constitute a serious disadvantage if this delay has a negative effect on the defendant's trial.[155]

The time defense counsel has to consider the competency issue will vary greatly, again depending on the circumstances of each case. The degree of the client's mental impairment often determines the time available to counsel to explore the issue. If defense counsel is having difficulty communicating with a client, counsel should generally seek the assistance of a privately retained expert before raising competency.[156] In addition to providing guidance on the competency question, that expert should also be used to secure information about the viability of an insanity defense. The expert's opinion regarding the merits of an insanity defense will often be a crucial factor in defense counsel's assessment of the costs of raising the competency issue.

Before choosing a particular role in a case, defense counsel must also consider the seriousness of the charge lodged against the defendant, the strength of the State's evidence, and the availability as well as relative merit of different courses of action. Some commentators, for example, suggest that competency not be raised unless the charges against the defendant carry heavy penalties and the State's case is strong.[157] In some misdemeanor cases, however, the mere threat of raising competency may be sufficient to convince an overworked prosecutor to offer a non-criminal disposition.[158] Yet that same approach with a different prosecutor may land the defendant in a mental hospital

154. Section 971.14(6) of the Wisconsin Statutes requires the court to dismiss a criminal charge and release a defendant from a commitment when the defendant is unlikely to become competent within the remaining commitment period. The statute permits the court, however, to order the defendant delivered to a treatment facility so that the State can commence civil commitment proceedings. WIS. STAT. § 971.14(6) (1985-1986).

155. For example, crucial defense witnesses may leave the jurisdiction while the defendant is regaining competency. *See also* Winick, *supra* note 17, at 947-49.

156. *See* A. AMSTERDAM, *supra* note 51, at 1-207. In Wisconsin, a lawyer representing an indigent defendant may obtain funds to retain an expert through the local branch of the State Public Defender's office. In fact, proceeding without any expert in a case with mental health issues may not only be "foolhardy," *see* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977), it may be ineffective assistance of counsel. *See supra* note 18.

157. *See, e.g.*, A. AMSTERDAM, *supra* note 51, at 1-207.

158. In order to obtain a good disposition for a client, a lawyer will employ a host of different tactics and strategems. As any text on litigation techniques demonstrates, lawyers often take non-legal factors into consideration in the negotiation process. As long as there is some factual basis for the lawyer's use of the competency process, the defense lawyer should be allowed to utilize the process to her client's advantage. If the lawyer for the mentally impaired defendant cannot use the competency process to secure a favorable result for the client (*see supra* note 146) it is clear that the mentally impaired defendant is being provided something less than a zealous advocate.

for thirty days or more instead of the fine which the prosecutor was prepared to offer.

Defense counsel must be familiar, therefore, with the likely responses of the other actors in the criminal justice system to the mentally ill defendant in order to assess accurately the defendant's available options. Even in serious cases, the creative criminal defense lawyer may be able to work out solutions for a mentally impaired defendant other than raising competency.[159] It will generally take some time for defense counsel to carefully analyze the defendant's particular circumstances. While analyzing the competency issue, defense counsel should pursue non-criminal dispositions that may obviate the need to resolve the issue.[160]

The final and most important step in defense counsel's decision-making process is to discuss the competency issue as thoroughly as possible with the defendant. Although the defendant's mental illness may make this a time-consuming, frustrating discussion, it is imperative that counsel take the necessary time to ensure that the client understands as fully as possible the significance and consequences of raising competency. Many mentally ill defendants are capable of making choices and articulating desires or goals.[161] It may be necessary, however, for defense counsel to listen patiently to a barrage of conflicting wishes before identifying the client's primary goal. As with many criminal defendants, the mentally impaired defendant may be very reluctant to choose from any of the limited undesirable options available. Reluctance to choose should not be equated with incompetence. As with other defendants, defense counsel often must push her mentally impaired client to make choices. Unlike other defendants, however, counsel must then decide whether the mentally impaired client's choice should be respected.

It may be useful to think of mentally impaired clients along a continuum. At one end is the client who is a rational decisionmaker fully capable of grasping every aspect of a case, able to articulate goals, and ready to make informed decisions. On the other end is the comatose client seemingly totally unaware of anything defense counsel says, unable to articulate any goals, and incapable of making any choices. The closer the mentally ill client is to the rational decisionmaker end of the

159. Assuming that the client agrees with the lawyer's approach and is capable of entering a plea, the lawyer may be able to persuade the prosecutor to offer a favorable plea agreement. Such an agreement may include probation with conditions such as a structured living arrangement for the client, outpatient counseling, alcohol or drug abuse treatment, monitored medication or restrictions on the client's activities. *But see supra* note 151.

160. ABA Standard 4-6.1 imposes a duty on defense counsel to explore diversion of a client's case from the criminal justice system. Some prosecutors will be willing to hold a mentally impaired defendant's criminal case open for a stated period with a promised dismissal if the client stays out of trouble, stays on medication or cooperates in a treatment program for that period.

161. *See supra* notes 44, 45 and 138 and accompanying text.

continuum, the more defense counsel should respect the defendant's choice on raising competency. The more the client can make choices and articulate goals, the more likely it is that the defendant is indeed competent. Near the other end of the continuum, defense counsel will be able to place little weight on the defendant's expressed choice. It may be that the client's choice is hopelessly unclear or that counsel seriously doubts the client's capacity to understand or process information. The more substantial the client's mental impairment, the harder it becomes for defense counsel to respect the client's desire not to raise competency.

Defense counsel's role in representing a mentally impaired defendant, therefore, requires counsel to balance the client's choice with the seriousness of the client's mental impairment, the nature of the defendant's case, and the lawyer's assessment of the costs and benefits of various actions. The lawyer's role will be clear in any case in which the client and defense counsel agree that competency should be raised. That role is less straightforward when the client insists on raising competency even though the lawyer feels that doing so is not in the client's best interest. Nevertheless, the client's right to make fundamental case decisions, the value of client autonomy, and the uncertainty of judgments regarding competency require defense counsel to provide the defendant an opportunity to litigate competency if the defendant so desires.[162]

Some clients will state unequivocally that they do not want competency raised.[163] Despite doubts about a client's competency, defense counsel should respect that client's choice when, as in *Johnson,* counsel agrees that raising competency is not in the client's best interest.[164] Defense counsel should continue then to play her normal role of zealous advocate as long as there is agreement between counsel and her client on all fundamental case decisions.

Occasionally, a mentally impaired defendant may insist on making a fundamental decision that the lawyer deems disastrous and not in the client's best interest. For example, assume the defendant refuses a prosecutor's offer to reduce a felony to a misdemeanor with a recommenda-

162. *See* State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 325, 204 N.W.2d 13, 17-18 (1973) (a defendant is entitled to a hearing on the question of competency); Chernoff & Schaffer, *supra* note 5, at 520. This does not mean, of course, that the lawyer should not seek to persuade the defendant to reassess a poor choice. As Paul Tremblay points out, however, persuasion can easily become coercive manipulation. Tremblay, *supra* note 15, at 582. Although Tremblay believes that the use of persuasion protects client autonomy far better than other alternatives, such as formal or de facto guardianship, he concludes that a lawyer is not justified in simply manipulating the client to select a choice the lawyer deems best. *Id.* at 577-83. For a further discussion of various persuasive techniques and the appropriateness of their use, see D. BINDER & S. PRICE, *supra* note 19, at 203-10.

163. In particular, clients with prior negative experiences in the mental health system or strong feelings about drugs may be resistant to raising competency.

164. *See supra* notes 129-41 and accompanying text.

tion of credit for time served, but even in the face of overwhelming evidence demands a jury trial on the felony charge even though conviction carries a mandatory prison term. Defense counsel cannot simply plead the client guilty to the misdemeanor.[165] Counsel will have to respect the defendant's decision to try the case or else raise competency.[166] But should competency be raised over the client's objection?

Defense counsel's decision turns on the degree of the client's impairment and the relative costs or benefits of respecting the defendant's wishes. The "normal" client is afforded the right to make his own decisions, even harmful ones, because society values highly the individual's freedom to choose for himself what constitutes his best interest.[167] Society restricts the mentally impaired person's right to choose because it lacks confidence in that person's capacity to make informed decisions. In short, since we do not know why the impaired client is making a seemingly irrational choice, we are reluctant to honor his choice. It follows, then, that the further a defendant is from the rational decisionmaker end of the continuum, the more willing counsel should be to override a defendant's disastrous choice and raise competency.[168]

Counsel's role will be particularly clear when the client's irrational decision is inconsistent with the client's primary case objective or when that decision is obviously disastrous to the client's well-being. The more irrational the client's insistence is on not raising competency when that insistence runs contrary to the client's own stated goals, the easier the lawyer's decision is to raise the issue. If the impaired client's irrational choice impinges significantly upon counsel's ability to pursue her strate-

165. Bookhart v. Janis, 384 U.S. 1, 7 (1966). It is the defendant's decision whether to plead guilty. *See supra* note 13.

166. Again, this assumes that counsel already has attempted to change the defendant's poor decision. *See supra* note 162.

167. Faretta v. California, 422 U.S. 806, 834 (1975).

168. David Binder and Susan Price, *supra* note 19, at 155, posit the general rule that lawyers should intervene in a client's decision if that decision will result in substantial economic, social or psychological harm in return for little gain. They suggest that before allowing a client to make an extremely detrimental decision, the lawyer request the appointment of a guardian. *Id.* at 205. Model Rule 1.14(b) suggests that counsel may either seek a guardian or take other protective action when the lawyer reasonably believes the client cannot adequately act in the client's own interest. In some jurisdictions, in a comparable situation involving the defendant's decision to waive an insanity defense, the trial court is given the discretion to appoint a guardian to advise the court whether to honor the defendant's decision. *See* Frendak v. United States, 408 A.2d 364 (D.C. 1979); Anderson v. Sorrell, 481 A.2d 766 (D.C. 1984). Obtaining a guardian requires defense counsel to disclose confidential information or at least alert the prosecutor and judge to the defendant's impaired condition, possibly leading to the adverse results that the defendant and defense counsel are seeking to avoid. Instead of seeking a guardian, defense counsel and the defendant should undertake the analysis suggested in this Article and make the difficult decision regarding competency. By such action, defense counsel is taking appropriate protective action to secure the best possible result for the client. For a detailed discussion of the difficulties of the guardian alternative, even in the civil setting, see Tremblay, *supra* note 15, at 559-67.

gic means of achieving the client's desired ends, counsel should raise competency.

It is not appropriate for counsel merely to substitute her judgment as to what case disposition is in the client's best interest. In some cases, however, no rational person would dispute what constitutes a defendant's best interest. Take the example of the defendant who turns down the misdemeanor plea to take the hopeless felony case to trial. Since it is highly unlikely that a rational decisionmaker would opt to take an utterly hopeless felony case to trial and risk a mandatory prison sentence rather than plead to a misdemeanor charge for time served, counsel should raise competency over the objection of her mentally impaired client.[169] On the other hand, if it is a close call whether raising competency will benefit the client or if it is unclear that the client will be harmed by pursuing his course of action rather than defense counsel's, counsel should respect the client's wishes and not raise competency.

In the *Johnson* case, if Kagan-Kans was correct that the lesser included jury instruction decision was his to make, then he properly declined to raise competency. Johnson did not want to raise the issue, and Kagan-Kans had strategic reasons for agreeing with him. Moreover, since Kagan-Kans could proceed with his proposed defense despite Johnson's irrational objections, Johnson's impairment did not interfere with his ability to assist counsel.

On the other hand, if Kagan-Kans was incorrect and the lesser included instruction decision was a fundamental case decision that counsel could not make, his position would indeed have been unavoidably difficult. He would first have had to confront Johnson with his dilemma and advise him that, unless they resolved their dispute over case strategy, he would raise competency. If Johnson continued to object both to Kagan-Kans's strategy and to raising competency, Kagan-Kans would then have had to raise the issue. The seriousness of the charge and the dire consequences of Johnson's choice of strategy would not permit counsel to respect Johnson's choice.[170]

---

169. Chernoff and Schaffer argue that such an approach is unsatisfactory for two reasons. First, it elevates counsel's subjective judgment as to what is rational over the client's and, second, it may be merely postponing matters, for the client may return competent but still opposed to counsel's decision. Chernoff & Schaffer, *supra* note 5, at 527. Some clients will undoubtedly return competent and still want to make the same disastrous decision. They should be permitted to do so. Faretta v. California, 422 U.S. 806 (1975). Others, however, will now make the "rational" decision. Assuming counsel is conscientious and mindful to exercise this override function only in clear-cut cases, individual autonomy will not be unduly compromised.

170. *See supra* notes 168 and 169 and accompanying text. Respect for individual autonomy does not require that defense counsel blindly rely on the choices of a defendant whose reasoning is suspect. Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), *aff'd*, 624 F.2d 1093 (4th Cir. 1980) (lawyer found ineffective for failing to develop only possible defense in case because client indicated he was not interested in raising insanity).

Assume, however, that Johnson was evaluated and determined to be competent and yet he persisted in opposing Kagan-Kans's defensive strategy. At this point, again assuming that the lesser included instruction decision is a fundamental one reserved ultimately for the client, Kagan-Kans would have had to accept Johnson's disastrous decision.[171]

In any case in which defense counsel raises competency over the client's objection, counsel should attempt to minimize the adverse effects on the lawyer-client relationship. Counsel should not disclose any confidential communications but simply indicate that, in her opinion, a competency evaluation is warranted.[172] If counsel's testimony is required, she will have to withdraw from the case. In addition, counsel should fully advise the client of her reasons for raising competency and inform the defendant of his right to a hearing to challenge the report prepared by the competency evaluator.[173] Counsel should also offer to withdraw if the client desires a new lawyer.

Finally, there are some defendants who are unable to discuss the competency issue, to articulate any goals, or to make any fundamental decisions. For some of these impaired clients, the best approach may be to wait briefly to see how the client responds before making any decision regarding competency. In some cases, freedom from alcohol or drugs, the stark reality of jail, or the return to medication will improve the client's ability to communicate with counsel. During this brief wait-

171. *See supra* note 167 and accompanying text. *See also* Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983) (lawyer wanted to present second degree murder defense based on depraved mind but defendant refused to allow defense; court held that defense lawyer bound to follow wishes of competent client even though detrimental); Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984) (lawyer who honored defendant's decision not to raise insanity defense not ineffective despite defendant's mental illness because judge found defendant competent and only psychiatrist to examine him regarding insanity considered the defendant sane).

172. The trial court generally will accept defense counsel's representation that an evaluation is appropriate without an evidentiary showing, especially if the court's observations suggest that the defendant is mentally ill. Winick & DeMeo, *Competence to Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 39 (1980). *See also* ABA STANDARD 7-4.2 (recommending that if defense counsel raises competence counsel should not divulge confidential communications); ABA STANDARD 7-4.8 and commentary (discussing the importance of protecting confidentiality and the attorney-client privilege). If the court is concerned that defense counsel's request for an evaluation is a delaying tactic, it could require counsel to file a sealed memo detailing why counsel feels a competency evaluation is warranted. The memo would remain sealed unless the evaluation indicated that there was no possible basis for believing that the defendant was incompetent. In such a rare case, the court, at the conclusion of the criminal case, could hold a contempt hearing to determine if counsel had acted improperly in requesting a competency hearing. The need to file a sealed memo and the threat of contempt will deter the few lawyers who would use a frivolous competency request to gain a desired delay. Given the imprecision of judgments about competency and the fluctuations in some defendants' mental conditions, it should be very difficult, however, to find a lawyer's request for a competency evaluation to be frivolous.

173. *See supra* note 127; WIS. STAT. § 971.14(4)(b) (1985-1986). *See also* ABA STANDARD 7-4.8 (spelling out the rights to be afforded a defendant at a competency hearing).

ing period, counsel should make every effort, consistent with respecting client confidentiality, to secure information from family, friends, or mental health professionals about the client. The lawyer should again attempt to discuss the case and the competency issue with the client before deciding how to proceed.

In cases in which defendants remain uncommunicative and incapable of articulating any choices, the role of defense counsel again involves more than just automatically raising the competency issue. A necessary first step is to undertake an analysis of the merits of raising the issue given the circumstances of the defendant's case. For some clients, the most appropriate action the lawyer could take would be to persuade the prosecutor to dismiss the charges or to pursue civil commitment proceedings. Such action may be warranted when the charges facing the client are minor, the client can be quickly stabilized on medication, or the client's living situation is very stable. In other instances, the client's mental condition may be so aggravated that, even though the charge is fairly minor, the lawyer has no recourse but to raise competency.[174] Similarly, when the client's ability to communicate is severely restricted and the nature of the case is such that the client's version of the incident is crucial, counsel may be compelled to raise the competency issue. For a few incompetent, uncommunicative clients, however, counsel may identify a course of action, other than raising competency, which would allow her to resolve the case favorably for the client. In such a rare case, counsel should be permitted to play a paternalistic role and secure that favorable result for the client without raising competency.[175]

---

174. For example, the client charged with criminal trespass to dwelling may be physically abusive to himself or others. Thus, counsel may feel compelled to raise competency to facilitate the defendant's transfer to a hospital.

175. Consider, for example, the case of a mentally ill defendant charged with criminal damage to property for intentionally breaking a store window. Because the defendant has engaged in similar conduct in the past, the defendant is arrested and jailed. The next morning the prosecutor charges the defendant but, prior to the initial appearance, offers to recommend a sentence of "time served" in exchange for the defendant's guilty plea. Defense counsel attempts to discuss the case with the defendant but soon recognizes that the defendant is incompetent. The defendant, badly shaken, pleads with counsel to help him get home. Counsel is then approached by the defendant's mother who confirms the long-standing nature of the defendant's condition. Defense counsel urges the prosecutor to drop the case or at least not oppose defendant's release without cash bail. The prosecutor refuses, saying that despite the defendant's mental problems, his conduct warrants a conviction. If counsel concludes that the defendant will not be released on bail, she should assist her client in entering a plea so as to secure his release. Raising competency or litigating the case will result in needlessly extending the defendant's detention. While counsel ultimately may be able to get the case dismissed by raising competency, most clients would prefer to take the proposed offer and go home. In such a case, therefore, counsel should be permitted to take this "protective action" and obtain the result that appears to be consistent with the client's wishes and best interests. *See* MODEL RULE 1.14. Additionally, counsel's actions are in keeping with the principle of client autonomy spelled out in Faretta v. California, 422 U.S. 806 (1975). While under existing case law a trial judge may not accept a guilty plea without a knowing and intelligent

VI. CONCLUSION

The role of the criminal defense lawyer in deciding whether to raise competency is indeed unavoidably difficult. The rule announced in the *Johnson* decision and set forth in ABA Standard 7-4.2 does not make that role any easier. By requiring defense counsel to act as an officer or friend of the court, the *Johnson* court unduly impinges upon the lawyer-client relationship, compromises zealous representation, and undercuts the defendant's right to individual autonomy. The case-by-case approach suggested in this Article allows defense counsel to play the role of zealous advocate. Such an approach will not eliminate tough judgment calls for defense counsel, for the indeterminacy of the competency issue and the varying circumstances of each case require different responses. In fashioning a response, however, the lawyer should respect, to the fullest extent possible, the value of client autonomy and provide her client the same zealous representation she would afford any other criminal defendant.

waiver of the defendant's constitutional rights, Horace v. Wainwright, 781 F.2d 1558 (11th Cir. 1986), many trial judges in practice would accept the plea of an incompetent defendant under the circumstances described in this footnote. *See also* Winick, *supra* note 17, at 959-79 (arguing that such pleas ought to be accepted even under existing case law).