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Professional Responsibility of the Criminal Defense Lawyer Redux: The New Three Hardest Questions

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ARTICLE

Todd A. Berger

Professional Responsibility of the Criminal Defense Lawyer Redux: The New Three Hardest Questions

Abstract. In 1966, Professor Monroe Freedman authored *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, a work that occupies an important place in the canon of legal ethics. Freedman believed that the three hardest questions facing a criminal defense attorney relate to whether it is ethical to discredit a truthful witness; whether it is proper to knowingly allow a client to testify falsely; and whether a lawyer may provide a client with legal advice when the lawyer suspects the client may use that advice to commit a crime.

Beyond Freedman's queries there are other important, yet largely unaddressed, ethical issues that feature prominently in the landscape of criminal defense representation. This Article identifies its own version of the "three hardest" ethical questions in the context of criminal defense practice, and proposes answers to these questions.

These issues are: (1) what is the ethically appropriate response when a crime victim who does not wish to pursue prosecution asks a criminal defense attorney, "what happens if I don't come to court?"; (2) what should defense counsel say to a judge who directly asks counsel about incriminating information that is protected by attorney–client confidentiality when the judge can easily infer that defense counsel's refusal to answer is an indication of the client's guilt; and (3) can defense counsel zealously advocate for an individual client if doing so would potentially anger a prosecutor who is likely to retaliate by punishing the attorney's other clients?

Author. Associate Professor of Law, Syracuse University College of Law. The author issues a special thank you to Marissa Olsen and to St. Mary’s University School of Law for inviting him to participate in the 16th Annual Symposium on Legal Malpractice and Ethics hosted by the *St. Mary’s Law Journal*. Additional thanks are given to Professors Jason Hoge and Gary Pieples for their time and thoughtful feedback. The author is also grateful to Beverly Beaver, Leigh Wiclair, Sarah Kapitko, Sarah Ballard, and Yolanda Beasley for their advice and suggestions. As always, a special thank you is owed to Hedimay Berger for her careful and detailed editing.

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INTRODUCTION

In 1966, Professor Monroe Freedman authored *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, a work that occupies an important place in the cannon of contemporary legal ethics.¹ Freedman suggested that the three hardest questions facing a criminal defense attorney are the following: (1) is it ethical to discredit a truthful witness; (2) is it proper to knowingly put a witness on the stand who will commit perjury; and (3) may a lawyer provide a client with legal advice

1. See William H. Simon, "Thinking Like a Lawyer" *About Ethical Questions*, 27 HOFSTRA L. REV. 1, 1 (1998) (stating the following with regards to the importance of Freedman's article, "[s]uppose you had to pick the two most influential events in the recent emergence of ethics as a subject of serious reflection by the bar. Most likely, you would name the Watergate affair of 1974 and the appearance a few years earlier of an article by Monroe Freedman. The article was a discussion of what Freedman called the 'Three Hardest Questions' surrounding the responsibilities of criminal defense lawyers.") (citing Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter Freedman, *The Three Hardest Questions*]). Interestingly, the Freedman article sparked enormous controversy and some of Freedman's proposed answers "even led Warren Burger, then a federal appellate court judge, to initiate professional disciplinary proceedings against Freedman." See Abbe Smith, *Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 957-58 n.158 (2000) (emphasizing the importance of zealous advocacy in a criminal defense practice).

when the lawyer suspects the client may use that advice to commit perjury?² Since the publication of *The Three Hardest Questions*, legal scholars have devoted a substantial amount of scholarly attention to these particular topics.³

To the extent that legal ethicists have addressed other ethical dilemmas in the practice of criminal law, a significant amount of focus has been trained on topics relating to witness coaching,⁴ the destruction of evidence,⁵ conflicts of interest,⁶ attorneys' fees,⁷ trial publicity, and public statements.⁸ Legal commentators have also addressed other ethical concerns that occur in criminal defense practice, including issues such as the use of preemptory challenges on the basis of race and the classic, "How can you defend those people?" (although the latter question may be characterized as relating more to general moral concerns as opposed to how to conduct oneself in accordance with relevant ethical rules).⁹

The above topics are obviously worthy of discussion and present their own set of ethical difficulties. Nevertheless, limited attention has been

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

3. See David S. Rubenstein, *Remembering Monroe*, J. KAN. B. ASS'N, July–Aug. 2015, at 14, 14 n.3 (noting "[t]o this day, Freedman's canonical article is one of the most—if not the most—widely cited article on legal ethics ever").

4. See generally James Farragher Campbell, *Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand*, 36 HOFSTRA L. REV. 265, 265 (2007) ("How a defendant delivers his testimony is often as crucial as *what* he testifies to. How does defense counsel go about preparing her client for the witness stand?"); Roberta K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret,"* 38 HASTINGS CONST. L.Q. 1007–08 (2011) (discussing the ethical constraints on witness preparation in trial advocacy).

5. See generally DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 595–621 (2d ed. 1998) (describing the methodology employed by criminal attorneys when undercutting damaging evidence); Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?*, 62 HASTINGS L.J. 1177, 1181–82 (2011) (analyzing the difficulties practitioners often face with the treatment of potentially incriminating physical evidence).

6. See generally JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS (2d ed. 2016) (addressing the topics of conflicts of interest, attorneys' fees, and trial publicity in substantial detail over several chapters).

7. *Id.*

8. *Id.*

9. See Tim Kiefer, *Real Lawyers by Kenneth Farmer* WIS. LAW., Mar. 2015 (book review) (discussing the issues that affect defense attorneys). See generally Brent E. Newton, "How Can You Defend a Person You Know Is Guilty?": Reflections of a Public Defender, 33 AM. J. TRIAL ADVOC. 167 (2009) (recounting a prosecutor who used peremptory strikes to remove the African-Americans in the jury pool, and, in closing argument stated "we have been concerning ourselves with the civil rights of the defendant for the past twenty years . . . and it's time we started thinking about the civil rights of the victims").

devoted to addressing other important ethical issues that feature prominently in the landscape of criminal defense representation. These other largely unaddressed ethical dilemmas are not only frequently encountered by criminal defense attorneys in courtrooms across the country, they also pose questions of substantial ethical complexity. To that end, this Article identifies its own newer version of the “three hardest” ethical questions in the context of criminal defense practice.¹⁰

The issues this Article intends to shed light on are as follows:

- (1) What is the ethically appropriate response when a victim of a crime who does not wish to pursue prosecution asks a criminal defense attorney, “*So, what happens if I don’t come to court?*”
- (2) What should defense counsel say to a judge who directly asks counsel about incriminating information that is protected by attorney–client confidentiality when the judge can easily infer that defense counsel’s refusal to answer such a question is an indication of the client’s culpability?
- (3) Can defense counsel zealously advocate for an individual client if doing so would potentially anger a prosecutor who is likely to retaliate by punishing the attorney’s other clients?

The purpose of this work is to provide meaningful guidance to those criminal defense attorneys who encounter these particular ethical dilemmas.¹¹

This Article proceeds in four parts. Part I addresses the definitional matter of what it means for a particular ethical question to be considered

10. I do not suggest the three issues identified by this Article as the new “three hardest questions” are literally the three hardest ethical questions attorneys face. There are many hard, ethical questions and it is impossible to say which three are the hardest. See Part I below detailing how this work defines a “hard” ethical question.

11. In addition to legal scholarship, it is not clear that this Article’s version of the three hardest questions receives much attention in law school professional responsibility classes. See Leah Wortham, *Teaching Professional Responsibility in Law School*, DEL. LAW., Dec. 1993, at 18, 19 (explaining that in ten years of teaching professional responsibility, Professor Wortham devotes three or four hours each semester “to some issues unique to criminal practice—duties regarding physical evidence that could be termed a fruit or instrumentality of the crime, legal ethics in plea bargaining, and prosecutorial conduct”). Of course, any particular professional responsibility class could address this Article’s version of the three hardest questions and it may be that other classes, such as law school criminal defense clinics, may address these questions as well. Certainly, this Article’s version of the three hardest questions are topics that frequently present themselves in the course of supervising my clinic students and also comprise a portion of the material covered in the seminar portion of the class.

“hard” or complicated. In addressing this question, to some extent, this Article re-frames Freedman’s understanding of this particular issue. Parts II through IV individually explore the ethical dimensions related to each of the above three questions. In so doing, this Article proposes workable responses and solutions to the new three hardest questions primarily, but not exclusively, from the perspective of the American Bar Association’s (ABA) Model Rules of Professional Conduct, the primary source of law that regulates the legal profession.

I. DEFINING A “HARD” ETHICAL QUESTION

Before turning to this Article’s version of the three hardest questions, it is of course necessary to define what is meant by a “hard” ethical question in the first place. In answering this question, this Article has adopted its own working definition of what constitutes a hard ethical question. To that end, this Article’s understanding of what makes for a “hard” ethical question departs somewhat from the definitional framework adopted by Freedman.

Simply put, this work defines a “hard” ethical question from the perspective of compliance with formal ethics rules, as opposed to Freedman’s approach which focused more on competing moral values.

A. *Defining “Hard” Ethical Questions by Adopting a Rules-Based Approach*

When Freedman explored the three hardest questions, there was “no professional consensus on their resolution.”¹² Indeed, at the time of Freedman’s 1966 writing, the ethics rules then in effect consisted of the 1908 American Bar Association’s *Canons of Professional Ethics*.¹³ These canons provided no clear answers to his ethical queries.¹⁴

Not surprisingly then, Freedman did not view the question of what constitutes a “hard” ethical question from the perspective of determining the meaning of a particular ethics rule. Rather, in his view, a “hard” question

arises where any answer to that question permits a lawyer to pursue a moral value but also requires another moral value to be sacrificed. The question is hard because it places moral values in irreducible conflict. The lawyer has

12. Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1105–06 (2016).

13. *Id.* at 1106.

14. *Id.*

no unambiguous response, morally speaking; whatever she chooses, she will do both right *and* wrong.¹⁵

In the years after Freedman wrote *The Three Hardest Questions*, the construction of formal ethics rules eventually moved beyond the 1908 *Canons of Professional Ethics*.¹⁶ Nevertheless, Freedman disagreed with those who saw ethical problems as capable of being resolved entirely through the application of a particular rule.¹⁷ In Freedman's view, "a rule produced a result, but it did so at the cost of evading the nature of the ethical problem it supposedly resolved."¹⁸

However, for the purposes of this Article, I have chosen not to identify the difficulty of an ethical dilemma by determining the moral value of a particular lawyer's response. Instead, I have chosen to define the difficulty of a particular ethical challenge by examining how a lawyer should respond in light of relevant ethics rules and guidelines—not abstract morals. To that end, legal ethics rules are not the same as moral pronouncements. As commentators have long recognized, ethics rules are written with respect to the values that are expected of "good lawyers" and not necessarily "good people."¹⁹ Professor Fred C. Zacharias has even referred to formal

15. Alice Woolley, *Hard Questions and Innocent Clients: The Normative Framework of the Three Hardest Questions, and the Plea Bargaining Problem*, 44 HOFSTRA L. REV. 1179, 1179–80 (2016) (footnote omitted). This is not to suggest that Freedman's view of attorney ethics was entirely theoretical and without grounding in the law itself. Freedman's view of legal ethics produced "a new client-centered paradigm for thinking about the relative roles of lawyers, clients, and courts in an adversarial system," and this new paradigm found legal support in Freedman's view of the Constitution. See Rubenstein, *supra* note 3, at 14. To that end, Freedman's basic premise was that the American adversarial legal system is rooted in the *Bill of Rights* and exists principally to affirm the human dignity of each individual. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 13, 26 (3d ed. 2004) (listing several cases in which the ability to litigate a claim is fundamental in the Bill of Rights).

16. Following the 1908 Canons of Professional Ethics, in 1969 the ABA adopted the Model Code of Professional Responsibility. *About the Model Rules*, AM. B. ASS'N http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Apr. 16, 2017). "The ABA *Model Rules of Professional Conduct* were adopted by the ABA House of Delegates in 1983." *Id.* For a history of the evolution of ABA ethics codes, see *id.*

17. Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. LEGAL EDUC. 569, 578 (1969) ("[T]hese issues do not appear to have been settled satisfactorily by the Canons of Professional Ethics. Indeed, several problems seem in fact to be created, or at least to be brought into sharper focus, by self-contradictions in the Canons themselves.")

18. Woolley, *supra* note 15, at 1184 (citing Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. LEGAL EDUC. 569, 578 (1969)).

19. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 227–28 (1993).

ethics rules as “morally neutral.”²⁰

Nevertheless, this Article’s version of what constitutes a “hard” ethical question does bear some similarity to Freedman’s point of view. Freedman’s characterization of a hard ethical question involves an “irreducible conflict” between competing moral values.²¹ This Article’s rendition of the three hardest questions also recognizes that hard ethical questions raise the potential for an “irreducible conflict.”

In this regard, a hard ethical question from the perspective of a rules-based analysis falls into one of two categories. Either, (1) a particular ethical dilemma represents a conflict between competing ethics rules and regulations (questions one and two of this Article) or (2) an irreducible conflict exists between the literal dictates of the relevant ethics rule and the practical concerns that make it difficult for an attorney to follow those dictates in the real world practice of law (this Article’s third question).

1. The Value of a Rules-Based Approach to Defining Hard Ethical Questions

As noted above, ethics codes have gradually evolved into more detailed documents over time. Moving beyond the 1908 Canons, under the direction of then-ABA President and later Supreme Court Justice Lewis F. Powell, Jr., in 1969, the ABA created the Model Code of Professional Responsibility.²² Eventually, the Code of Professional Responsibility was replaced in 1983 with the Model Rules of Professional Conduct (the Model Rules).²³

The Model Rules have been adopted, at least in part, as the formal ethics rules by every state in the country, with the exception of California.²⁴ It is for this reason that the Model Rules are the most

20. *Id.* at 228.

21. Woolley, *supra* note 15, at 1179 (characterizing the dilemma attorneys face between doing what is right as opposed to what is best for their client).

22. Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. L.Q. 637, 639 (1999).

23. *Id.* at 640; *see also About the Model Rules*, *supra* note 16 (“Before the adoption of the Model Rules, the ABA Model was the 1969 Model Code of Professional Responsibility. Preceding the Model Code were the 1908 Canons of Professional Ethics . . .”).

24. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. B. ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Apr. 16, 2017) (providing a history of the evolution of ABA ethics codes). Attorney conduct in California is regulated by a separate ethics code called the California Rules of Professional Conduct. *See generally* CAL. RULES OF PROF’L CONDUCT (West 2015) (providing a unique code of ethics for the lawyers of the California Bar). While not formally adopted by the State of California, California courts may look at ABA Model Rules for guidance “when

important set of ethics rules that regulate attorney conduct.

Indeed, Professor Cecelia Klingele has stated that the most influential source of guidance for attorney conduct “will be the rules of professional conduct that govern the behavior of lawyers within a specified jurisdiction: Because breach may result in professional sanction, lawyers are likely to pay close attention to the content of these rules.”²⁵ In fact, the Model Rules have been referred to as “quasi-criminal” in nature.²⁶

Accordingly, in the world in which criminal defense attorneys practice, ethical dilemmas are not viewed from the perspective of a particular moral quandary. Rather, for practicing attorneys, questions of legal ethics are likely defined by the “statute like” regulations that govern the profession.

In light of this realization, I have chosen to explore my version of the three hardest questions from the perspective of formal ethics rules. To that end, this work will principally address these three questions from the perspective of the ABA’s Model Rules of Professional Conduct, as the Model Rules are the primary source of law that regulates the legal profession.²⁷

It should be noted that while this Article’s stated purpose is to provide rules-based guidance with respect to its three particular ethical questions, doing so is at times complicated by the ambiguity of ethics rules and the

California does not have an ethical rule governing a specific issue.” San Diego Cty. Bar Ass’n, Legal Ethics Op. 2011-1.

25. Cecelia Klingele, *Confidentiality and Disclosure: What the New ABA Criminal Justice Standards (Don’t) Say About the Duties of Defense Counsel*, 38 HASTINGS CONST. L.Q. 983, 984–85 (2011).

26. John W. Allen, *Protecting the Privilege—MRPC 3.4(g) is NOT the Way*, MICH. B.J., Nov. 2006, at 48, 49.

27. See *About the Model Rules*, *supra* note 16 (“[The Rules] serve as models for the ethics rules of most states.”). In addition to the ABA’s Model Rules of Professional Conduct, there are two other influential sources of ethical guidance for criminal defense attorneys. These are the ABA’s *Criminal Justice Standards* and American Law Institute’s *Restatement (Third) of the Law Governing Lawyers*. The ABA’s *Criminal Justice Standards* have no legal authority unless adopted by a court or legislature. Rory K. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113 (2011). While generally non-binding, the *Criminal Justice Standards* function as a potentially influential source of guidance in terms of defining the ethical limitations of attorney conduct. Klingele, *supra* note 25, at 985. While also non-binding, another source of ethical guidance comes from the *Restatement (Third) of the Law Governing Lawyers*. The primary goal of the Restatement is not to supplant ABA ethics guidelines, but to complement them. The Restatement therefore is influenced not only by ABA ethics rules, but also by decisional law and other statutory text. Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 712 (1998) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS proposed final draft no. 1, at xxxvi (AM. LAW INST. 1996)). While this work is primarily focused on the ABA’s Rule of Model Conduct, it should be noted that neither the *Criminal Justice Standards* nor the *Restatement (Third) of the Law Governing Lawyers* contradicts the Model Rules that are referenced as part of the preceding analysis.

fact that a determination regarding ethical conduct is subject to a seemingly infinite number of factual variations.²⁸

As a result, this Article cannot always provide rules-based ethical guidance in terms of absolute dictates (this is particularly true with respect to questions one and two). Indeed, an attorney practicing in the real world may occasionally find herself faced with an ethical quandary in which her view of the most ethically appropriate course of action may inevitably boil down to her individual interpretation of a given rule coupled with her willingness to push ethical boundaries.

However, regardless of the fact that ethics rules can be ambiguous and ethical or unethical behavior can turn on slight factual variances, a rules-based approach to exploring ethical complexities has value. Indeed, despite these particular shortcomings, because lawyers practice in a rules-based world, “lawyers are likely to pay close attention to the content of these rules.”²⁹ In light of this observation, as stated previously, the purpose of this Article is to identify and, to the extent possible, provide concrete rules-based guidance to those attorneys who must attempt to navigate through the ethical minefields that are this Article’s three hardest questions.³⁰

28. Abraham Dash, *Lawyer-Client Privilege—Exceptions Swallowing the Principle?*, MD. B.J., Mar./Apr. 2011, at 46, 46 (“[T]he American Bar Committee and the various state bar committees that fashioned the Rules of Professional Conduct dealt with complex ethical issues that are difficult to find practical answers for, under the many different factual situations that can arise.”). Therefore, the language of any given ethics rule often times reflects numerous philosophical and practical differences of opinion. *Id.* In light of the above, it is not surprising that the ethical rules written by committees are often times ambiguous and unclear. *Id.* at 49.

29. Klingele, *supra* note 25, at 984–85 (2011).

30. It should be acknowledged that a rules-based approach to addressing ethical issues is not the most effective way to create a just society. Again, legal ethics rules and moral values are not necessarily the same. Zacharias, *supra* note 19, at 227–28. Certainly, it is not always clear that the answer to a particular ethical challenge, as provided for in a formal ethics regulation, is the most normatively appropriate way in which to create a more moral version of the practice of law. See Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CALIF. L. REV. 885, 886 (1996) (calling a rule-based approach to ethical analysis “technocratic lawyering” and positing that “this mode of lawyering discourages, and may even entirely thwart, a certain sentimental responsiveness integral to genuine ethical deliberation”); see also Michael Ambrosio, *Reflections on the Appearance of Impropriety Standard*, N.J. LAW., Dec. 2011, at 5, 10 (commenting on the work of psychologist Lawrence Kohlberg and suggesting a legalistic adherence to rules may ultimately prevent one from recognizing the rights and values that are necessary for the formation of a good society and to achieve justice). Additionally, this work does not take a position with respect to whether certain ethics rules are consistent with the various goals that comprise the American criminal justice system (such goals include finding the truth, “respecting individual dignity, equal justice, and maintenance of an accusatorial system”). David A. Harris, *The Constitution and the Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 494–99 (1992).

II. QUESTION # 1 (WHAT IS THE ETHICALLY APPROPRIATE RESPONSE WHEN A VICTIM OF A CRIME WHO DOES NOT WISH TO PURSUE PROSECUTION ASKS A CRIMINAL DEFENSE ATTORNEY, “SO, WHAT HAPPENS IF I DON’T COME TO COURT?”)

A. *The Factual Scenario*

Often times—and especially in domestic violence cases, where the parties frequently reconcile—a complainant decides that she wants to drop the charges. Perhaps the defendant is truly guilty, but the victim does not want to see him go to jail, either for financial reasons or otherwise. Perhaps the complainant and victim have worked to resolve whatever underlying issue led to the criminal case and all is forgiven. Perhaps the complainant simply lied to the police to get the defendant arrested for some reason. Regardless, she no longer wishes to go forward.

However, the complainant is unable to get in touch with the district attorney handling the case. The district attorney was either too busy to talk to her, or never called her back, or the district attorney’s voicemail was full.

Or, perhaps the complainant spoke with the district attorney and was told she could not drop the case. Often, witnesses think they can simply tell the prosecution they “don’t want to press charges” and the case will go away. After all, that is how things work on television. However, in the real world it is the prosecution who decides, even over the complainant’s objection, whether or not a case goes to trial.³¹

Certainly, questions relating to whether the rules-based answers this Article provides are morally correct, or effectively promote the goals of the American criminal justice system, are questions worthy of debate. However, providing an answer to such questions is not this Article’s intended purpose. In this sense, the exploration of such issues is indeed beyond the scope of this particular work. While this Article explores the answer to these questions under current ethics rules, future works can explore the normative value of these answers and, if necessary, propose changes that take into account broader questions of morality and the norms of the criminal justice process.

31. In domestic violence cases this is referred to as a “no-drop” statute or policy. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV 7, 16 (2004) (defining a “no-drop” policy as one in which “decisions to pursue a domestic violence case would be made by the government, not the victim”). The following Florida statute is an example of a “no-drop” statute:

It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter The filing, nonfiling, or diversion of criminal charges . . . shall be determined by . . . specialized prosecutors over the objection of the victim, if necessary.

FLA. STAT. § 741.2901(2) (2017); *see also* Mich. Standing Comm. on Prof’l & Judicial Ethics, Op. RI-302 (1997) (noting “it is the legal prerogative of the prosecutor to determine whether to prosecute or

Out of frustration, and in an attempt to resolve the matter in the manner that both the complainant and obviously the accused desire, the complainant will approach the defense attorney. This may happen in court, the complainant may come to the defense attorney's office, or the complainant may reach the defense attorney by phone. After the defense attorney discusses the case with the complainant and explains to her why she cannot simply drop the charges, the complainant usually asks something to the effect of, "*So what happens if I don't come to court?*"

When confronted with this situation, how can an attorney best represent her client and at the same time do so in compliance with governing ethics rules?³² Simply put, what can an attorney say, and what should an attorney say, when the complainant asks such a question?

Indeed, in answering this question, an attorney is necessarily required to navigate several different ethics rules, each of which regulate attorney conduct in its own unique way. There are certainly some answers to the ethical dilemma addressed in this Part that are clearly in compliance with ethics rules. Yet, there are also potential answers whose legality is subject to debate. This is due in large part to the ambiguity of certain ethics rules and the lack of guidance in the form of ethics opinions or decisional law interpreting these rules.

As will be seen below, the ethical boundaries related to how an attorney may respond when the complainant asks her, "What happens if I don't come to court?" depends in large part on each individual attorney's interpretation of the law and willingness to push ethical boundaries.

not, not the complainant?").

32. It should be noted that for the purposes of addressing all of this Article's ethical questions, specific Model Rules will be examined. However, Model Rule 8.4(a) contains a catch-all provision that reads, "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct." MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2016). Therefore, any specific violation of a model rule detailed in this Article would necessarily violate Model Rule 8.4(a). With respect to the question specific to this particular portion of the Article, obviously, other legal issues may arise when a complainant expresses her desire not to come to pursue charges. If the complainant informed the prosecutor of this intent, and depending upon what was said, the prosecutor may have an obligation to pass favorable and material evidence pursuant to *Brady v. Maryland*. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1983) (holding an accused's due process rights are violated when the prosecution withholds favorable evidence upon request from defense counsel). Further, if the complainant admits that she fabricated the story, this may raise questions relating to the Fifth Amendment right against self-incrimination and whether the prosecution should initiate charges for making a false police report. *See* U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . ."). That being said, this work is focused only on addressing the question of an attorney's compliance with formal ethics rules.

B. *The Ethical Response*

1. The Complainant Is Not a Represented Party

Before moving on, it is first necessary to make clear that it is well within existing ethical boundaries for defense counsel to have a conversation with the complaining witness in a criminal matter.³³

To that end, the complaining witness in a criminal matter is not considered a represented party, unless she has retained her own attorney.³⁴ In other words, the government is the true complainant, and the complaining witness is really just a witness for the government.³⁵

Therefore, it is plainly ethical to speak with the complainant without violating Model Rule 4.2 which provides that attorneys may “not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”³⁶ Simply put, not only is it ethical for defense counsel to speak with the complaining witness, because the witness is not considered a represented party, defense counsel is not required to ask the prosecutor’s permission to do so.

33. See Mich. Standing Comm. on Prof'l & Judicial Ethics, Op. RI-302 (1997) (explaining it is ethically permissible for a defense attorney to communicate “with a complaining witness without notice to or consent of the prosecutor”).

34. In addressing whether a criminal defense attorney engages in misconduct for communicating with the complainant without providing the prosecutor notice, it has been said

[t]he prosecutor is not the agent of the complaining witness as would be the case if a lawyer-client relation existed. As noted above, the prosecutor is not bound to move to dismiss the case at the request of the complaining witness, as would be the case if the prosecutor represented the complaining witness as a client. Thus, a criminal defense attorney does not violate MRPC 4.2 by initiating an *ex parte* interview with a complaining witness without notice or consent of the prosecutor.

Id.

35. *Id.*

36. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2016); see also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 245 (1972) (“A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party, as a witness does not ‘belong’ to any party.”). Further, it is ethically permissible for defense counsel to contact the complaining witness even if the defendant herself is the subject of a court order that prohibits contact with the complainant. See Op. S.C. Att’y Gen. (S.C.A.G. June 2, 2015) 2015 WL 3636394, at *8 (opining it is not unethical for a defense attorney to contact a victim in a case because it is part of the defense attorney carrying out reasonable diligence in defending his or her client).

2. The Ethically Obvious Answers

a. The Requirement of Diligent (Zealous) Advocacy

Although defense counsel may obviously speak with a complaining witness without first getting the prosecutor's permission, defense counsel must still adhere to the legal boundaries created by formal ethics rules. Moreover, when speaking with the witness, defense counsel also has certain ethical obligations with respect to representation of her own client.

Recognizing that defense counsel has ethical obligations with respect to her own client, it is important to note that Model Rule 1.3 provides a lawyer has an overarching responsibility to "act with reasonable diligence and promptness in representing a client."³⁷ This rule is sometimes referred as the duty to zealously advocate for one's client. The drafters of the Model Rules chose not to incorporate this language into its formulation of Rule 1.3, although such language previously existed in Canon 7 of the Model Rules of Professional Responsibility.³⁸ However, it is common practice for attorneys to speak of their obligation to zealously represent their clients because the Model Rules have certainly not abandoned the concept of zealous advocacy.³⁹ In fact, "five references are made to the concept of zeal in the preamble, commentary and background material within the overall text of" the Model Rules.⁴⁰

Model Rule 1.3 is important to the current discussion in that it requires that defense counsel's response to the complainant's inquiry comply with diligent/zealous advocacy in aiding the client's cause.⁴¹ Indeed, zealous advocacy is "especially important in the context of criminal defense, where the client's liberty interest is at stake."⁴²

37. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2016).

38. See George A. Riemer, *Zealous Lawyers Saints or Sinners?*, OR. ST. B. BULL., Oct. 1998, at 31, 31-32 (1988) (acknowledging the historical lineage and derivation of the concept of zealous advocacy, despite its absence from the current Model Rules); see also Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, 245 N.Y. L.J. (Mar. 11, 2011) ("[T]he word 'zeal' was removed from the only place it appeared in the proposed new rules, the Comment to Rule 1.3.").

39. See Riemer, *supra* note 38, at 31-32 ("[W]e should not water down one of the core duties of lawyers: to be zealous advocates on behalf of their clients."); see also Saunders, *supra* note 38 ("'Zealous advocacy' is what clients expect, and it is what they deserve.").

40. Riemer, *supra* note 38, at 32.

41. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016).

42. Herman J.F. Hoying, *To File or Not to File: The Practical and Ethical Implications of Motion Practice on Sentence Negotiations in Capital Cases*, 15 CAP. DEF. J. 49, 49 (2002) (first citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-1.2(b) (3d ed. 1992); and then citing *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948)).

Assume that defense counsel were to respond to the complainant by saying, “*You’re saying my client did a bad thing. I think it might be a good idea for you to come to court and testify. That way, he might get convicted and put in jail and you will not have to worry about him anymore.*”

One would be hard pressed to make the case that such a response is consistent with the comment to Rule 1.3, which provides that a “lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”⁴³ Indeed, one imagines that few criminal defense attorneys actually respond in such a manner, recognizing that such a response does not reflect the type of advocacy mandated by Rule 1.3.

However, if the above response constitutes too little advocacy, at what point may defense counsel’s response constitute too much advocacy? Or said another way, is there a way in which defense counsel may answer the complainant’s questions that is violative of the boundaries established by current ethical regulations? This question is addressed below.

b. Fairness to Opposing Party and Counsel

In the above example, defense counsel clearly does little to advance his client’s interests by actively encouraging the witness to come to court and testify against his client, thereby increasing the chances of a conviction. If such a response does not meet the requirement of zealous advocacy, would defense counsel have behaved ethically if she had said, “*If you don’t want the case to move forward, don’t come to court; just ignore the prosecutor or any court issued subpoenas you happen to receive,*” (or some variation of affirmatively telling the witness not to testify for the government)?

In answering this question, it is important to take note of Model Rule 3.4(a), which addresses fairness to opposing parties and counsel, and reads in relevant part, “[a] lawyer shall not unlawfully obstruct another party’s access to evidence.”⁴⁴ An ethics opinion authored by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility concluded, quite obviously, that affirmatively telling a witness not to testify on behalf of the prosecution violates Rule 3.4.⁴⁵

43. MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2016).

44. *Id.* r. 3.4(a).

45. See Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Op. 98-134 (1999) (responding to defense counsel’s question regarding whether it was proper to interview the complaining witness concerning the facts of the case and stating “[p]rovided you did not attempt to tell the witnesses not to testify for the Commonwealth, it appears your contact with them was

Indeed, conveying this information to the witness would unethically restrict another party's access to evidence, as the prosecution has the right to present this witness's testimony at trial.⁴⁶ This answer seems easy enough.

3. The Ethically Ambiguous (and the Most Common) Response

The two sections above have made clear that the defense counsel owes the client a duty of zealous advocacy, but that there are limits to how far defense counsel may go when advocating on her client's behalf.

However, it is unlikely that most criminal defense attorneys would respond in the same manner as the hypothetical advocate described in Part II(B)(2)(a) and abandon all pretense of zealous advocacy on the client's behalf. Nor is it likely that most criminal defense attorneys would affirmatively tell a complainant that she should not come to court, as in Part II(B)(2)(b).

In all likelihood, most defense attorneys will respond to the complainant's inquiry regarding the consequences of not coming to court by making a statement that is somewhere between the two extremes identified above, i.e., telling the witness she should come to court to prosecute your client or she should not come to court at all.

In this regard, the question becomes the following: How may an attorney respond to the complainant's inquiry regarding the consequences of not coming to court that is acceptable under prevailing ethics rules? Said differently, what type of advocacy is not too little, not too much, but just right?

A criminal defense attorney in Washington D.C. attempted to answer

ethically proper"). It should be noted that the opinions of state and local ethics committees, in many jurisdictions, are purely advisory. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 318 (2002) (observing "most state and local published ethics opinions are advisory in nature") (citation omitted). Nevertheless, as noted by Professor Peter A. Joy, the opinions are important for several reasons:

[F]irst, ethics opinions serve as a source of guidance for lawyers uncertain about their ethical responsibilities. Second, in a significant number of jurisdictions, ethics opinions are either binding upon or serve as some authority for disciplinary bodies and courts interpreting duties created by ethical rules. Third, federal and state court judges rely on state and local ethics opinions when resolving cases and controversies with legal ethics dimensions. Fourth, these ethics opinions serve as a source of bargaining leverage in negotiations between lawyers, between lawyers and their employers, and between lawyers and their clients.

Id.

46. Pa. Bar Ass'n Comm. Legal Ethics & Prof'l Responsibility, Op. 98-134 at 1 (1999).

this question by noting with specificity his two-part response when a complainant asks, “[w]hat would happen, . . . if I simply failed to show up for court?”⁴⁷

I . . . deliver some version of the spiel I was taught as a public defender: A subpoena is a court order. If you disobey the subpoena, the court could issue a warrant for your arrest. I am an officer of the court. I cannot advise you to ignore the subpoena. You should contact the prosecutor.

If pressed, I will concede that, depending on the facts of the case, it could be difficult for the government to make its case against the defendant without the complaining witness’ testimony and that the chances of the court actually issuing the warrant, at least in most jurisdictions, is very small. But, again, I cannot advise you to ignore the subpoena. That would have to be your decision.⁴⁸

Obviously, any given attorney may answer this question differently, alter words and phrases, use part of the above answer, none of it, or all of it. Nevertheless, I believe, based on my experience as a criminal defense attorney, that the above attorney’s response represents a fairly close approximation of how many criminal defense attorneys may respond when they find themselves confronted with this particular question.⁴⁹

It is for this reason that this work will address whether the above response is ethically appropriate (recognizing some variations of the response as described below). Indeed, a determination of whether the above response complies with existing ethics rules is particularly relevant for the many attorneys who likely respond in a similar manner.

In this regard, whether the Washington D.C. defense attorney’s response is ethically acceptable depends in large part on how one

47. See Jamison Koehler, *When the Complaining Witness Refuses to Testify in a Domestic Violence Case*, KOEHLER L. (Aug. 11, 2010), <http://koehlerlaw.net/2010/08/when-the-complaining-witness-refuses-to-testify-in-a-domestic-violence-case/>. This particular blog posting indicates the frequency with which this particular ethical dilemma manifests itself in criminal trial practice, as well as the lack of scholarly guidance that exists with respect to this question. As the comments section of this blog posting indicates, not only do many attorneys encounter this particular ethical dilemma, they are frequently left to ruminate on the answers to this question without more formal guidance. See *id.* (revealing several comments similar to the underlying question but varying factual scenarios).

48. *Id.*

49. My practice experience includes close to seven years as a public defender in Philadelphia, another two years providing prisoner reentry legal services at the Rutgers School of Law-Camden Federal Prisoner Reentry Project, and close to five years as the Director of the Criminal Defense Clinic at the Syracuse University College of Law.

interprets Model Rule 4.3 which addresses communications with unrepresented parties,⁵⁰ as well as the criminal prohibition against witness tampering. These issues are explored below.⁵¹

a. Rule 4.3: Giving Legal Advice to Adverse Unrepresented Parties

Model Rule 4.3 provides that when communicating on behalf of a client with a person who is not represented by counsel, “a lawyer shall not state or imply that the lawyer is disinterested.”⁵² Further, and of particular importance, this rule notes in relevant part that, “[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”⁵³

First, for the purposes of determining whether the defense attorney’s response is ethically appropriate, it is assumed the complainant knows, hopefully because this fact was communicated to her directly by defense counsel, that the attorney does not represent her and instead represents the defendant.

Second, it is important to note that beyond the requirement that a lawyer not state or imply that she is disinterested, Model Rule 4.3 can be broken down into two component parts, each of which must be satisfied for a violation of the rule to have occurred. The first part makes clear an ethical violation occurs only when the lawyer gives an unrepresented party legal advice.⁵⁴ The second part of Model Rule 4.3 provides that even if the lawyer gives an unrepresented party legal advice, the lawyer has committed an ethical violation only when the parties’ interests are in conflict with one another.⁵⁵

50. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2016).

51. As noted above, I view the Washington D.C. defense attorney’s statement as a fairly typical example of the response given by many criminal defense attorneys when answering a complainant’s question regarding the consequences of not appearing in court. As the proceeding Part demonstrates, the lawfulness of the attorney’s proffered response is subject to meaningful debate and does not lend itself to obvious clarity. Consequently, it should be noted that I am not suggesting that the particular attorney whose response is addressed here has engaged in wrongdoing of any kind.

52. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2016).

53. *Id.*

54. *Id.*

55. *Id.*

1. Legal Advice

In turning to the first part of Model Rule 4.3, does the Washington D.C. criminal defense attorney's response constitute legal advice?

While the model rule itself does not define what is meant by legal advice, courts have attempted to provide their own definition.⁵⁶ In this regard, courts have held that "there is a difference between merely providing legal information and providing legal advice."⁵⁷ However, defining the exact difference between what constitutes legal information and legal advice is extremely difficult. In fact, one commentator has argued the difference between legal advice and legal information is "a variation of Justice Stewart's pornography definition, 'I can't define it, but I know it when I see it.'"⁵⁸

With respect to the ethical prohibition attendant to providing legal advice to unrepresented parties, one definition used by courts and cited to approvingly by one legal commentator defines legal advice "as giving an opinion as to the law applicable to the subject matter."⁵⁹ Professor Russell Engler has stated that "[f]or the purpose of recognizing impermissible statements or communications to unrepresented persons, this definition of legal advice is instructive."⁶⁰

Based on the above definition, it would appear that some, but not all, parts of the criminal defense attorney's answer as described above do in fact, "give an opinion as to the law applicable to the subject matter."⁶¹ In this regard, the first part of the answer—in which the lawyer tells the witness that she is an officer of the court, that she cannot tell the witness to ignore a subpoena, and that the complainant should talk to the prosecutor—does not seem like legal advice. In fact, the lawyer is actually telling the complainant that the lawyer cannot help her and the complainant should talk with someone else. That is clearly the opposite of

56. See, e.g., *Dawson v. N.Y. Life Ins. Co.*, 901 F. Supp. 1362, 1367 (N.D. Ill. 1995) (distinguishing between communication of a legal nature and the application of law to facts, such as instructing on how to use information or consulting about legal consequences).

57. *Id.*

58. John M. Greacen, "No Legal Advice from Court Personnel" *What Does That Mean?*, JUDGES' J., 1995, at 10, 10.

59. *Franko v. Mitchell*, 762 P.2d 1345, 1360 (Ariz. Ct. App. 1988) *disapproved on other grounds*, *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001) (en banc); see also Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 96 (1997) (noting the definition of legal advice is also "an important inquiry in cases involving alleged attorney malpractice").

60. Engler, *supra* note 59, at 96.

61. *Franko*, 762 P.2d at 1360.

legal advice.

The same may not be so readily said regarding the second part of the lawyer's answer, in which the lawyer tells the witness "*it could be difficult for the government to make its case against the defendant without the complaining witness.*"⁶² This seems to some extent to involve an application of the law to the subject matter. This part of the lawyer's statement helps the complainant achieve the goal of preventing the defendant from being convicted by drawing on the lawyer's knowledge of evidentiary law and the applicable burden of proof. This involves an application of legal principles to the subject matter at hand.

However, criminal defense attorneys have argued that the giving of mere "procedural information" does not constitute legal advice and is instead simply legal information.⁶³ As noted above, courts have accepted there is a difference between legal information and legal advice, although it may not always be easy to identify which category a particular statement belongs to.⁶⁴

To that end, would the lawyer's response appear more in line with legal information than legal advice if the lawyer had simply said, "*Generally speaking, when the complainant is not present, the prosecutor either withdraws the case or the judge dismisses it.*"?

While ethics authorities have offered little guidance with respect to what constitutes legal information in a criminal case,⁶⁵ the Texas Office of Court Administration, recognizing that court clerks are prohibited by

62. *See id.* (finding an attorney gave legal advice because he provided "an opinion as to the law applicable to the subject matter").

63. *In re Conduct of Lawrence*, 98 P.3d 366, 374 (Or. 2004) (en banc).

64. *See Dawson v. N.Y. Life Ins. Co.*, 901 F. Supp. 1362, 1367 (N.D. Ill. 1995) (finding attorneys did not give legal advice by providing factual information, as opposed to consulting on legal consequences); *see also* N.Y.C. Bar Ass'n, Formal Op. 2009-02 (2009) (noting when a lawyer's adversary is a self-represented party, "it would be permissible for a lawyer to freely provide to a self-represented non-client information that is 'purely a matter of fact'"). The same ethics opinion notes that un-represented parties are to be treated the same as self-represented parties for the purposes of a lawyer's giving advice. *Id.*; *see also* Greacen, *supra* note 58, at 10 (indicating the difficulty in determining the difference between legal information and legal advice).

65. This guidance abounds in non-criminal contexts, particularly with respect to the role of court clerks in advising the general public. *See* Robin Jean Davis, "Helping Self-Represented Litigants", W. VA. LAW., June 2002, at 8 (noting "[a] large poster explaining the differences between legal information and legal advice also is now displayed in every West Virginia court"); *see also Legal Information vs. Legal Advice*, TEX. OFF. CT. ADMIN., 1, 5, 6 (Sept. 2015), <http://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf> (providing general examples of the types of information that court clerks can provide to the general public).

statute from giving legal advice,⁶⁶ prepared guidelines and instructions to help the clerks distinguish between legal advice and legal information.⁶⁷ Those guidelines indicate that legal information may consist of information regarding “common, routinely-employed court rules, court procedures, administrative practices, and local rules” and that clerks are permitted to “explain generally how the court and judges function.”⁶⁸

Perhaps a future court or disciplinary authority in the context of a criminal defense attorney’s communicating with an unrepresented complainant would want to adopt a broad definition of legal advice, which would in turn narrow the types of communications that could be regarded as simply legal information. Certain policy concerns unique to this particular context may dictate such a result, namely that the purpose of Rule 4.3 is to prevent unrepresented parties from being taken advantage of,⁶⁹ and also to further the truth seeking function at the core of the criminal justice system.⁷⁰

However, putting such policy matters aside, if one were to employ the same analytical framework adopted by the Texas Office of Court Administration, it can certainly be argued that defense counsel’s statement, “*Generally speaking, when a witness is not present the case is dismissed,*” constitutes mere legal information. In this sense, defense counsel’s statement appears less like “an opinion as to the law applicable to the subject matter”⁷¹ and more a statement reflecting routine court procedures⁷² and explaining “generally how the court and judges function.”⁷³

Accordingly, whether one has provided legal advice may turn on the artful use of certain words and phrases and even then, may be subject to debate.⁷⁴

66. See TEX. GOV’T CODE § 81.101 (West 2015) (defining the phrase “practice of law”).

67. See *generally Legal Information vs. Legal Advice*, *supra* note 65 (distinguishing between legal advice and legal information as well as providing a list of actions clerks are allowed and prohibited from engaging in).

68. *Id.* at 5.

69. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 898 (2011) (citing MODEL RULES OF PROF’L CONDUCT r. 3.4(a) cmt. 2 (AM. BAR ASS’N 2016) (positing “[t]he basis for the rule against giving legal advice to unrepresented parties is ‘the possibility that the lawyer will compromise the unrepresented person’s interests’”).

70. See Harris, *supra* note 30, at 494 (stating that of the goals the criminal justice system is designed to promote, finding the truth emerges as a preeminent goal).

71. Franko v. Mitchell, 762 P.2d 1345, 1360 (Ariz. Ct. App. 1988) *disapproved by on other grounds*, Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593 (Ariz. 2001) (en banc).

72. *Legal Information vs. Legal Advice*, *supra* note 65, at 1, 5.

73. *Id.*

74. If one were to conclude that the lawyer’s advice was ethically permitted, but nevertheless

2. Adverse Party

It may be suggested that parsing each sentence of a lawyer's given answer to determine if the lawyer provided the unrepresented complainant with legal advice is not necessary. In this regard, one could conclude even if the entirety of the sample answer is legal advice, the defense attorney will not have violated Rule 4.3.

The reason for this is simple. Rule 4.3 only prohibits the giving of legal advice to an unrepresented party when the lawyer "knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."⁷⁵ In fact, comment 2 to Rule 4.3 emphasizes this fact and reads in relevant part, "[t]he Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's."⁷⁶ The argument follows that the interests of the defendant and the victim were not in conflict, because each wanted the criminal charges dismissed. Accordingly, the Washington D.C. defense lawyer's statement did not violate the strictures of Rule 4.3, even if parts of it did constitute legal advice.

However, there is little case law addressing the question of when the parties in a criminal case may find their interests are in conflict with one another for the purposes of Rule 4.3. Further, the rule itself does not address this particular question in its text or the accompanying comments. What little guidance exists with respect to this issue can be gleaned from the case of *In re Conduct of Lawrence*,⁷⁷ in which the Oregon Supreme Court held in the specific context of a domestic violence case, the defendant and the complainant's interests were deemed to be per se adverse to one another, despite the fact that both parties desired withdrawing the criminal charges.⁷⁸

caused the complainant to absent herself from court, it cannot be said that the lawyer violated Model Rule 3.4. Rule 3.4 provides that, "[a] lawyer shall not *unlawfully* obstruct another party's access to evidence." MODEL RULES OF PROF'L CONDUCT r. 3.4(a) (AM. BAR ASS'N 2016) (emphasis added). Even assuming that the complainant's not coming to court constituted obstructing the other parties access to evidence, because defense counsel's statement complied with Rule 3.4(a), it cannot be said to be unlawful in that regard. However, the opposite conclusion may be true with respect to the crime of witness tampering, as discussed below.

75. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2016).

76. *Id.* at cmt. 2.

77. *In re Conduct of Lawrence*, 98 P.3d 366, 373 (Or. 2004) (en banc).

78. *Id.*

In *Lawrence*, defense counsel provided legal advice to the complainant in a domestic violence case because the complainant wished to see the case dismissed.⁷⁹ The lawyer advised the complainant that in the lawyer's opinion, the Oregon Constitution "granted to victims of domestic assault the right to require a trial court to dismiss the criminal charges against the defendant."⁸⁰ Based on this particular interpretation of the state constitution, defense counsel instructed the complainant that she should speak with the district attorney and also instructed her on how to present this particular legal argument to the trial judge.⁸¹

When the district attorney's office filed a disciplinary complaint accusing defense counsel of violating Oregon's then version of Model Rule 4.3,⁸² defense counsel in turn argued that she did not provide legal advice to a party in conflict with her client because the complainant and the defendant "desired the same outcome," meaning dismissal of the criminal case.⁸³

The Oregon Supreme Court noted its version of Rule 4.3 did not define what it meant for a person's interests to be in "conflict" with that of the client.⁸⁴ However, the court found the disciplinary rule defining what constitutes a conflict of interest in the representation of current clients did provide useful context.⁸⁵ Under the disciplinary rules in Oregon then in

79. *Id.*

80. *Id.* at 369–70.

81. *Id.* at 370.

82. *Id.* at 372. The applicable version of Oregon Disciplinary Rule, DR 7–104(A), provides, in part:

During the course of the lawyer's representation of a client, a lawyer shall not:

* * * * *

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

OR. CODE OF PROF'L RESPONSIBILITY r. 7-104(A) (2003). This particular rule differs from Rule 4.3 in that it does not reference "legal advice" and instead speaks more broadly of "advice" in general. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2016) (prohibiting a lawyer from giving legal advice to an unrepresented person). The Oregon Disciplinary Rules at issue in *Lawrence* have been repealed. Oregon has enacted a new disciplinary code that tracks more closely to the entirety of the ABA Model Rules of Professional Conduct. OR. RULES OF PROF'L CONDUCT (2015).

83. *In re Lawrence*, 98 P.3d at 372 (restating defense counsel's view "that there was no possibility of a conflict of interest in any event, because both [the defendant] and [complainant] desired the same outcome: dismissal of [the defendant's] criminal case").

84. *Id.* at 373.

85. *Id.*

effect, a conflict could be “actual” or “likely” and of particular pertinence, a “likely” conflict of interest could occur when “the objective personal, business or property interests of the clients are adverse.”⁸⁶

The court went on to hold,

We think that the objective personal interests of an alleged batterer and the batterer’s victim are inherently adverse and, therefore, that there is a ‘likely’ conflict of interest when a lawyer gives advice to both the abuser and the victim. For example, an unrepresented victim who is financially or otherwise dependent on the abuser may think that he or she has few options available other than to have the abuser return to the home to support or help the victim and any children involved. The victim, therefore, may be motivated to recant for reasons other than that the abuse did not happen. Such a scenario could place the victim in a position of having to lie, thereby placing the victim in danger of being charged with perjury or filing a false police report, among other things. In addition, a lawyer who has only the victim’s interests in mind well may be able to show the victim that other resources are available to assist him or her and that it would be in his or her and (and any children’s) best interest to have the abuser prosecuted.⁸⁷

The court further concluded pursuant to Oregon’s conflict of interest laws, the type of conflict that existed between the defendant and the complainant could not be waived by either party.⁸⁸

The opinion of the Oregon Supreme Court in *Lawrence*, is extremely broad in that the Court found that the interests of the complainant and the defendant in a domestic violence case are per se in conflict.⁸⁹ In this regard, *Lawrence* is particularly relevant because, as noted above, those instances in which a lawyer is asked by the complainant about the potential consequences of failing to appear in court occurs most often in domestic violence cases.⁹⁰

However, much of the court’s reasoning appears related to a specific type of domestic violence case—those in which the truthful victim may be

86. *Id.* (citing Disciplinary Rules 5–105(A) and (A)(2)).

87. *Id.* (internal citations omitted).

88. *See id.* at 373 n.9 (finding the conflict at issue not waivable and therefore distinguishable from other types of conflicts (citing Oregon Att’y Disciplinary Rules, DR 5–105(D) and (F), and DR 7–104(A)(2)).

89. *Id.* at 373.

90. *See, e.g.,* Koehler, *supra* note 47 (stating domestic violence victims often approach defense attorneys to determine the consequences of not showing up for court because he or she no longer wants to pursue the claim).

motivated to recant to ensure that the defendant can continue to provide financial or other types of familial support. In the *Lawrence* case, this appeared to be an issue of some concern.⁹¹

Yet, there are obviously other types of domestic violence cases (for example, those between short term romantic partners, those in which the parties have no children, those in which neither party is financially dependent upon the other, and those cases in which the parties do not even remain in contact with one another). Moreover, while most common in the context of domestic violence cases, the *Lawrence* court's decision does not address instances in which a complainant in a case that does not involve domestic violence asks defense counsel about the consequences of not coming to court. In light of the above, the rationale of the *Lawrence* decision is of questionable value in those criminal cases that differ factually from the facts of *Lawrence* itself.

Further, how the *Lawrence* court chose to define an instance in which the parties' interests may be in conflict with one another is related to how the state of Oregon's attorney disciplinary rules defined potential conflicts of interests between an attorney's own clients.⁹² In this sense, the court specifically found that a *likely* conflict existed between the parties' personal interests.⁹³ However, such language is not contained in ABA Model Rule 1.7, which addresses conflicts of interests between current clients.⁹⁴ Further, legal ethicists have observed "conflict of interest rules vary among states," in part, "because of the different treatment accorded to 'potential' versus 'actual' conflicts of interest and the waiver and consent requirements."⁹⁵

Moreover, it is worth noting that the government and the defendant, but not the complaining witness, are the named parties in the criminal

91. *Lawrence*, 98 P.3d at 373 n.8 ("In the present case, Patricia Battle stated in her request for waiver of the no-contact condition of Warren Battle's release agreement that her husband never had been abusive to her and that she needed him at home to care for their two daughters while she was at work.").

92. *Id.* at 373 (discussing Oregon's Disciplinary Rule 5-105(A) which declares that a conflict may be likely when considered from an objective standpoint).

93. *Id.*

94. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016). It is not clear that an Oregon court could reach the same conclusion today. As noted above, the Oregon disciplinary rules at issue in *Lawrence* have been replaced by a version that more closely tracks to the language of ABA Model Rule 1.7. See *supra* note 82.

95. 1 DUNCAN E. OSBORNE & ELIZABETH L. MORGAN, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS § 4:19 (2016).

charge.⁹⁶ Therefore, the complaining witness and the defendant are not, by definition, averse to each other. Rather, the parties that are by definition averse to each other are the government and the defendant. (This is precisely why it is the state and not the complainant who has the authority to drop the charges.)⁹⁷ To that end, and despite the view of the *Lawrence* court, some may suggest that it strains common sense to conclude that the complaining witness's and the defendant's interests are in conflict with each other, when both parties express the identical interest, i.e., that the defendant not be convicted.

Ultimately, whether our D.C.-based criminal defense lawyer's advice, in which he tells the complainant about the consequences of not appearing in court, is violative of Rule 4.3 is not obvious. How one answers this question depends in part on how one defines legal advice in the context of communicating with an unrepresented party, and the answer also depends upon how a given court may determine when the interests of the defendant and the complainant are in conflict with one another.

b. Witness Tampering

Beyond ethical considerations, the crime of witness tampering may be implicated when an attorney responds to the complainant's question regarding the likely consequences of not coming to court.

While different jurisdictions may refer to the crime of witness tampering by a different name or have differently worded statutes, the Model Penal Code version of witness tampering, a similar version of which has been adopted in several states, is instructive with respect to this concern.⁹⁸

In terms of answering a complainant's query regarding the consequences of not coming to court, Model Penal Code section 241.6(d) provides that a person is guilty of witness tampering "if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to . . . absent

96. Mich. State Bar Comm. on Prof'l & Judicial Ethics, Op. RI-302 (1997).

97. *See id.* at 2 (acknowledging the prosecutor's right to refuse to dismiss a claim "at the request of the complaining witness").

98. Model Penal Code section 241.6 defines the crime of witness tampering. *See* MODEL PENAL CODE § 241.6 cmt. 1, n.8 (AM. LAW INST. 1980) (listing the following states have modeled their witness tampering statutes after the Model Penal Code version: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Kentucky, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, Massachusetts, Michigan, South Carolina, Tennessee, Vermont, Washington and West Virginia).

himself from any proceeding or investigation to which he has been legally summoned.”⁹⁹

It should be noted that a defense attorney can engage in witness tampering even if the witness is not in receipt of an actual subpoena, so long as the defense attorney believes that an official proceeding or investigation is pending or about to be instituted. As the comment to section 241.6 indicates, the term witness refers to one who is not just under subpoena, but one who will or may be called to testify (and for obvious reasons the complaining witness would fall into this category).¹⁰⁰ Hence, “it is no defense that the other person has not yet been subpoenaed or does not intend to testify.”¹⁰¹

That being said, clearly, the part of the D.C. defense lawyer’s statement in which he tells a witness: “*A subpoena is a court order . . . I cannot advise you to ignore the subpoena. You should contact the prosecutor.*”¹⁰² does not constitute witness tampering. Telling a witness to follow the law and to contact the prosecutor is basically anti-witness tampering.

However, will the defense lawyer commit the crime of witness tampering if he utters the second part of the proposed answer: “*If pressed, I will concede that, depending on the facts of the case, it could be difficult for the government to make its case against the defendant without the complaining witness’ testimony and that the chances of the court actually issuing the warrant, at least in most jurisdictions, is very small. But, again, I cannot advise you to ignore the subpoena. That would have to be your decision.*”¹⁰³

For the purposes of answering this question, perhaps the most important word in the Model Penal Code version of witness tampering is “induce.” While the Model Penal Code does not define what this term means, the Arizona Supreme Court addressed this issue in the case of *State v. Gray*.¹⁰⁴ The *Gray* court interpreted the use of the word “induce” in its own witness tampering statute, which is modeled after the Model Penal Code version, to mean, “‘to move by persuasion or influence’; ‘to call forth or bring about by influence or stimulation’; ‘EFFECT, CAUSE’; or ‘to

99. *Id.* § 241.6(1)(d) (AM. LAW INST. 1980).

100. *Id.* at cmt. 2 (commenting the term is broadly defined because whether someone is a witness within the meaning of the Model Penal Code depends on the extent to which the defendant seeks to influence and affect the other person’s behavior).

101. *Id.*

102. Koehler, *supra* note 47.

103. *See id.* (providing a response for when pressed by an unrepresented domestic violence victim about the consequences of failing to appear at court).

104. *State v. Gray*, 258 P.3d 242 (Ariz. Ct. App. 2011).

cause the formation of.”¹⁰⁵

Further, the Model Penal Code version of witness tampering does not require that the defense lawyer's statement actually induce the witness not to come to court. Instead, the Model Penal Code version requires only that the defense lawyer in making such a statement attempt to induce the witness from absenting herself from the proceeding.¹⁰⁶ The commentary to section 241.6(d) makes clear that the use of the word “attempt” in the statute means the actor “must intend to influence the other's behavior.”¹⁰⁷

Simply put, to be guilty of the Model Penal Code version of witness tampering, the lawyer must have intended—through the use of his statement to the witness—to influence or persuade the witness not to come to court.

Notwithstanding defense counsel's caveat that “*I cannot advise you to ignore the subpoena,*” it is reasonable to infer that the second part of the proposed statement, in which the witness is told that if she doesn't come to court the case will most likely be dismissed and a bench warrant will not be issued, was intended to influence or persuade the witness to absent herself from proceedings.

If defense counsel's intention was not to influence the witness to absent herself from judicial proceedings, there seems little reason defense counsel would say anything beyond directing the witness to speak with the prosecutor. Other than attempting to influence the witness not to come to court, what could be counsel's reason for telling the witness that not coming to court will help the client avoid a criminal conviction and there will likely be no consequences for failing to appear? If the lawyer's statement was not intended to influence or persuade the witness not to come to court, it seems entirely unclear what other purpose the statement was designed to serve.¹⁰⁸

105. *Id.* at 245 (citing *Induce*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004)).

106. MODEL PENAL CODE § 241.6(1)(d) (AM. LAW INST. 1980)

107. *See id.* at cmt. 2 (“The [lawyer] must have a purpose to induce or otherwise to cause a witness . . . to engage in the conduct [set out in the statute].”).

108. It should be noted that the attorney in the specific example used in this section provides the witness with additional information beyond the fact that she should contact the prosecutor only when “pressed by the complainant for a more detailed response.” One could argue that the attorney's reluctance to provide the witness with more information beyond the need to speak to the prosecutor suggests the attorney did not intend to influence the witness not to come to court. Then again, it can be argued that the attorney's intent to induce the witness not to come to court was formed after the complainant pressed the attorney for additional details. A jury could presumably

Further, it may be argued that even telling the witness, “*Generally speaking, when a witness is not present the case is dismissed,*” (which may be considered legal information) constitutes witness tampering. In this sense, regardless of whether a statement is considered legal information or legal advice, defense counsel has committed the crime of witness tampering if the jury concludes the statement was uttered with the intent of influencing or persuading (inducing) the witness not to come to court.

Lastly, it should be noted that committing the crime of witness tampering necessarily means a violation of two other ethics provisions. Witness tampering represents a violation of Rule 3.4(a) and its prohibition against unlawfully obstructing “another party’s access to evidence.”¹⁰⁹ A lawyer who engages in the criminal offense of witness tampering also violates Model Rule 8.4(b), which provides that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.”¹¹⁰

c. The Final Answer

As stated above, ultimately, how a lawyer should choose to respond when confronted with the complaining witness’s question regarding the consequences of failing to appear for court is subject to discussion.

The response that raises no ethical red flags is for the defense attorney to first inform the complainant that she represents the defendant and not the complainant. Beyond that, the D.C. lawyer’s statement to the effect of, “*A subpoena is a court order. If you disobey the subpoena, the court could issue a warrant for your arrest. I am an officer of the court. I cannot advise you to ignore the subpoena. You should contact the prosecutor.*” is ethically appropriate.¹¹¹

Such a statement does not obstruct the opposing party’s access to evidence as prohibited by Rule 3.4(a), nor does it constitute legal advice, implicating any of the concerns addressed by Rule 4.3. Nor does it raise the possibility of a conviction for witness tampering.

Further, it is unclear that a lawyer can lawfully say more than that without raising Rule 4.3 related concerns in terms of giving legal advice and advising an unrepresented party or without engaging in witness

reach either conclusion. This reality highlights the fact that the legality of an attorney’s response to a witness’s question regarding the consequences of not coming to court will invariably turn on the specific facts of each individual case.

109. MODEL RULES OF PROF’L CONDUCT r. 3.4(a) (AM. BAR ASS’N 2016).

110. *Id.* r. 8.4(b).

111. Koehler, *supra* note 47 (emphasis added).

tampering. Accordingly, because it is unclear that an attorney can press the matter farther than the immediate statement referenced above, such a statement satisfies Rule 1.3 and its mandate of zealous advocacy.¹¹²

Of course, some attorneys may choose to respond in a less constrained manner. Indeed, it should be acknowledged that differing interpretations are possible with respect to the ethical and criminal statutes implicated by this particular question. Using the above discussion as guidance, any given attorney may choose to frame her particular response in a manner that she believes does not run afoul of ethical or criminal concerns. Hence, how any given criminal defense lawyer chooses to respond may ultimately come down to how that individual attorney interprets the relevant law and how willing she may be to approach the ethical line.¹¹³

112. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2165 (2003) (“Lawyers cannot be expected to conform their behavior to certain standards if they do not know what those standards are. Moreover, lawyers may take the safe approach in the face of confusing ethical expectations about zeal and opt for reduced zealousness in the advancement of defendants’ interests.”).

113. It is worth briefly taking note of a common variation of the ethical dilemma created by the complainant’s question regarding the consequences of not coming to court. This variation occurs when the lawyer’s own client asks the lawyer, “*What happens if she [the complainant] doesn’t come to court?*” This dilemma is capable of a fairly clear rules-based solution. To that end, Model Rule 1.2(d) provides that

[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROFESSIONAL CONDUCT r. 1.2(d) (AM. BAR ASS’N 2016).

Professor Joel S. Newman, in noting Model Rule 1.2(d) is a “rule of syntax,” has provided the following illustration of how the rule should be interpreted:

If the lawyer uses the command form of the verb, then the lawyer is “counseling or assisting a criminal act” and should be disciplined. On the other hand, if the lawyer merely answers the client’s questions, then she is “discussing the consequences of a proposed course of conduct” and should not be disciplined.

Consider the following easy case; the actual transcript of a conversation overheard by an eavesdropping telephone operator:

The appellant: “. . . I killed her.”

The voice in Dallas: “Did you get rid of the weapon?”

The appellant: “No, I still got the weapon.”

The voice in Dallas: “Get rid of the weapon and sit tight and don’t talk to anyone, and I will fly down in the morning.”

Of course, the “voice in Dallas” (which belonged to a lawyer) was violating Model Rule 1.2(d).

III. QUESTION # 2 (WHAT SHOULD DEFENSE COUNSEL SAY TO A JUDGE WHO DIRECTLY ASKS COUNSEL ABOUT INCRIMINATING INFORMATION THAT IS PROTECTED BY ATTORNEY–CLIENT CONFIDENTIALITY WHEN THE JUDGE CAN EASILY INFER THAT DEFENSE COUNSEL’S REFUSAL TO ANSWER SUCH A QUESTION IS AN INDICATION OF THE CLIENT’S CULPABILITY?)

A. *The Factual Scenario*

Assume that a criminal defense lawyer represents a client charged with the crime of driving under the influence of alcohol. The lawyer interviews her client and learns, because the client told her during the interview, that he has been convicted of a felony offense in another state. (The particular offense or state does not matter much.)

The case proceeds to trial and the defendant is found guilty. The case is brought back for sentencing. In preparation for the sentencing hearing, the probation department prepares a pre-sentence report, part of which contains the defendant’s prior criminal record. The probation department compiles information related to the defendant’s prior criminal record by conducting a background check utilizing databases that are available to law enforcement. The probation report indicates that the defendant has no prior criminal convictions. The probation department made a mistake and missed the felony conviction from the other jurisdiction.

The fatal error was the use of the command: “Get rid of the weapon.”

What if the conversation had been as follows:

Appellant: “What would happen if I got rid of the weapon?”

The voice in Dallas: “If you got rid of the weapon, it would be harder to convict you.”

It is likely that the consequence of that conversation would have been the same as the consequence of the real one—the appellant would get rid of the weapon. However, while the actual conversation was a clear violation of Rule 1.2(d), the alternative conversation would have been an appropriate discussion of the legal consequences of a proposed course of action.

Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287, 290–91 (1994).

Accordingly, if the lawyer tells the client to encourage the witness not to come to court, then the lawyer will have violated Rule 1.2(d) because the lawyer will have counseled the client to engage in witness tampering, discussed in section (2)(b). MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2016). The lawyer will have also violated Model Rule 3.4(a), which prohibits unlawfully obstructing another party’s access to evidence. *Id.* r. 3.4(a). However, if the lawyer simply answers the client’s question by informing the client that “*if the complainant doesn’t come to court, it will be harder to convict you*” the lawyer is simply addressing the legal consequences associated with a particular act and no ethical violation will have occurred.

At the sentencing hearing, the trial judge reviews the probation report. She looks up at the prosecutor, looks at the defendant and then says to the defense attorney, “*I have reviewed the probation report. I can put the defendant in jail, or I can put him on probation. I do not see a prior criminal conviction. So, I am inclined to put him on probation.*” After uttering the above statement, the trial judge then turns to the defense lawyer and says, “*Counsel, are you aware of any criminal convictions that are not before the court?*”

What should the defense lawyer say or do when she is asked this question directly by the trial judge?

What follows below is an exploration of the competing ethical obligations that the defense lawyer must contend with when she finds herself in a situation in which a judge directly asks counsel about incriminating information that is protected by attorney–client confidentiality and counsel’s revealing such information would be detrimental to the client. This Part identifies the most ethically appropriate (albeit, inevitably flawed) response.¹¹⁴

114. It should be noted that the particular hypothetical used here involves a sentencing hearing. Ultimately, the ethical dilemma that is the subject of Part II of this Article which focuses on how defense counsel should respond when asked a question directly by the trial judge. As will be demonstrated below, this particular predicament implicates concerns related to “Confidentiality of Information” (Rule 1.6), “Candor Toward the Tribunal” (Rule 3.3), and “Diligence” (Rule 1.3). Ultimately, as will be further demonstrated, the way in which an attorney should respond in the context of this particular sentencing hypothetical is equally applicable in any factual setting in which defense counsel is asked a question directly by the trial judge and the same ethical considerations are attendant.

However, in the specific context of a sentencing hearing, this scenario raises an additional ethical question that is not the subject of this Article—whether the lawyer has an obligation to correct the trial judge in terms of the judge’s mistaken belief, even if the trial judge does not directly ask defense counsel if the information is correct. If the court relies on information provided solely by the prosecutor or by the probation department, so long as defense counsel does not falsely confirm or imply that the defendant has no prior criminal record, “there is a professional consensus that when the prosecutor misinforms the sentencing judge, or the judge wrongly assumes that the defendant has no prior criminal convictions, the defense lawyer need not correct the judge.” Green, *supra* note 12 at 1112–13 (citing several opinions authored by professional ethics committees). Indeed, although such information may be available as a public record, the lawyer’s knowledge of the defendant’s record is considered confidential and disclosure is therefore not allowed. *Id.* at 1113 (citing MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016)). Moreover, disclosure of such information would likewise “violate the duty of zealous advocacy” owed to the client. *Id.* (citing MODEL CODE OF PROF’L RESPONSIBILITY DR7-101(A) (AM. BAR ASS’N 1986)).

On the other hand, when the court is relying on information provided to the probation department, from the defendant himself, or the court is told directly by the defendant that he has no criminal record, regardless of the duty of confidentiality owed to the client, the lawyer must attempt to convince the client to rectify the problem, and if that is not successful, to withdraw from the proceeding. *See* MODEL RULES OF PROF’L CONDUCT r. 3.3(b) (AM. BAR ASS’N 2016) (requiring the lawyer take remedial measures when the lawyer is aware that the client has “engaged in criminal or

B. *The Ethical Response*

1. Defense Counsel's Competing Ethical Obligations

The above dilemma requires that defense counsel strike a delicate balance between competing ethics rules.¹¹⁵ First, a lawyer has a duty of candor to the tribunal as defined in Model Rule 3.3.¹¹⁶ Subsection (a)(1) of this rule provides in relevant part that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal.”¹¹⁷

Second, defense counsel must be mindful of her duty to maintain confidential client information reflected in Model Rule 1.6.¹¹⁸ The relevant portions of Rule 1.6 provide that, “[a] lawyer shall not reveal

fraudulent conduct” related to the adjudicatory proceedings); *see also* ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 87-353 (1987) (discussing the courses of action available to attorneys in situations where the attorney knows, or has reason to know, that his witness will give false testimony). If the court will not allow the defense attorney to withdraw, the lawyer is required to disclose the defendant’s falsehood to the court, even if doing so would require that counsel divulge otherwise confidential information. *Id.* Importantly, the above obligation also applies regardless of whether the defendant was under oath at the time he gave his statement. *See* Utah Ethics Comm. Op. 00-06 (2000) (reasoning that because the ABA Committee on Ethics and Professional Responsibility has even applied Rule 3.3’s disclosure requirements to *pretrial* matters, defense counsel’s duty to take remedial measures to correct the client’s falsehood applies regardless of whether the client is under oath). Further, the above course of action is also mandated when the client’s false statement was given only to the probation department as opposed to the court alone. *See* Philip A. Cherner, *The Attorney, the Client and the Criminal History: A Dangerous Trio*, 23 COLO. LAW. 569, 570 (1994) (noting the word “tribunal” within the context of ethics rules necessarily encompasses the probation department “as an arm of the court,” and therefore, “representations made to the probation officer are akin to those made to the judge and the same ethical constraints apply” (citing *Smith v. People*, 428 P.2d 69 (Colo. 1967) (en banc))).

115. Interestingly, the ABA’s Model Code of Judicial Conduct does not appear to address the propriety of a judge asking a question that triggers the duty of attorney–client confidentiality. This issue has also not been addressed by legal scholars. Certainly, a judge asking questions that implicate confidentiality concerns appears inappropriate, because the lawyer’s refusing to answer the question, citing ethical constraints, may be viewed as an implicit disclosure of information that is harmful to the client. Further, because of the Fifth Amendment right against self-incrimination, it would of course be inappropriate for the judge to put certain types of questions directly to the defendant himself. Why then should the judge be able to undermine the protection against self-incrimination by simply asking the lawyer a question that could not be asked of the client? Perhaps this topic has not been the subject of more formal code regulation because it seems unlikely that most judges ask questions of a lawyer for the express purpose of breaching confidentiality or discovering incriminating information. Moreover, the judge asking defense counsel questions regarding aspects of the client’s case, such as if the lawyer agrees with probation’s assessment of the defendant’s prior record, or if the lawyer knows the defendant’s whereabouts prior to the judge issuing a bench warrant, may be viewed as the judge treating the defendant fairly by bringing his lawyer into the decision-making process.

116. *See* MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 2016).

117. *Id.* r. 3.3(a)(1).

118. *See id.* r. 1.6 (requiring lawyers to keep information provided by clients confidential).

information relating to the representation of a client unless the client gives informed consent”¹¹⁹ or “the disclosure is impliedly authorized in order to carry out the representation.”¹²⁰ What constitutes information for the purposes of Rule 1.6 is indeed quite broad. As commentators have noted, Rule 1.6 makes clear that lawyers have an obligation to refrain from revealing *all* information relating to representation of a client that their clients have not consented to have disclosed,¹²¹ whatever its source.¹²²

Lastly, defense counsel has an obligation to zealously represent her client as defined in Rule 1.3, as previously discussed.¹²³

In the above scenario, defense counsel is stuck between the proverbial rock and an ethical hard place. She violates Rule 3.3(a)(1) and its prohibition against knowingly making false statements of fact to the tribunal if she says, “*Your Honor, you are correct. My client has no prior criminal convictions.*” Defense counsel knows this statement is false because she was told by her client that he had a previous criminal conviction.¹²⁴

119. *Id.*

120. *Id.* Rule 1.6 also provides several circumstances in which disclosure is permitted that are not otherwise implicated by this section’s discussion. *See generally id.* (allowing attorneys to reveal confidential information to prevent clients from engaging in criminal or fraudulent conduct if it will affect another party financially, or to mitigate damages if a client has engaged in such conduct).

121. Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 627 (2001) (citing MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2016)).

122. *See also* MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2016) (applying the confidentiality rule to information the client confidentially communicates as well as information the lawyer receives from other sources); Rofes, *supra* note 121, at 627 (“The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” (citing MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2016))).

123. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2016).

124. Of course, one may advance the indeterminacy of truth argument. Perhaps the client, for whatever reason, is simply making up the existence of the out-of-state conviction. Hence, a lawyer can never really know that the probation report is wrong, because the lawyer can never really know that the information provided to her by the client is actually true. Therefore, in affirming the validity of the probation report, the lawyer cannot be said to have knowingly made a false statement of fact. However, the drafters of the Model Rules have rejected the indeterminacy of truth argument. The Model Rules define “knowledge” by stating that knowledge “denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” *Id.* r. 1.0(f). Comment 8 to Rule 3.3, further provides that, “the lawyer cannot ignore an obvious falsehood.” *Id.* r. 3.3 cmt. 8. Obviously then, the drafters of the Model Rules have accepted that there is a point at which the lawyer will be deemed to have knowledge of a particular fact. In terms of whether a lawyer will be deemed to have knowledge of a particular fact because the lawyer was told such by the client, noted ethicist Steven Lubet has posited, “[a]s an ethical matter . . . we should be more ready to assume that our client’s words—both helpful and damaging—are likely to be true. It is after all, the client’s case.” STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 6 (Nat’l Inst. for Trial

On the other hand, defense counsel violates duty of confidentiality imposed by Rule 1.6 if she corrects the trial court and says, “*Your Honor, what’s in the probation report is not accurate. My client was convicted of a felony offense in another state.*” This constitutes an obvious violation of the lawyer’s duty of confidentiality because the existence of the out-of-state conviction constitutes information related to the client’s representation that was disclosed without the client’s consent, nor was such a disclosure impliedly authorized.

Disclosure of the conviction, which only increases the chance of the defendant receiving a worse sentence, also violates the duty of zealous advocacy mandated by Rule 1.3, which includes an obligation “not to harm or prejudice the client.”¹²⁵

2. The Prevailing View: Refuse to Answer, Citing the Duty of Confidentiality

ABA Formal Opinion 87-353, written in 1987, addressed the exact situation where the judge asks the defense lawyer whether her client has a criminal record and the lawyer is aware that the client does have a criminal record, either from her own investigation, or because she was told so directly by the client.¹²⁶ The opinion stated that because such an instance does not implicate questions of client fraud or perjury, the lawyer is prohibited under Rule 1.6 from disclosing information relating to the representation.¹²⁷ Further, the opinion noted that in addition to not revealing client confidences, the lawyer must also refrain from making any false statements to the court.¹²⁸ Accordingly, the authors of the opinion suggested that the lawyer should “ask the court to excuse [her] from answering the question.”¹²⁹

Of course, if the lawyer believed the information provided by the probation department were correct, the lawyer would confirm such. Therefore, it is fairly obvious that the only reason defense counsel has

Advocacy eds., 4th ed. 2009). Accordingly, for the purposes of this section’s hypothetical, it can be said that the lawyer who tells the judge that the defendant has no prior criminal record has knowingly made a false statement, because defense counsel will be deemed to have knowledge of the defendant’s out-of-state criminal conviction.

125. Green, *supra* note 12 at 1113 (citing MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A) (AM. BAR ASS’N 1986)).

126. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 87-353 (1987).

127. *Id.*

128. *Id.* at n.5.

129. *Id.*

refused to answer the judge's question regarding the existence of the defendant's prior criminal record is because counsel is aware of the fact that the defendant does in fact have a criminal conviction.

Refusing to answer the question in such a way may be viewed as an implicit disclosure of information provided by the client in violation of the duty to preserve client confidentiality. Further, it may be viewed as inconsistent with zealous advocacy—because of defense counsel's actions, the court and the prosecutor are likely to inquire further, discover the conviction and use that conviction in a manner that is harmful to the defendant.

Yet, the drafters of Formal Opinion 87-353 accepted this reality and without much elaboration, stated that it represented the most ethically appropriate course of action, despite its obvious shortcoming.¹³⁰ Indeed, as the drafters of the opinion went on to note, “[t]he Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry”¹³¹

It is important to recognize that the ethical dilemma described above is not unique to the context of sentencing. Rather, it can occur in almost any factual setting in which a judge asks defense counsel a question that implicates concerns related to client confidentiality, candor toward the tribunal and zealous advocacy. Indeed, other ethics advisory committees have likewise concluded, consistent with Formal Opinion 87-353, that when defense counsel finds herself in such a predicament, she should ask to be excused from answering the question, due to ethical concerns, even in a non-sentencing context.

To that end, the San Diego County Bar Association was asked by an attorney whether the attorney could “answer a court's question asking if she has any idea why her client is not in court, when Attorney is aware of incriminating information that she suspects may explain her client's absence?”¹³² In that particular case the attorney, who was representing the client on a drug charge, received a call from the client's mother the night before court in which the client's mother stated, “[D]on't expect to

130. This had previously been the position embraced by the older, Formal Opinion 287. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 287 (1953). Formal Opinion 87-353 reaffirmed the Ethics Committee's position that this was in fact the appropriate course of action. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987).

131. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 87-353 at n.5 (1987).

132. San Diego Cty. Bar Ass'n, Legal Ethics Op. 2011-1.

see Client in court tomorrow morning; he just left the house high as a kite.”¹³³ Sure enough, not only does the client not appear in court, but the judge asks the attorney on the record, “Do you have any idea why your client is not here?”¹³⁴

The Bar Association Ethics Committee (referencing both California’s disciplinary rules, as well as the ABA Model Rules of Professional Conduct) concluded that the attorney could not tell the court that she was unaware of where her client was because doing so would violate her duty of candor to the court.¹³⁵ The attorney, likewise, was “not at liberty to disclose the information imparted to her by the Client’s mother the night before, because even though that information was not relayed to her by the client and therefore is not protected by attorney-client privilege, it nonetheless constitutes confidential information.”¹³⁶

Of course, the drafters of the opinion were aware of the fact that in refusing to answer the question, the court might be put on notice that the attorney was in possession of information that was detrimental to the client, noting that the attorney would of course divulge to the court an exculpatory or unexceptional reason explaining the client’s absence, as such disclosure would not violate the duty of confidentiality.¹³⁷ Further, because the attorney’s refusal to answer, or to provide some exculpatory response to the court’s question regarding the defendant’s whereabouts,

133. *Id.*

134. *Id.*

135. *Id.* See *supra* note 24 for a discussion of the relationship between California’s ethical code and the ABA Model Rules of Professional Conduct.

136. San Diego Cty. Bar Ass’n, Legal Ethics Op. 2011-1. Comment 3 to ABA Model Rule 1.6 describes the relationship between the ethical duty of confidentiality and the attorney–client privilege as follows:

The attorney–client privilege and work–product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

MODEL RULES OF PROF’L CONDUCT r. 1.6. cmt. 3 (AM. BAR ASS’N 2016).

137. See San Diego Cty. Bar Ass’n, Legal Ethics Op. 2011-1 (citing Cal. State Bar Formal Op. 1993-133) (positing a disclosure of such exculpatory or unexceptional information does not violate attorney–client privilege because it is not information the client has requested not be revealed or that is otherwise detrimental or embarrassing to the client).

will prove detrimental to the client (the court will likely issue a bench warrant for the client's arrest), concerns related to zealous advocacy are once again brought to the fore.

Nevertheless, the ethics committee concluded that based on the facts of the case, the attorney's "only ethical option is to inform the court respectfully that due to applicable ethics rules she is not at liberty to answer the question."¹³⁸

3. Is There a Better Response than Refusing to Answer the Court's Question?

As demonstrated above, it is clear on the whole, ethics committees have concluded when an attorney is asked a question by the judge that implicates the three-fold ethics concerns of candor to the tribunal, client confidentiality, and zealous advocacy, the appropriate response is to refuse to answer the question citing relevant ethics rules. While cognizant of the shortcomings associated with such a response, as previously indicated, the ABA Formal Opinion noted, "[t]he Committee can offer no better guidance under the Model Rules"¹³⁹

Could the Committee in fact offer better guidance? Arguably they could, although such a conclusion is far from clear.

a. The Technically True Response

To that end, some attorneys may suggest the best possible response to a question posed by a judge that implicates these three particular ethical concerns is something other than refusing to answer the judge's question. Rather, the best and most ethically appropriate response is to say something that is technically true and not harmful to the defendant. Whether or not such a response is consistent with ethical regulations was not explored in either of the ethics opinions cited above.

To illustrate how such a response might work, let us return to the previous example taken from the context of a sentencing hearing. To that end, when the judge asks, "*Counsel, are you aware of any criminal convictions that are not before the court?*" the defense attorney would say something to the effect, "*I do not have any official documentation reflecting prior criminal convictions.*" Or, if the defense counsel was simply told by the client about the prior criminal conviction but never reduced such to writing, the attorney could

138. *Id.* (citing *In re Fee*, 898 P.2d 975, 979 (Ariz. 1995).

139. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 n.5 (1987).

pick up her file, look through it and say, “*I have nothing in my file reflecting prior criminal convictions.*” Defense counsel may also say, “*Your Honor, my client has no prior criminal convictions based on what is reflected in the probation report.*”

Those who might advocate for one of these technically true responses would likely suggest that this type of response represents an effective balance between these three competing ethical obligations. First, saying, “*I do not have any official documentation reflecting prior criminal convictions.*” (or something to that effect) complies with Rule 1.6 in that it does not represent a breach of attorney–client confidentiality.¹⁴⁰ The lawyer’s not having a particular court document does not seem to itself constitute information learned in the course of representing the client, and even if it did, it can be assumed that the client impliedly consented to this revelation because such a statement is far more advantageous to the client than the lawyer’s refusing to answer.¹⁴¹

In this regard, this technically true statement is more advantageous to the client than refusing to answer the judge’s question, because it likely produces no, or fewer, red flags. The lawyer’s response is calculated to make the judge believe the probation report is correct and the client has no prior criminal record. The client will accordingly receive a reduced sentence. Clearly then, this type of technically true response can be seen as more consistent with Rule 1.3’s duty of zealous advocacy than simply refusing to answer the judge’s question when such a refusal tacitly reveals to the judge and prosecutor the client’s prior criminal conviction.

Lastly, because such a statement is actually true, it does not constitute a false statement of fact and therefore does not violate the lawyer’s duty of candor to the tribunal for the purposes of Rule 3.3.

b. The Ethical Boundaries of a Technically True Response

However, while innovative, these technically true statements are arguably unethical. Such responses may be viewed this way because Model Rule 8.4(c) provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹⁴² Importantly, Rule 8.4(c), while overlapping

140. See MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016) (indicating attorney–client privilege as giving effect to client–lawyer confidentiality).

141. *Id.*

142. See *id.* r. 8.4(c) (“A fundamental principle in the client–lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to

somewhat with Rule 3.3's duty of candor to the tribunal, is equally applicable to an attorney's conduct and statements made before a trial court.¹⁴³

Of particular relevance to the question of whether these technically true statements given in response to the judge's question violate Rule 8.4(c), is the rule's use of the word "dishonesty."¹⁴⁴ While no decisional law or ethics opinions appear to have addressed the ethical ramifications of the technically accurate response to the ethical dilemma described immediately above, *In re Shorter*¹⁴⁵ is instructive with respect to what constitutes dishonest conduct.

In *Shorter*, the District of Columbia Court of Appeals was called on to review the decision of the Board on Professional Responsibility, recommending the defendant's disbarment following his federal conviction for failing to pay income taxes.¹⁴⁶ While the Court of Appeals concluded that the crime in question was not a crime of moral turpitude, the court held the defendant's disbarment was appropriate, in part because defendant violated an attorney disciplinary rule that prohibited conduct "involving dishonesty, fraud, deceit, or misrepresentation."¹⁴⁷

In particular, *Shorter* took note of the fact that agents for the Internal Revenue Service (IRS) had initiated tax collection efforts that predated the filing of criminal charges. During these tax collection efforts, the agents were attempting to identify any particular assets that could be used to pay Shorter's back taxes.

During these interviews, Shorter informed the agents that he had no personal assets.¹⁴⁸ At Shorter's criminal trial, an IRS Agent testified that when interviewed, Shorter was asked "if he had any bank account or any interest in any bank account . . . he replied no."¹⁴⁹ Similarly, when Shorter met with an IRS agent to make a financial statement, the agent asked Shorter if "he had cash in a bank account or a savings account or

representation.")

143. See, e.g., *In re Fee*, 898 P.2d 975, 980 (Ariz. 1995) (censuring lawyers who are not honest with settlement judge for violating Rules 3.3(a)(1) and 8.4(c)). See *Attorney Grievance Comm'n v. White*, 731 A.2d 447, 456–57 (Md. 1999) (holding a lawyer who lied in deposition and lied to the judge violated Rules 3.3(a)(1), 8.4(c), and 8.4(d)).

144. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2016).

145. *In re Shorter*, 570 A.2d 760 (D.C. 1990).

146. *Id.* at 761–62.

147. *Id.* at 767 (citing DR 1-102(A)(4)). While *Shorter* itself does not cite to Model Rule 8.4(c), the language of the disciplinary rule at issue in *Shorter* is identical.

148. *Id.* at 763.

149. *Id.*

any other financial institution,” and he answered that “[h]e had no accounts whatsoever.”¹⁵⁰

As it turns out, Shorter had a fairly interesting financial arrangement with his law partner, Bernadette Gartrell. Shorter would simply take the money that he earned from representing clients and would give that money to Gartrell.¹⁵¹ She would in turn put the money in a bank account that was used by the firm and was not in Shorter’s name.¹⁵² All of Shorter’s expenses were paid by his firm from accounts held solely by Gartrell.¹⁵³

Accordingly, while Shorter was aware of the fact the IRS was interested in identifying any particular assets he may have had access to for the purposes of repaying his back taxes, Shorter provided technically correct answers when he indicated that he had no bank accounts in his name.¹⁵⁴

The *Shorter* court held that fraud, deceit or misrepresentation, while somewhat different from each other, all require “kinds of active deception or positive falsehood.”¹⁵⁵ However, dishonesty, while also encompassing fraud, deceit and misrepresentation also “encompasses conduct evincing ‘a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness[.]’”¹⁵⁶ Thus, in the words of the *Shorter* court, “what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.”¹⁵⁷ Indeed, legal

150. *Id.*

151. *Id.* at 763–64.

152. *Id.* at 763.

153. *Id.*

154. *Id.* at 768 (describing Shorter’s responses as “technically true”).

155. *Id.* at 768 n.12 (providing specific definitions for fraud, deceit and dishonesty). Further, these terms are not defined in the Model Rules themselves. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016).

156. *In re Shorter*, 570 A.2d at 768 n.12 (citing *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). This particular definition of dishonest conduct has been accepted by other courts. See *People v. Katz*, 58 P.3d 1176, 1189–90 (Colo. 2002) (“[D]ishonesty’ . . . encompasses fraudulent, deceitful, or misrepresentative behavior. In addition to these, however, it encompasses conduct evincing a ‘lack of honesty, probity or integrity in principle’”); *Attorney Grievance Comm’n of Md. v. Sheridan*, 741 A.2d 1143, 1156 (Md. 1999) (“The most general term . . . is ‘dishonest,’ which encompasses fraudulent, deceitful, or misrepresentative behavior. In addition to these, however, it encompasses evincing a lack of honesty, probity or integrity in principle”). It also appears to have been generally accepted by legal commentators as well. See Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 306 (2004) (explaining the definition of dishonesty, which is not limited to fraudulent and deceitful acts).

157. *In re Shorter*, 570 A.2d at 768. In the example provided in this section, the lawyer has crafted her statement with the intent of misleading the trial judge in terms of the defendant’s prior criminal record. However, specific intent is not a necessary ingredient of dishonesty or

commentators have noted “the threshold for what constitutes ‘dishonesty’ under Rule 8.4(c) is lower than lawyers might expect.”¹⁵⁸

In light of the above definitions, the court concluded that because Shorter’s statements were *technically true*¹⁵⁹ and because he refrained from making, actually *false statements*, he did not engage in conduct that constituted fraud, deceit or misrepresentation.¹⁶⁰

However, the court held Shorter violated the attorney disciplinary rules by engaging in dishonest conduct, both because of the nature of his financial arrangements, which frustrated the IRS’s collection efforts, and because of the manner in which he answered the IRS agent’s questions.¹⁶¹

In terms of Shorter’s technically true responses to the agent’s questions, the court noted that “[b]y his own acknowledgment respondent [Shorter] knew what information the IRS was after, but for his own benefit refrained from supplying that information even when asked questions that grazed the truth . . . [t]his conduct was of a dishonest character”¹⁶²

Consequently, in view of *Shorter*, it is clear an attorney cannot simply claim she engaged in no ethical wrongdoing simply because she provided a technically true response to a judge’s question regarding the defendant’s prior criminal record (or other confidentially protected type of information where disclosure would harm the defendant). In fact, it can be argued that when a lawyer knows that a judge’s question is asked for the purposes of finding out a particular piece of information (similar to how Shorter knew the purpose of the IRS’s questions) and the attorney provides a technically true answer that otherwise creates a false impression in the mind of the court, (similar to how Shorter’s answers created a false impression in the minds of the IRS agents) such conduct, “evinces a lack of integrity and straightforwardness.”¹⁶³ In the words of the *Shorter* court, such conduct is “therefore dishonest.”¹⁶⁴

misrepresentation. See *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003) (noting that a violation of Rule 8.4(c) can be premised on mental state of intent, knowingness, or recklessness).

158. Richmond, *supra* note 156, at 306.

159. *Shorter*, 570 A.2d at 768.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

c. Defining Dishonest Conduct Based on the Factual Context

It may be suggested that an attorney's having to choose between lying to the court, disclosing client confidences and possibly undermining the client, while responding to a judge's question in a courtroom setting, is not the functional equivalent of Shorter being confronted by the IRS. In this regard, Shorter's acts of dishonesty were entirely for his own benefit. However, the attorney's response was not for her own benefit, but instead for the benefit of her client based on her attempt to balance out competing ethical obligations.

It is clear that the statement "*Your Honor, my client has no prior criminal convictions based on what is reflected in the probation report.*" was uttered with the intent of leaving the court with a particular impression that counsel knew to be untrue. This is precisely why many advocates believe that such a response is preferable to the implied disclosure that comes with asking to be excused from answering the judge's question. Therefore, it is difficult to argue that in making this particular statement the attorney's intent was something other than leaving the court with a particular belief concerning the defendant's prior record that the attorney knew to be inaccurate.¹⁶⁵

Accordingly, if an attorney should be found not to have engaged in an act of dishonesty, it cannot relate to the attorney's intent in uttering the above statement.¹⁶⁶ Rather, it may be suggested that what constitutes dishonest conduct should in part be determined by whether the attorney is acting for her own benefit or whether she finds herself on the horns of an ethical dilemma in a courtroom setting.

In this sense, perhaps as a policy matter, it may be wise to construe dishonest conduct differently based on the factual setting in which the attorney was behaving. The argument follows that society should attach less culpability to the acts of an attorney who finds herself in the thick of a court created ethical dilemma and attempts to best represent her client than it should to an attorney who misleads the IRS to avoid paying back taxes. The attorney who utters a technically true statement as a means of resolving this particular ethical trilemma should by definition not be viewed as having engaged in dishonest conduct.¹⁶⁷

165. However, as noted before, an attorney need not act with specific intent to violate Rule 8.4(c). See *In re Romansky*, 825 A.2d 311, 317 (D.C. 1990) (indicating the standard for dishonesty is recklessly or knowingly engaging in dishonesty).

166. *But see id.* ("In order to find a violation of the rule in this case, the Board must find that Romansky acted knowingly or recklessly when he adjusted the client bills.")

167. See *In re Shorter*, 570 A.2d at 768 (viewing technically true statements as dishonest only)

However, it may also be suggested that countervailing policy concerns dictate an attorney be held to the same standard of honest conduct regardless of whether she is acting outside of the courtroom, or attempting to balance out competing ethical obligations inside of it.

In this regard, this countervailing policy argument can be seen in the interaction between Rule 8.4(c) and Rule 8.4(d), which prohibits conduct that is “prejudicial to the administration of justice.”¹⁶⁸ Indeed, the interplay between these rules reflects emphasis on the particular importance of an attorney behaving honestly in her dealings with the tribunal. To that end, apart from Rule 3.3, which was previously addressed, a violation of Model Rule 8.4(c) may also violate Model Rule 8.4(d).¹⁶⁹

Courts have held that conduct “prejudicial to the administration of justice” consists of conduct which either taints or improperly interferes with the decision-making process of a tribunal.¹⁷⁰ Certainly, an attorney’s statement to the tribunal can bear directly upon any decision or the decision-making process of the court and could therefore, prejudicially influence the administration of justice.

Accordingly, because defense counsel’s statements can prejudicially influence the administration of justice, there seems to be little reason why an attorney navigating competing ethics rules in a courtroom setting should otherwise be subject to a more watered-down standard of what constitutes honest conduct than any other attorney. In this regard, a compelling reason certainly exists for applying exacting standards of honest conduct to those statements by defense counsel that can influence the court’s decision and correspondingly have a negative impact on the fair

when the maker of the statement lacks integrity and straightforwardness when making the statements).

168. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2016). A violation of Rule 3.3(a)(1) is also a violation of Rule 8.4(c). *See In re Fee*, 898 P.2d 975, 980 (Ariz. 1995) (concluding a violation of ER 3.3(a)(1) also amounts to a violation of ER8.4(c)); Att'y Grievance Comm'n v. White, 731 A.2d 447, 456–57 (Md. Ct. App. 1999) (ruling that providing false and misleading testimony violates both Rules 8.4(c) and 3.3(a)(1)).

169. MODEL RULES OF PROF'L CONDUCT r. 8.4(c), (d) (AM. BAR ASS'N 2016). *See also In re Hansen*, 877 P.2d 802, 804–06 (Ariz. 1994) (finding Hansen violated rules 8.4(c) and (d) by “engaging in conduct that involves dishonesty, deceit, or misrepresentation and that is prejudicial to the administration of justice”).

170. *See In re Reback*, 487 A.2d 235, 239 (D.C. 1985) (determining “the prohibition against conduct prejudicial to the administration of justice bars not only those activities which may cause a tribunal to reach an incorrect decision, but also conduct which taints the decision[-]making process” (internal quotation marks omitted)).

administration of justice. To that end, Rule 8.4 seems to embrace such an approach by drawing no distinction based on the factual setting in which counsel behaves.¹⁷¹

C. *The Final Answer*

Ultimately, when defense counsel is asked a question by a judge and answering that question would violate attorney client confidentiality and harm the client, it may be suggested that the most ethically appropriate response is for defense counsel to ask that she be excused from answering the question, citing ethical considerations.

There is no doubt that such a response is far from perfect. The refusal to answer the judge's question operates as an implicit disclosure of confidential client information and may ultimately harm the client.

Yet, as demonstrated above, it is unclear that the alternative, i.e., answering in a technically true manner that does not disclose client confidences and leaves the court with an inaccurate impression that is beneficial to the client, necessarily constitutes honest behavior. In this sense, because it is not clear that defense counsel can take a more aggressive tact, taking the safest ethical route and refusing to answer the question cannot be said to violate the attorney's duty of zealous advocacy.¹⁷² In fact, current legal authority indicates that while flawed in its own respect, asking to be excused from answering the judge's question is the most ethically sound response.¹⁷³

Perhaps defense counsel can refuse to answer the question, citing more generic reasons. For example, defense counsel could say, "*Your Honor, it is not my burden to produce any evidence for sentencing purposes that the government wants to use for the purposes of a sentencing increase.*"¹⁷⁴ Or, defense counsel could

171. The fact that the attorney did not act out of an obviously selfish motive should certainly be viewed as a mitigating sentencing factor if counsel is found to have engaged in dishonest conduct or conduct that prejudicially influenced the administration of justice. The Maryland Attorney Grievance Commission adopted this approach to violations of 3.3(a)(1) and 8.4(d) that arose in the context of "robo-signing" affidavits for foreclosures without the attorney having knowledge of or verifying the facts. Attorney Grievance Comm'n of Maryland v. Dore, 73 A.3d 161, 169 (Md. 2013).

172. See Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2164 (2003) (noting it is ethically appropriate to refrain from the most aggressive form of advocacy when the ethical ramifications of such conduct are unclear).

173. See *supra* Part III.B.2. referencing the ABA and San Diego County Bar Association ethics opinions.

174. See *United States v. Torres*, 182 F.3d 1156, 1162 (10th Cir. 1999) ("The government shall bear the burden of proof for sentence increases and the defendant shall bear the burden of proof for

say, “As a general principal, I do not answer questions that if put directly to my client would constitute a violation of his Fifth Amendment right against self-incrimination.”¹⁷⁵ Obviously if defense counsel believed the client had no prior record, she would readily volunteer such information. Therefore, whether these particular responses are better than refusing to answer is a matter of debate.

As with the previous ethical question posed by this Article, how an attorney chooses to respond when asked a question by a judge that implicates concerns related to candor to the tribunal, client confidentiality and zealous advocacy may very well depend on how an attorney interprets the relevant ethics rules and her willingness to run the risk of having gone an ethical “bridge too far.”¹⁷⁶

IV. QUESTION # 3 (CAN DEFENSE COUNSEL ZEALOUSLY ADVOCATE FOR AN INDIVIDUAL CLIENT IF DOING SO WOULD POTENTIALLY ANGER A PROSECUTOR WHO IS LIKELY TO RETALIATE BY PUNISHING THE ATTORNEY’S OTHER CLIENTS?)

A. *The Factual Scenario*

An attorney represents a client charged with the illegal possession of a firearm (whom we’ll call the “gun client”). On the eve of the motion hearing, the attorney has discovered an important piece of evidence. She has discovered a cell phone video of the stop of her client and the subsequent search of his person that led to the discovery of the firearm. The cell phone video plainly contradicts the police officer’s version of

sentence decreases.”) (citing *United States v. Hill*, 53 F.3d 1151, 1153 (10th Cir. 1995) (en banc)).

175. “The Fifth Amendment by its terms prevents a person from being ‘compelled in any criminal case to be a witness against himself.’ To maintain that sentencing proceedings are not part of ‘any criminal case’ is contrary to the law and to common sense.” *Mitchell v. United States*, 526 U.S. 314, 327 (1999) (internal citations omitted). Of course, adopting such a general policy may violate the duty of zealous advocacy that is owed to each individual client. After all, some clients may not have a criminal record and refusing to confirm that fact could work to that individual client’s detriment.

176. The expression “a bridge too far” is typically used to reference something that is too ambitious or drastic to be realistic, or to describe an action that is very complicated and challenging to execute, so much so that it is likely to fail. *What Does the Idiom “a Bridge Too Far” Mean?*, WISEGEEK, <http://www.wisegeek.com/what-does-the-idiom-a-bridge-too-far-mean.htm> (last visited Apr. 16, 2017). The expression owes its roots to the failed mission of the Allied Forces during the Second World War to overtake a number of German bridges during Operation Market Garden. *Id.* That failure was the basis of both a novel, and a later film, carrying the title of *Bridge Too Far*. *Id.* The novel and film are largely responsible for the idiom’s usage in English-speaking communities. *Id.*

events and makes clear that the stop and search of her client was unconstitutional. Once the video is shown to the judge during the motion to suppress, the judge should disbelieve the police officer and suppress the evidence.

In the jurisdiction in question, defense counsel is only required to provide the prosecution with evidence it intends to introduce at a motions hearing if the prosecutor has filed a discovery demand. In this particular case, the prosecutor has not filed such a demand, nor is the prosecutor aware that the video evidence exists.

Defense counsel is concerned that if she were to show the video to the prosecutor beforehand and the police officer was alerted to the video's contents, the police officer might invent some type of explanation that minimizes the evidentiary value of the video. Simply put, the prosecutor and the police officer would find a way to work around the video's damning contents.

As a result, in defense counsel's mind, not passing the cell phone video to the prosecutor before the motion, which defense counsel is not required to do, will preserve the element of surprise. This course of action is therefore the best strategic decision defense counsel can make.

Yet, defense counsel's decision concerning whether to give the prosecutor the video before the motions hearing is not nearly so simple.

Defense counsel also represents a client whose case is being handled by the same prosecutor. This client is facing a mandatory five years in prison for accepting a large package that she knew contained marijuana (the marijuana client). This five-year sentence is far more time than counsel's client is facing in the firearm's case. The marijuana client is a single mother, the sole provider for her family, and has no prior criminal record. Defense counsel believes the best possible outcome for this client would be a sentence of house arrest. Such a sentence would allow the client to stay home, work, and provide for her family.

Getting a de-mandatorized sentence of house arrest is not easy. The prosecutor would have to actually take such a request to her supervisor. Moreover, the supervisor is not likely to agree to a sentence of house arrest unless the prosecutor advocates for such.

Defense counsel knows that—while they should not be—her advocacy in the gun case is connected to the client's interests in the marijuana case.

While counsel knows that not passing the video to the prosecutor beforehand maximizes the chances of winning the gun case, counsel also knows that adopting such a tactic will likely anger the prosecutor. The

prosecutor will feel as though defense counsel “pulled a fast one” on her by giving her no opportunity to prepare for the introduction of this new evidence. Further, the prosecutor may feel embarrassed that she presented obviously untruthful testimony.

Consequently, when defense counsel goes to beg the prosecutor for a sentence of house arrest, this is likely to be met with a chilly response. The prosecutor, still angered by defense counsel’s aggressive surprise tactics, will retaliate. The prosecutor will refuse to even consider, let alone approach her supervisor, for a sentence of house arrest. This client who has no prior record and is the sole caretaker of her children will go to jail for five years.

Should defense counsel decide that she should pass the video in the gun case to the prosecutor to have the best shot at preventing the single mother in the marijuana case from going to jail for five years? Said another way, what should defense counsel do when she knows that zealous advocacy in the case of one client will lead to another client being punished for such advocacy?

Unlike the two previously addressed ethical dilemmas, the dilemma identified immediately above lends itself to a relatively clear rules-based answer. However, the complicated nature of this ethical quandary largely relates to the practical difficulties associated with implementing this rules-based answer in the actual practice of law.

B. *The Ethical Response*

1. Ethical Obligations

The above factual scenario implicates two specific ethics rules. First, as noted throughout this work, defense counsel has a duty pursuant to Rule 1.3 to zealously represent the client.¹⁷⁷ In this sense, the lawyer’s duty to pursue the most advantageous course of action for each of her clients is of paramount importance.¹⁷⁸

In terms of our current example, defense counsel must not pass the cell

177. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2016).

178. In addition to following ethical guidelines, criminal defense attorneys must also provide their clients with representation consistent with their clients’ Sixth Amendment right to the effective assistance of counsel. *See generally* Strickland v. Washington, 466 U.S. 668 (1984) (holding the Constitution is violated when “defense counsel’s representation falls below the level expected of reasonably competent defense counsel”). Of course, the failure to zealously advocate for one’s client may also be a violation of the right to effective assistance of counsel.

phone video in the case of the gun client, because doing so is the most advantageous course of action that effectuates the client's goal of winning the case.¹⁷⁹ This also means that defense counsel must adopt what she believes to be the most effective negotiation strategy for achieving the demandorized sentence of house arrest in the marijuana case.

Of course, lawyers also have obligations to avoid conflicts of interest which may prevent them from putting their most zealous foot forward. Model Rule 1.7 addresses conflicts of interest that may arise between a lawyer's current clients (referred to as concurrent conflict of interest).¹⁸⁰ Subsection (a)(1) of Rule 1.7 provides that a conflict of interest exists if "the representation of one client will be directly adverse to another client."¹⁸¹ Under Rule 1.7(a)(1), a "directly adverse" conflict of interest occurs in the following circumstances:

- 1) when one of a lawyer's clients asserts a claim against another client of the lawyer;
- 2) when a lawyer must cross examine a witness who is a client represented in a different matter;
- 3) when a lawyer represents a client against a person the lawyer represents in some other matter, even if the matters are wholly unrelated.¹⁸²

179. While recognizing an obligation to zealously advocate for one's client, comment 1 to Rule 1.3 states that, "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client." MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016). For example, "a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued." *Id.* This does not mean that a lawyer is ethically excused from pressing every strategic advantage for a client that would impact the outcome of the case. As legal commentators have noted, the notion that a lawyer is not required to press for every advantage is largely limited to those instances in which, "the strategic decision would not materially prejudice the rights of your client." See *What the Lawyer Decides in a Case*, NAT'L PARALEGAL COLLEGE, https://nationalparalegal.edu/public_documents/courseware_asp_files/Ethics/DutiesToClient/WhatLawyerDecidesInACase.asp (last visited Apr. 16, 2017) (observing attorneys are often the ones who make strategic and procedural decisions in cases—not the clients themselves).

180. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016).

181. *Id.* r. 1.7(a)(1).

182. Ohio Adv. Op. 2008-04 (Ohio Bd. Com. Grievances and Discipline), 2008 WL 4186032, at *3 (2008) (interpreting Ohio's version of Rule 1.7(a)(1) in the context of representing multiple defendants in a criminal case). Ohio's version of the rule reads the same as Model Rule 1.7(a)(1). Compare OHIO RULES OF PROF'L CONDUCT r. 1.7(a)(1) (2007) (tracking similar language to the Model Rules), with MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2016) (declaring "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" wherein "the representation would be directly adverse to another client"). When a criminal defense attorney represents multiple clients in the same proceeding,

a directly adverse conflict will occur if one co-defendant accepts a favorable plea bargain in exchange for testimony against the other co-defendant; if the testimony of one co-defendant is

In this regard, the hypothetical lawyer's gun and marijuana clients are not directly adverse to one another. None of the above three circumstances that give rise to a directly adverse conflict of interest are relevant to the attorney's gun and marijuana clients.

Subsection (a)(2) of Rule 1.7 relates to what may be called the materially limited conflict of interest, and states that a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."¹⁸³ The comment to 1.7 elaborates on this subsection by noting, "[e]ven where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."¹⁸⁴

In this regard, it is important to take note of the central role that the threat of risk plays in the creation of a materially limited conflict of interest. Simply put, a conflict of interest occurs because of the degree of risk involved, regardless of whether a substantive impropriety, such as a lack of zealous advocacy, eventuates.¹⁸⁵

The comment further addresses what constitutes a "significant risk" and states:

the mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives

unfavorable to the other co-defendant; or if a lawyer must impeach on cross examination one of the co-defendants he or she represents in the proceeding.

Ohio Adv. Op. 2008-04 (Ohio Bd. Com. Grievances and Discipline), 2008 WL 4186032, at *4.

183. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

184. *Id.* r. 1.7(a)(1) cmt. 8. While not entirely congruent with the issue at hand, it is worth pointing out that Rule 1.8, while primarily addressing conflicts of interest that arise in the context of business dealings, states in Subsection (g) that a lawyer who represents multiple clients in a criminal case, "shall not participate in making . . . an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client." *Id.* r. 1.8(g).

185. See Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 54 (2009) ("Placing risk at the center of conflicts analysis results in an important point that can be overlooked: as a matter of professional ethics, a conflict of interest exists even if the feared eventuality never materializes. In other words, a conflict is present if there is sufficient risk of resulting impairment, irrespective of whether the lawyer's ability to function is ever adversely affected by the circumstances.").

or foreclose courses of action that reasonably should be pursued on behalf of the client.¹⁸⁶

In other words, Rule 1.7(a)(2) “requires the likelihood of a material limitation on the representation before it can be invoked.”¹⁸⁷ In interpreting the rule prohibiting materially limited conflicts of interest, one legal ethicist has noted that the rule requires not just that the possibility that the representation may be materially limited before it is invoked, but also substantial risk.¹⁸⁸

In terms of the gun and marijuana clients, a materially limited conflict of interest could exist, depending on the lawyer’s perception of the degree of risk involved. The lawyer’s ability to represent the gun client may be materially limited by the lawyer’s desire to get the best possible deal for the marijuana client. In this regard, while somewhat of a subjective determination at the time of representation,¹⁸⁹ if there exists a significant risk¹⁹⁰ that counsel will not pursue the most strategically advantageous course of action (not passing the cell phone video) out of fear that doing so will lead to retaliation against the marijuana client, then a materially

186. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS’N 2016).

187. Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 224 (2004) (interpreting the language of what is now Rule 1.7(a)(2) but at the time of the author’s writing was contained in Rule 1.7(b)). Relatedly, the Utah State Bar Ethics Advisory Opinion Committee was asked to give an opinion on the question of whether it is ethical under the Rules of Professional Conduct for a criminal defense attorney to advise a client/defendant to negotiate and enter into a plea agreement whereby the client waives all post-conviction claims, including claims of ineffective assistance of the attorney, except for claims of ineffective assistance of counsel based upon negotiating or entering into the plea or waiver. Utah Ethics Op. 13-04 (Utah St. B.), 2013 WL 7393112, at *1. While the committee concluded that advising the client with respect to such waivers violated Rule 1.7, a dissenting committee member took note of the fact that “[u]nder rule 1.7 only when there is a ‘significant risk’ that the attorney’s performance will be ‘materially limited’ by the personal interest at stake” does a conflict of interest occur. *Id.* at *12. The member further commented, “[h]ere, where the possibility of being publicly identified in an ineffective assistance ruling is so small, I do not believe that the attorney’s perceived interest in avoiding this would materially limit the lawyer’s ability to advise the client about the pros and cons of a plea deal.” *Id.*

188. Rosner, *supra* note 187, at 224.

189. See Gianfranco A. Pietrafesa, *One Lawyer Representing Multiple Clients Sitting on the Same Side of the Table*, 2006 N.J. LAW., 38, 39 (observing “[w]hether a limitation is material and a risk significant can be viewed as subjective standards”). Of course, if an ethics complaint is brought against an attorney for violating conflict of interest rules, the inquiry will be “measured according to an objective standard, meaning that a lawyer’s conclusions will be evaluated based on the ‘facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation.’” Eldred, *supra* note 185, at 53.

190. See MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2016) (requiring significant risk as an element for a finding of a concurrent conflict of interest).

limited conflict of interest has occurred.

This example is fairly straightforward in that the question of whether defense counsel's representation of the gun client would be materially limited by other concerns relates entirely to the decision to provide the cell phone video to the prosecutor. However, it is important to note that in any given case, defense counsel may be required to make a myriad of strategic decisions related to motions and trial practice. If in the course of making any of these decisions, or all them, defense counsel believes that a significant risk exists that her "ability to consider, recommend or carry out an appropriate course of action"¹⁹¹ is hampered by representation of another client, a materially limited conflict of interest exists.

In the words of one legal observer, "absent the informed consent of the client, an attorney's motion practice and sentence-bargaining efforts may not be limited by the attorney's own professional interests or by her interest in obtaining favorable sentence agreements for other clients."¹⁹²

Lastly, as previously indicated, if defense counsel decided to soft pedal her zeal and sacrifice the gun client for the marijuana client, not only was defense counsel laboring under a Rule 1.7 conflict of interest, she would also have violated Rule 1.3's requirement of zealous advocacy.

2. The Reality of the Materially Limited Conflict of Interest

It is clear ethics rules mandate that defense counsel cannot compromise the representation of one client to serve the interests of other clients.¹⁹³ Little difficulty is posed by an application of this standard to fairly obvious examples. To that end, it is clearly unethical for defense counsel to engage in overt trading with the prosecutor in a manner that explicitly benefits

191. *Id.* r. 1.7 cmt. 8.

192. Hoying, *supra* note 42, at 56.

193. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 90 (1995) (citing Model Code Disciplinary Rules 5-106, 7-101(A)(1), Model Rules 1.7 and 1.9, and ABA Standards for Criminal Justice, *The Defense Function* section 4-6.2(d)). This standard reads, "[d]efense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case." STANDARDS FOR CRIMINAL JUSTICE PROSECUTION AND DEFENSE FUNCTION § 4-6.2(d) (Am. Bar Ass'n, 3d ed. 1993). See *supra* note 27 for further explanation of the importance of the ABA Standards for Criminal Justice. Additionally, the new fourth edition of the Criminal Justice Standards contains virtually the same language as used in the third edition. See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE § 4-6.2(i) (Am. Bar. Ass'n, 4th ed. 2015) [hereinafter CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE, 4th Edition] ("Defense counsel should not recommend concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case, unless both clients give their fully-informed consent.").

one client to the detriment of another.¹⁹⁴ For example, defense counsel cannot say, “I’ll talk person X into taking five years in prison if you give me probation for person Y.” As commentators have noted, “[s]uch overt ‘trading’ plainly violates the lawyer’s duty of undivided loyalty to a client and is so blatant it is unlikely to be a serious systemic problem.”¹⁹⁵

Further, those instances in which criminal defendants’ interests are directly adverse under Rule 1.7, are not particularly common. It is unlikely that in most cases of concurrent representation a criminal defense attorney will be representing a client who asserted a claim against one of the lawyer’s other clients, the lawyer will be forced to cross-examine a current client whom she represents in another matter, or the lawyer “represents a client against a person the lawyer represents in some other matter, even if the matters are wholly unrelated.”¹⁹⁶

On the other hand, the above hypothetical involving gun and marijuana clients is more likely to be the type of ethically complicated conflict of interest case that defense lawyer’s encounter—one in which the potential for prosecutorial retaliation is unspoken and may in fact not materialize, but has nonetheless crept into the lawyer’s thought process.

This is particularly true with respect to the system’s repeat players. Certain defense attorneys have several cases with the same prosecutor. This in turn increases the prosecutor’s opportunity to retaliate against the defense attorney’s numerous current and potentially future clients.¹⁹⁷

It is certainly the case that not all prosecutors would engage in retaliatory tactics (or would do so consciously).¹⁹⁸ Moreover, the

194. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE, 4th Edition, *supra* note 193, at § 4-6.2(i).

195. Uphoff, *supra* note 193, at 91 n.72.

196. The Supreme Court of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2008-4 (2008). Based on my experience as a criminal defense attorney, it is not common to have clients who have interests that are directly adverse to each other in terms of the three factual scenarios that give rise to such conflicts. See *supra* note 49 for additional details of my experience as a criminal defense attorney.

197. See Hoying, *supra* note 42, at 62 (“[B]ecause criminal defense attorneys are repeat players in the criminal justice system, the maintenance of a strong and positive personal and professional relationship with other players in the criminal justice system can be essential to a criminal defense attorney’s professional success.”); see also Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1210 (1975) (“A defender assigned to a particular courtroom may well see more of the prosecutor assigned to that courtroom than he does of his wife, and when adversaries in the criminal justice system become too close, they may choose to help each other at the expense of the persons and the interests that they have been hired to serve.”).

198. See Uphoff, *supra* note 193, at 89 (“Certainly there are many prosecutors who attempt to wield this power in a fair and even-handed way.”).

particular legal culture in any given jurisdiction is likely to influence prosecutorial behavior. The more adversarial a particular culture, the more likely it is the prosecutor will view defense counsel's zealous advocacy without much chagrin. Of course, the opposite is also true—prosecutors are more likely to retaliate in anger against strong criminal defense attorneys in legal cultures with weak adversarial expectations.¹⁹⁹

Further, retaliating against a defense attorney's client because of an attorney's strong advocacy, whether implicitly or explicitly, raises ethical concerns that some prosecutors are not likely to engage. Prosecutors have an overarching responsibility to do justice.²⁰⁰ While this prescription is somewhat vague,²⁰¹ this duty necessarily entails the obligation to seek a fair result based on the facts of each case.²⁰² If a prosecutor were simply to retaliate against one defendant because of the manner in which defense counsel advocated for another client, the prosecutor's conduct would not be consistent with the obligation of seeking a just result because the prosecutor's decision to retaliate was not based on the culpability of the individual defendant.²⁰³ Therefore, partaking in such behavior represents

199. *See id.* at 90 (“The prosecutor in a county with a timid defense bar may single out the more zealous defense lawyer and refuse to provide her clients the kind of concessions generally provided the more pliant defense lawyers.”).

200. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991). *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. The responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”); *see also* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE, 4th Edition, *supra* note 193, at § 3-1.2(c) (stating “[t]he duty of the prosecutor is to seek justice . . . not merely to convict”).

201. *See* Zacharias, *supra* note 200, at 46 (remarking on the vagueness of prosecutor's duty to “do justice”).

202. *See* Angela J. Davis, *Reform of the Prosecution Function*, CHAMPION, Jan./Feb. 2010, at 18 (noting the prosecutor's duty to seek justice in addition to applying the broader administration of criminal justice, also relates to individual cases). This obligation to seek justice based on the facts of each case is an especially salient concern in the plea-bargaining context. *See* Sylvia Shaz Shweder, *Donating Debt to Society: Prosecutorial and Judicial Ethics of Plea Agreements and Sentences That Include Charitable Contributions*, 73 FORDHAM L. REV. 377, 386 (2004) (“While plea bargaining is a useful prosecutorial tool, it cannot be used to the detriment of prosecutorial duties, such as the prosecutor's special duty to ‘seek justice’ and to protect defendants' rights.”). The United States Attorneys' Manual guides federal prosecutors in their special role in plea bargaining. DEP'T OF JUSTICE MANUAL, U.S. Attorneys' Manual tit. 9, § 9-27.000 (2d ed. 2004). Prosecutors are responsible for delivering fair, evenhanded administration of the law so that the public and defendants have confidence that prosecutors base their decisions on the merits of each case. *Id.* at § 9-27.001. Plea agreements are expected to “reflect the totality and seriousness of the defendant's conduct.” *Id.* at § 9-27.400(B).

203. *See* DEP'T OF JUSTICE MANUAL, U.S. Attorneys' Manual, *supra* note 202, at § 9-27.230

a violation of the prosecutor's special obligation to ensure the fairness of the criminal justice process as it relates to each individual case.²⁰⁴

Nevertheless, as Professor Rodney Uphoff has observed, "[d]efense counsel who stands up to fight in one case may be concerned that the prosecutor will take it out on her other clients."²⁰⁵ Certainly legal commentators believe that prosecutorial retaliation in response to strong advocacy is in fact quite real.²⁰⁶

Of course, whether prosecutorial retaliation is real is somewhat besides the point in terms of a materially limited conflict of interest. So long as defense counsel legitimately perceives the threat of prosecutorial retaliation as real, this perception rises to the level of a conflict of interest if it poses "a significant risk" to the lawyer's "ability to consider, recommend or carry out an appropriate course of action"²⁰⁷ such that representation of one client "will be materially limited as a result of the lawyer's responsibilities to another client."²⁰⁸

(outlining certain criteria—one of which is culpability—that should be given weight when assessing whether to prosecute).

204. See *supra* note 202 (showing the decision-making process utilized by U.S. Attorneys when deciding to prosecute an individual).

205. Uphoff, *supra* note 193, at 90. This is not to suggest that defense attorneys fear the consequences of zealous advocacy are limited to a prosecutor's retaliating against other clients. Defense attorneys recognize that the maintenance of a cooperative, positive relationship with the prosecutor and judge will often produce a more enjoyable work environment. As a result, defense counsel may fear that angering the prosecutor or the judge could create a hostile or unpleasant work place. Hoying, *supra* note 42, at 62–63. Further, defense counsel may fear that aggressive advocacy could result in economic retaliation. This is certainly the case if defense counsel's advocacy angers a judge who has the power to withhold appointments. *Id.* However, under Rule 1.7, compromising the representation of one client to serve the lawyer's personal interests is likewise prohibited. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 10 (AM. BAR ASS'N 2016) ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."); see also Hoying, *supra* note 42, at 56 (stating "absent the informed consent of the client, an attorney's motion practice and sentence-bargaining efforts may not be limited by the attorney's own professional interests or by her interest in obtaining favorable sentence agreements for other clients").

206. See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 78 (1985) ("Generally, prosecutors expect that defense attorneys will be cooperative in plea bargaining; they punish attorneys who are too adversarial in representing their clients by refusing to grant the typical plea bargaining concessions to these attorneys' clients."); see also James E. Bond, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*, 15 WAKE FOREST L. REV. 837, 838 (1979) (observing young defense lawyers learn "that filing motions only irritates the prosecutor or judge, both of whom can and do 'punish' defense counsel for the zealous assertion of his client's rights").

207. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2016); see also *supra* note 189 (discussing the subjective and objective aspects of this determination).

208. *Id.* r. 1.7(a)(2).

3. Waiver or Withdraw

What should defense counsel do if she believes that a conflict of interest exists in her representation of concurrent clients?

First, when a lawyer determines that the risk of conflict is sufficient to trigger the prescriptions of the ethical rules, the lawyer must resolve the ethical issue at the time the risk becomes apparent, and not wait until representation becomes compromised.²⁰⁹

Accordingly, defense counsel has several options. First, she can abandon either of the clients thus avoiding the potential of any conflict of interest. For example, counsel, if possible, could choose to represent either the gun or the marijuana client, thus eliminating any potential conflict of interest issues.²¹⁰

If counsel does not adopt this approach, pursuant to Model Rule 1.7(b)(4) defense counsel is required to apprise the client of the potential conflict of interest and can continue with the representation when the client has given her informed consent in writing.²¹¹ As such, the lawyer in our example would have to explain to the gun client that she may give the cell phone video to the prosecutor before the motion's hearing so that the prosecutor does not retaliate against the marijuana client.

Of course, no client is likely to ever consent to the lawyer's continued representation in such an instance. If the client does not agree to continued representation, then the lawyer must withdraw from the case.²¹² Further, in criminal cases, a court can refuse to allow the client to waive the potential conflict of interest, then require representation by a different attorney, if the court finds that doing so serves the interests of justice.²¹³

209. Eldred, *supra* note 185, at 54; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 2016) (discussing the option of informed consent in representation if a concurrent conflict of interest exists).

210. Hoying, *supra* note 42, at 64 (noting that when clients' interests "are directly adverse to one another or might materially limit [the lawyer's] ability to adequately represent both, the attorney either must abandon one of the conflicting interests or must obtain the informed consent of the client").

211. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 2016). Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Utah Ethics Op. 13-04 (Utah St. B.), 2013 WL 7393112, at *13 n.15.

212. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 4 (AM. BAR ASS'N 2016).

213. In deciding whether or not a defendant should be able to waive a conflict of interest and continue to be represented by the counsel of his choice, "a court balances the defendant's right to

Additionally, it should be pointed out that the Model Rules themselves do not address the question of whether defense counsel's representation of one client may be materially limited by the potential representation of future clients. In this sense, would defense counsel still be laboring under a conflict of interest if she thought that not passing the video would not be taken out on any current clients, but may make it harder to get worthwhile plea bargains for future clients?

While the Model Rules themselves do not address conflicts with future clients, one legal commentator observed:

Although an attorney's consideration of the interests of future clients might not fall neatly into any of the categories established by the conflict rules, such a consideration creates a definite conflict and the attorney, therefore, must not allow this consideration to affect her representation of the client without obtaining the client's informed consent.²¹⁴

In other words, if a defense attorney finds that her representation of a current client would be materially limited because of concerns related to possible future clients, then a conflict of interest exists and defense counsel must act accordingly. This concern is likely to be particularly relevant with respect to the system's repeat players.

Further, it should be noted that this fact pattern has employed the example of prosecutorial retaliation in the context of plea-bargaining. Indeed, the plea-bargaining process is the most opportune point in the criminal justice system for a prosecutor to retaliate against a defense attorney's clients following counsel's aggressive advocacy. This is because the vast majority of criminal cases are disposed of by plea bargains,²¹⁵ and because this is the point in the process where the prosecutor wields considerable power.²¹⁶ Prosecutors often have significant discretion in terms of selecting charges, recommending sentences, and either offering concessions to those who plea bargain or punishing those who do not.²¹⁷

choose his representative against *both* the defendant's countervailing right to conflict-free representation *and* the court's independent interest in the integrity of criminal proceedings." United States v. Bikundi, 80 F. Supp. 3d 9, 16 (D.C. 2015).

214. Hoying, *supra* note 42, at 64–65.

215. Missouri v. Frye, 566 U.S. 133, 143 (2012) (demonstrating in recent statistics "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

216. Uphoff, *supra* note 193, at 88 (indicating prosecutors "retain considerable power and discretion" regarding which cases are tried and which cases are settled).

217. *Id.* (asserting prosecutors "can select from a wide range of potential charges" and "are free

However, a defense attorney's obligation to avoid a conflict of interest that may occur because of the threat of prosecutorial retaliation is not limited to the plea bargaining context (this is the most likely circumstance in which retaliation will be encountered). Rather, whenever the potential for prosecutorial retaliation, regardless of the context, has risen to the level of creating a material limiting conflict of interest, defense counsel's obligations remain the same.²¹⁸

4. The Ethical Dilemma in the Real World

As noted above, defense attorneys certainly recognize the threat of prosecutorial retaliation and commentators have noted its existence as well.²¹⁹ However, in my career as a criminal defense attorney, I certainly cannot recall an instance in which a defense attorney conflicted out of a case because of the fear that a prosecutor would punish another client. There may be several reasons for this, some more insidious than others.

Importantly, the threat of retaliation must be real enough²²⁰ that it rises to the level of a significant risk in that it will materially limit the "lawyer's ability to consider, recommend or carry out an appropriate course of action for the client" because of the lawyer's responsibilities or interests.²²¹

Yet, the criminal defense attorney may have varying degrees of confidence in her belief that a prosecutor will punish another client for the attorney's aggressive advocacy. This confidence may be based on past experiences with the prosecutor or the prosecutor's reputation amongst the defense bar.

This collective evidence may lead to the conclusion that there is a "mere

to offer concessions or to threaten additional punishment to force defendants to accept some negotiated deal").

218. A potential example of prosecutorial retaliation in the non-plea-bargaining context would be a prosecutor's refusal to stipulate to testimony of a defense witness in the absence of that witness being present. In certain circumstances, the prosecutor's refusal to stipulate could prejudice the defense. Assume that counsel represents two clients on the same day in the same courtroom. If the defense attorney fears that representation of one client could compromise the interests of another because the prosecutor will refuse to stipulate to the important testimony, the same conflict of interest concerns exist.

219. *See supra* notes 205 and 206 for a discussion on how defense lawyers realize the risks associated with not fully cooperating with prosecutors.

220. *See supra* note 189 for a discussion on the subjective and objective aspects of this determination.

221. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2016); *see also supra* note 210 (addressing how the threat of a conflict of interest is sufficient to trigger ethical concerns and require prospective enforcement).

possibility” that a difference in the clients’ “interests will eventuate.”²²² As stated in Part IV(B)(1), this possibility alone does not create a significant risk that the attorney will be materially constrained in her representation and hence, no conflict of interest exists.²²³ “The risk must be substantial.”²²⁴

While this Article has provided a specific example in which retaliation was possible, the reality of prosecutorial retaliation may exist in the minds of criminal defense attorneys in a more general sense. As a result, the potential for such retaliation occurs in a state of mere possibility.²²⁵ Therefore, no specific conflict of interest exists.

In light of this recognition, it is important to note if defense counsel’s representation of one client, does not rise to the level of materially limiting her representation of another client, “[d]efense counsel is ethically bound to fight zealously on behalf of a client even though counsel’s stance and efforts may irritate or offend a prosecutor who has the power to affect the disposition of counsel’s other cases.”²²⁶ In other words, the general fear of retaliation without more, does not create a conflict of interest, nor excuse the duty of zealous advocacy.

Of course, some lawyers may constrain their advocacy in violation of Rule 1.3 and labor under a conflict of interest in violation of Rule 1.7. These lawyers may choose between clients and consciously advance the interest of one client over the other. Obviously, such action is ethically inappropriate.²²⁷ These lawyers may practice in this manner because they do not wish to anger the judge and the prosecutor by raising a conflict of interest concern and creating a difficult work environment, which compromises the lawyer’s future success.²²⁸ They may also have their own economic incentives related to continuing to represent a particular

222. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS’N 2016).

223. *See supra* note 187 (noting a conflict of interest will not automatically arise due to the mere fact that there may be a shift in interests of a client so that there will be different interests does not automatically add up to a conflict of interest).

224. *See supra* note 187 (indicating a conflict of interest will only arise when there is a significant risk of an attorney’s interests conflicting with the ability to adequately represent a client is there a conflict of interest).

225. *See supra* notes 185–89 (discussing the requirement that the materially limited conflict of interest must be likely).

226. Uphoff, *supra* note 193, at 90.

227. *See supra* notes 193–95 (discussing the ethics involved in representing and defending clients and when a violation of these ethics occurs).

228. *See supra* notes 197, 205–06 (observing the ability of defense attorneys to participate in questionable practices as to avoid creating a stressful work environment for themselves).

client and/or continuing to receive court appointments.²²⁹

However, while some lawyers may unfortunately engage in such conduct, what is much more likely is that such a lawyer plays various, subconscious psychological games in which she rationalizes the lack of zealous advocacy and ignores the conflict of interest, either because she truly favors one client over the other or to limit the professional repercussions associated with angering the judge or prosecutor, as described in the preceding paragraph.²³⁰ While fascinating literature has been written regarding the psychological dimensions of how lawyers rationalize conflict of interests,²³¹ it suffices to say for the purposes of this work that attorneys “will rationalize behavior as consistent with ethical norms, even when in actuality the decision preferences self-interest.”²³²

Accordingly, while ethics rules provide a clear answer to the question of how counsel should respond when zealous advocacy of one client will lead to prosecutorial retaliation against another client, there are obviously practical difficulties inherent in implementing the solution provided for in the Model Rules. In light of this observation, apart from raising awareness amongst the defense bar with respect to subconscious influences that play a role in rationalizing away conflicts of interest, the antidote to the corrupting fear of prosecutorial retaliation is to change the existing legal culture within a given jurisdiction so that prosecutors do not view retaliation as an appropriate response to zealous advocacy.

This is particularly important in two respects. First, as noted above, zealous advocacy may be viewed as the norm in a given jurisdiction and not likely to provoke an angry response.²³³ When prosecutors recognize and respect the value of zealous advocacy, they are less likely to begrudge defense attorneys who represent their clients in such a manner.

Second, a given legal culture may place greater emphasis on the ethical

229. *See supra* note 205 (noting the economic interest in the continuance or discontinuance of representing a client).

230. *See supra* notes 227–28 (describing the type of behavior that some attorneys will engage in when they put too much emphasis on keeping the peace with a prosecutor or judge).

231. *See generally* Eldred, *supra* note 185 (illustrating the dynamics occurring when an attorney is contemplating a conflict of interest).

232. *Id.* at 69. Professor Eldred explored psychological studies relating to an attorney’s ability to prospectively and retrospectively assess conflicts of interest and concluded that attorneys, as a whole, are not well-suited to evaluate conflicts that arise during a criminal proceeding. *Id.* at 64–77. Ultimately, Professor Eldred concluded that “[g]iven the evidence, current doctrine should be re-evaluated to better align existing legal rules with how lawyers actually behave when conflicts are present or likely.” *Id.* at 89.

233. *See supra* notes 198–99.

limitations associated with engaging in prosecutorial retaliation in the face of aggressive defense lawyering.²³⁴ A prosecutor will most likely be able to invent a reason in any given case for why her actions did not constitute retaliation. As a result, the ethical restraints associated with prosecutorial retaliation will most likely only be realized when a prosecutor voluntarily chooses to follow the relevant ethical rules.²³⁵ The more likely it is that the culture in place at a given prosecutor's office encourages self-enforcement with respect to this particular ethical issue, the more likely it is that the prosecutor's actions will reflect voluntary restraint.²³⁶

Obviously how to create or change a legal culture so that prosecutors respect the value of zealous advocacy and adhere the ethical limitations associated with prosecutorial retaliation lends itself to a lengthy discussion that is beyond this specific work. Nevertheless, it is worth briefly noting that a change in lawyering culture can be brought about by addressing the manner in which lawyers (future prosecutors in particular) are trained in law school,²³⁷ through the culture of ethical lawyering fostered by local bar associations,²³⁸ professional associations that represent the interests of prosecutors,²³⁹ and through the specific type of training that takes place at a given prosecutor's office.²⁴⁰ Certainly the more likely a prosecutor is to view zealous advocacy as normatively acceptable, the less likely it is that a defense attorney will be forced to confront the ethical questions posed by the threat of a prosecutor retaliating against one client because of counsel's

234. *See id.* (detailing how a prosecutor retaliating against one client because of defense counsel's zealous advocacy for another client constitutes unethical behavior).

235. For example, the Preamble and Scope of the ABA Model Rules state that "[c]ompliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance." MODEL RULES OF PROF'L CONDUCT preamble ¶ 16.

236. *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351–53 (2001) (noting how the culture of ethical lawyering that exists in individual prosecutors' offices can impact the conduct of prosecutors).

237. *See* Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 695 (2001) ("Lawyers are usually first introduced to the profession as students in law school. It is in law school that lawyers first learn rules of law, are introduced to the practice of law, and the ideals of law as a profession.").

238. *See* Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 205 (1996) (acknowledging "the potential for great influence" held by bar associations).

239. *See* Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515, 520 (2016) (noting the existence of "professional associations on which they are more likely to rely to articulate high professional expectations").

240. *See* United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) ("One of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach.").

zealous advocacy on behalf of another client.

CONCLUSION

The practice of law is fraught with ethical peril. This is especially true for criminal defense lawyers. In putting forth this Article's version of the three hardest questions, this work has attempted to provide guidance to those criminal defense attorneys who find themselves confronted with one of these difficult rules-based ethical dilemmas. In so doing, the ultimate goal of this work is to ensure zealous advocacy on behalf of every criminal defendant, while also ensuring that such an objective is carried out in a manner consistent with the ethical practice of law.

