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Lindsay R. Goldstein

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Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I would like to thank Professor Bruce A. Green for his invaluable insight and guidance, as well as his extraordinary commitment to the writing process. I am grateful, as always, to my family for their continuing support and encouragement. And lastly, to Matthew Tossman, who already does so much, and still read every word.

A VIEW FROM THE BENCH: WHY JUDGES FAIL TO PROTECT TRUST AND CONFIDENCE IN THE LAWYER-CLIENT RELATIONSHIP—AN ANALYSIS AND PROPOSAL FOR REFORM

*Lindsay R. Goldstein**

INTRODUCTION

The lawyer-client relationship stands at the epicenter of our legal system. Part historical treasure, part myth, it is the subject of endless cultural fascination and rhetoric. In theory, the lawyer-client relationship approximates a sacred trust between a lawyer and a client. This relationship is characterized by open communication and complete confidentiality, which fosters the client's trust in the lawyer, and the lawyer's steadfast loyalty to the client. In practice however, not all relationships between a lawyer and a client conform to this, arguably aspirational, model. Instead, communication between a lawyer and a client may be strained, or even nonexistent, leading to a relationship characterized by mutual mistrust and dissatisfaction.

The lawyer-client relationship is, quite simply, in dire straits. This is particularly true in the criminal justice system, where the former foundational elements of trust and confidence appear to be eroding in the face of overwhelming judicial skepticism.¹ Perhaps this is inevitable when judges, called upon to assess alleged breakdowns in the lawyer-client relationship,² are restricted in their inquiries by the confidential nature of the lawyer-client relationship.³ Privy only to general information regarding an alleged breakdown, judges' appraisals of the lawyer-client relationship appear to be guided primarily by their skepticism of criminal defendants and their

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1. See *infra* Parts II.B.2.a-b (discussing judges' apparent skepticism of criminal defendants and their defense lawyers, respectively).

2. See *infra* text accompanying note 61 (noting judges' roles in terminating the lawyer-client relationship during litigation).

3. See *infra* notes 38-41 and accompanying text (explaining the lawyer's ethical obligation to maintain the confidentiality of the lawyer-client relationship).

lawyers.⁴ This results in a greater likelihood that a lawyer-client relationship lacking in trust and confidence will continue in the context of the criminal justice system than in civil litigation.⁵

Consider the following true scenario from the criminal justice system as an example of this recurring problem: Defendant Joe Ed Earp refused to cooperate with a sheriff's deputy who was investigating an attempted bank robbery, and instead taunted the deputy by yelling, "Bring it on, pig."⁶ After a physical struggle, which involved several deputies, Earp was arrested and convicted during a jury trial of "detering an executive officer from performing a lawful duty."⁷ The trial was bifurcated so as to fairly assess Earp's prior convictions for sentencing purposes; however, before the second phase of the trial began, Earp requested that he be permitted to replace his appointed lawyer.⁸ Earp believed that his court-appointed lawyer was colluding with the prosecutor and described his trial as a "set up."⁹ The appointed lawyer confirmed the breakdown in his relationship with Earp by stating as follows:

[T]he attorney-client relationship, in my opinion, appears to have broken down to the extent that he has absolutely no confidence in me. During the five minutes that the court gave us alone, although I will not get into what we discussed, the fact of the matter was that it appeared to me that the attorney-client relationship had completely broken down.¹⁰

Nevertheless, the trial judge denied Earp's motion to substitute counsel.¹¹ The appellate court affirmed this decision, finding that the asserted conflict was not irreconcilable,¹² and that the trial judge's skepticism of the defendant's request for, and the defense lawyer's support of, the motion to substitute counsel was reasonable.¹³

Earp's case continues to be demonstrative of the threat to trust and confidence in the lawyer-client relationship in the criminal justice system. This Note undertakes a comparison of the judiciary's current approach to ending the lawyer-client relationship in civil litigation and

4. *See infra* Part III.A.

5. *See infra* Part III.A.

6. *People v. Earp*, No. F041724, 2003 WL 22368871, at *1 (Cal. App. Dep't Super. Ct. Oct. 17, 2003).

7. *Id.*

8. *Id.* at *3.

9. *Id.* at *4.

10. *Id.* Notably, Earp's defense lawyer explicitly references his inability to disclose details of the alleged breakdown in the lawyer-client relationship to the judge. *Id.*

11. *Id.*

12. *Id.* at *7.

13. *Id.* at *6.

in the criminal justice system.¹⁴ This Note suggests reforming the current procedure in the criminal justice system for ruling on motions to withdraw or to substitute counsel so that judges may act to protect, rather than to undermine, trust and confidence between a criminal defendant and his lawyer.¹⁵

Part I explores traditional expectations for the lawyer-client relationship by examining its core values—trust and confidence—as articulated by the judiciary and by the ethical standards of the legal profession. This part also provides a framework for understanding termination of the lawyer-client relationship in civil litigation¹⁶ and in the criminal justice system, where the Sixth Amendment is heavily implicated.¹⁷

Part II of this Note thematically presents judges' views of the lawyer-client relationship using language from court opinions that address motions to withdraw or to substitute counsel. The judiciary's approach to ending the lawyer-client relationship in civil litigation¹⁸ and in the criminal justice system¹⁹ are considered in turn. Where possible, the same themes are discussed to facilitate a comparison of the judiciary's view of the lawyer-client relationship in each context.

Finally, Part III of this Note concludes that requiring unduly skeptical judges to rule on motions to withdraw or to substitute counsel using a procedure that provides them with woefully inadequate information regarding alleged breakdowns in the lawyer-client relationship, results in less protection for trust and confidence in the lawyer-client relationship in the criminal justice system than in civil litigation.²⁰ This part argues for and discusses the benefits of revising the procedure for ruling on motions to withdraw or to substitute counsel in the criminal justice system to include an independent lawyer who acts as the court's fact-finder.²¹

14. See *infra* Parts II.A-B (discussing the judiciary's approach to ending the lawyer-client relationship in civil litigation and in the criminal justice system, respectively).

15. See *infra* Part III.B (proposing the appointment of an independent lawyer to serve as the court's fact-finder in certain instances where a breakdown in the lawyer-client relationship is alleged). While the discussion in Part II.B of this Note is not limited to the lawyer-client relationship between an indigent criminal defendant and his appointed lawyer, the proposal for reform suggested in Part III.B is limited in scope, and is intended only to apply to lawyer-client relationships where the defense lawyer has been appointed by the court. See *infra* note 234 and accompanying text.

16. See *infra* Part I.C.2.a.

17. See *infra* Part I.C.2.b.

18. See *infra* Part II.A.

19. See *infra* Part II.B.

20. See *infra* Part III.A.

21. See *infra* Part III.B.

I. TRADITIONAL AND CONSTITUTIONAL EXPECTATIONS OF THE LAWYER-CLIENT RELATIONSHIP

This part provides a glimpse into the lawyer-client relationship, from the judiciary's traditional understanding to our modern conception, as reflected in the current ethical standards of the legal profession. In addition, this part explores how the termination of the lawyer-client relationship during litigation, both by motions to withdraw or by motions to substitute counsel, is regulated by the profession and the bench. Finally, this part closely examines the procedural differences of ending the lawyer-client relationship in the contexts of civil litigation and the criminal justice system.

A. *The Foundation: Trust and Confidence*

American jurisprudence has long distinguished the lawyer-client relationship from other forms of contractual relationships.²² Following suit, organizations within the American legal community²³ have attempted to articulate just why this division exists, and why it should continue. Overwhelmingly, the judiciary and these professional authorities have focused on elements of trust and confidence, which are central to the lawyer-client relationship.²⁴ Part I.A.1 discusses the American judiciary's and legal community's historical expectations of trust and confidence within the lawyer-client relationship, while Part I.A.2 discusses the practical significance of these views.

1. Expectations of the Bench

Judges describing the lawyer-client relationship frequently cite trust and confidence as its quintessential elements.²⁵ Typically, these terms

22. See *In re Dunn*, 98 N.E. 914, 916 (N.Y. 1912) (noting "the relationship of attorney and client . . . is subject to principles and rules which do not apply to an ordinary contract"). Judge Irving Younger famously and concisely characterized the lawyer-client relationship as a "unique contract." *Battani, Ltd. v. Bar-Car, Ltd.*, 299 N.Y.S.2d 629, 631 (Civ. Ct. 1969). For a further discussion of the unusual elements of the lawyer-client contract, see *infra* notes 129-30 and accompanying text.

23. These organizations include the American Bar Association ("ABA") and the American Law Institute ("ALI"). For a more in-depth discussion of the ABA's history of articulating the role of lawyers in American society and the ethical standards of the legal profession, see *infra* notes 32-37 and accompanying text.

24. See *infra* Parts I.A.1-2.

25. See *United States v. Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889). The *Costen* court described the importance of trust in the lawyer-client relationship by stating the following:

Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights . . . with the absolute assurance that the lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation . . . is guilty of the grossest breach of trust. . . . I cannot tolerate

refer to the client's trust and confidence in the lawyer's abilities and loyalty. One judge described the reciprocal nature of the lawyer-client relationship as "one of an unusual character There lie at its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one" ²⁶ Judges adhere to this notion because of the widely held belief that without the client's complete trust, the lawyer's ability to serve the client would be severely impaired. ²⁷ Accordingly, trust and confidence between a client and lawyer are viewed as prerequisites for a properly functioning relationship ²⁸ and for effective legal representation. ²⁹ Importantly, the judiciary's institutional emphasis on trust and confidence has permeated our current expectations of the lawyer-client relationship. ³⁰ An examination of the legal profession's ethical standards illustrates this point.

2. Expectations of the Profession: The Model Rules

The principles of trust and confidence are similarly central to the American Bar Association's conception of the lawyer-client relationship, as articulated by the Model Rules of Professional Conduct ³¹ ("Model Rules"). The Model Rules were not, however, the American Bar Association's first attempt at formalizing ethical guidelines for the legal profession. In 1908, the American Bar Association ("ABA") adopted the Canons of Professional Ethics. ³² Criticized as "vague and self-contradictory," ³³ the Canons were replaced in 1969 when the ABA adopted the Model Code of Professional Responsibility ("Model Code"). ³⁴ In 1983 the ABA

for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client.

Id.; see also *Morris v. Slappy*, 461 U.S. 1, 21 & n.4 (1983) (Brennan, J., concurring).

26. In re *Dunn*, 98 N.E. at 915.

27. See *infra* note 40 and accompanying text.

28. See *Slappy*, 461 U.S. at 24 (Brennan, J., concurring) (explaining that the lawyer-client relationship "involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney" (quoting *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968))).

29. See *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."); see also *Wolgin v. Smith*, No. CIV.A.94-7471, 1996 WL 482943, at *4 (E.D. Pa. Aug. 21, 1996) (stating that "trust and confidence . . . is the cornerstone of the lawyer client relationship and . . . will be essential to effective trial preparation").

30. See *infra* Part I.A.2.

31. Model Rules of Prof'l Conduct (1983) (amended 2003).

32. Monroe H. Freedman & Abbe Smith, *Understanding Lawyer's Ethics* § 1.03, at 4 (2d ed. 2002).

33. *Id.*

34. *Id.* at 5.

again changed course, adopting the Model Rules.³⁵ The Model Rules have been amended several times since 1983, including substantial amendments in 2002, and then additional amendments in 2003.³⁶ In their current form, the Model Rules “provide a framework for the ethical practice of law.”³⁷ They also provide a framework for understanding how principles of trust and confidence shape the lawyer-client relationship.

The characteristic of trust so frequently remarked upon by judges is understood by the Model Rules as “the hallmark of the client-lawyer relationship.”³⁸ Notably, protecting trust in the lawyer-client relationship is a key rationale for the lawyer’s ethical obligation to maintain the client’s confidentiality.³⁹ According to this reasoning, absent this trust between the client and his lawyer, the client’s full disclosure of information relating to the representation would be unlikely, making effective representation nearly impossible.⁴⁰ In addition to keeping client confidences,⁴¹ the Model Rules construe lawyers’ duties as including the duty to represent their clients competently⁴² and diligently.⁴³ These duties apply to all aspects of a lawyer’s engagement, and are not limited to the litigation context.⁴⁴ Similarly, the American Law Institute’s *Restatement (Third) of the Law Governing Lawyers* (“*Restatement*”) describes the lawyer as a “fiduciary”⁴⁵ and explicitly articulates a duty of loyalty.⁴⁶ This

35. *Id.* The Model Code of Professional Responsibility (“Model Code”) format, however, still remains the framework for standards in some jurisdictions, including New York. *Id.*

36. Thomas D. Morgan & Ronald D. Rotunda, 2004 Selected Standards on Professional Responsibility, at v (2004).

37. Model Rules of Prof’l Conduct pmbl. para. 16 (1983) (amended 2003). It is important to note that while the ABA promulgates ethical standards for the legal profession, those standards are not enforceable against a lawyer unless adopted by the jurisdiction in which he practices. Freedman & Smith, *supra* note 32, § 1.03, at 2 n.1.

38. Model Rules of Prof’l Conduct R. 1.6 cmt. 2.

39. *Id.*

40. Comment 2 to Model Rule 1.6 recognizes that often, it is the “embarrassing or legally damaging” information that is critical to the representation. *Id.* Therefore, it is only by maintaining a client’s confidence, thereby gaining his trust, that a lawyer is able to effectively represent his client. *See id.*; *see also* Freedman & Smith, *supra* note 32, § 5.02, at 128 (“The lawyer is in a position to offer . . . good counsel . . . only if the client is willing to entrust the lawyer with information that might be embarrassing or incriminating.”).

41. Model Rules of Prof’l Conduct R. 1.6 (1983).

42. *Id.* R. 1.1.

43. *Id.* R. 1.3.

44. *See id.* pmbl. para. 2 (describing the lawyer’s role as advisor, advocate, negotiator, and evaluator).

45. *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b (2000).

46. *Id.* The duty of loyalty is arguably implied by the Model Rules of Professional Conduct (“Model Rules”) in the Rules Pertaining to Conflicts of Interest and Duties to Former Clients. *See* Model Rules of Prof’l Conduct R. 1.7, 1.8, 1.9.

heightened attention to the governance of the lawyer-client relationship also extends to its termination.

B. Termination of the Lawyer-Client Relationship

Given the intimate nature of the lawyer-client relationship, it is perhaps not surprising that its termination is a delicate and sometimes vigorously contested matter, which is closely regulated by both the legal profession and the bench. Part I.B.1 discusses how the lawyer's duties to the client impact the lawyer's ability to withdraw from the lawyer-client relationship, while Part I.B.2 examines the judiciary's nebulous definition of good cause and its effect on lawyers' withdrawal during litigation.

1. The Asymmetry of the Right to Terminate the Lawyer-Client Relationship

The judiciary has traditionally understood the right to terminate the lawyer-client relationship as asymmetrical.⁴⁷ Clients are, with few exceptions,⁴⁸ permitted to discharge their lawyers at any time for any reason.⁴⁹ Lawyers, on the other hand, are significantly more restricted in their ability to withdraw from the lawyer-client relationship.⁵⁰ This doctrine contemplates the lawyer's unwavering faithfulness to the client's cause, except in the few instances where "good cause" is

47. See Restatement (Third) of the Law Governing Lawyers § 14 cmt. b (internal citations omitted). The Restatement explains that "[a] client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services." *Id.*

48. A notable exception is with regard to a criminal defendant's ability to discharge his appointed lawyer, which may be subject to applicable law or result in the defendant's self representation. See Model Rules of Prof'l Conduct R. 1.16 cmt. 5.

49. See *In re Dunn*, 98 N.E. 914, 916 (N.Y. 1912) ("It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney."); see also *Malarkey v. Texaco, Inc.*, No. 81 Civ. 5224, 1989 WL 88709, at *1 (S.D.N.Y. July 31, 1989) (noting that "where a client wishes to halt representation by current counsel, no cause is required"); *Battani, Ltd. v. Bar-Car, Ltd.*, 299 N.Y.S.2d 629, 631 (Civ. Ct. 1969) (describing the underlying contract of the lawyer-client relationship as one that "[t]he client may breach . . . at will"). The Model Rules generally support this proposition. See Model Rules of Prof'l Conduct R. 1.16 cmt. 4. Also, the Model Rules make clear that discharging the lawyer does not absolve the client of liability for payment for the lawyer's services. *Id.* For a discussion of exceptions to the client's ability to terminate the lawyer-client relationship at will, see *supra* note 48.

50. See *Rindner v. Cannon Mills, Inc.*, 486 N.Y.S.2d 858, 859 (Sup. Ct. 1985) ("When an attorney is retained to conduct a legal proceeding, he enters into an entire contract to conduct the proceeding to a conclusion and he may not abandon his relation without reasonable or justifiable cause." (internal citations omitted)); see also *United States v. Ramey*, 559 F. Supp. 60, 62 (E.D. Tenn. 1981) ("By accepting employment as counsel for [the defendant], his attorney of record herein stipulated impliedly that he would represent his client in this matter to a conclusion."). For an in-depth discussion of the Model Rules' restrictions on a lawyer's ability to terminate a representation, see *infra* Part I.C.1.

present to terminate the lawyer-client relationship.⁵¹ The question then arises: What constitutes good cause for a lawyer to withdraw from a lawyer-client relationship?

2. The Challenge of Defining "Good Cause"

The cases suggest that the most obvious and consistent characteristic of good cause is its ambiguity.⁵² The fact is that, "[a]part from obvious cases, . . . what constitutes reasonable or justifiable cause is not so readily stated."⁵³ There are, however, a few elements of good cause that are uniformly recognized. First, judges evaluating good cause use an objective standard.⁵⁴ Also, while loss of trust alone is not sufficient to constitute good cause,⁵⁵ the cases suggest that good cause exists where there has been a complete breakdown of the lawyer-client relationship.⁵⁶ The definition of a complete breakdown is also hazy,⁵⁷ but judges seem to characterize the conflict as a complete breakdown if the state of trust and confidence between the lawyer and client is irrevocably compromised.⁵⁸ Often this is the case

51. See ABA Comm. on Prof'l Ethics, Informal Ethics Op. 807 (1965). The opinion declares the following:

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect.

Id. (internal quotation marks and citation omitted); see also *In re Dunn*, 98 N.E. at 916 (recognizing "good and sufficient cause" as an appropriate ground for the lawyer's withdrawal from the representation); *Battani*, 299 N.Y.S.2d at 631 ("The attorney may terminate the relation upon good cause.").

52. See *Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520, 522 (Mich. Ct. App. 1975) ("What is a sufficient good cause to justify an attorney in abandoning a case in which he has been retained has not been laid down by any general rule, and in the nature of things cannot be . . .") (quoting *Genrow v. Flynn*, 131 N.W. 1115, 1116 (Mich. 1911)).

53. *Rindner*, 486 N.Y.S.2d at 859.

54. See *United States v. Myers*, 294 F.3d 203, 206 (1st Cir. 2002) ("Good cause depends on objective reasonableness; it cannot be gauged solely by ascertaining the defendant's state of mind.").

55. *United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986) ("Although loss of trust is certainly a factor in assessing good cause, it is, standing alone, insufficient.").

56. See *Ambrose*, 237 N.W.2d at 522 (finding good cause where there was a "total breakdown" in the lawyer-client relationship).

57. This is true largely because judges exercise tremendous discretion when determining whether a complete breakdown in the lawyer-client relationship exists. See *infra* notes 81, 96 and accompanying text.

58. See *Ambrose*, 237 N.W.2d at 522-23 (finding good cause where the conflict between the lawyer and the client "result[s] in the destruction of all faith in each other and render[s] it impossible for them to further co-operate" (quoting *Genrow v. Flynn*, 131 N.W. 1115, 1116 (Mich. 1911))); see also *In re Dunn*, 98 N.E. 914, 915 (N.Y. 1912) (suggesting that good cause to terminate the lawyer-client relationship exists where either the client's confidence in the lawyer or the lawyer's allegiance to the client is compromised). But see *Myers*, 294 F.3d at 206 (observing that "[l]oss of

where communication between the lawyer and the client is so severely strained that it becomes essentially nonexistent.⁵⁹ The rationale for this threshold is that effective representation is impossible where a total breakdown of the relationship occurs.⁶⁰ Elements of this doctrine are reflected in the judiciary's and the profession's formal treatment of the termination of the lawyer-client relationship during litigation.

C. Standards for Termination of the Lawyer-Client Relationship

Termination of the lawyer-client relationship is governed by a dual set of standards: those expressed in the Model Rules, and those articulated by the judiciary. While the Model Rules provide ethical guidance for the profession, the authority to terminate the lawyer-client relationship during litigation ultimately rests with the judiciary.⁶¹ This Note next examines these standards in detail. Part I.C.1 discusses the relevant provision of the Model Rules, while Part I.C.2 explores the judicial standards for termination of the lawyer-client relationship, specifically within the procedural framework of motions to withdraw in civil litigation⁶² and motions to withdraw or to substitute counsel during a criminal proceeding.⁶³

1. The Model Rules' Standards for Termination

Model Rule 1.16 governs a lawyer's ethical obligations with regard to declining or terminating a representation.⁶⁴ For the purposes of termination, Rule 1.16 contemplates two types of withdrawal: mandatory⁶⁵ and permissive.⁶⁶ While the circumstances that require a

trust, standing alone, is insufficient" to constitute good cause for the substitution of counsel (quoting *United States v. Woodard*, 291 F.3d 95, 108 (1st Cir. 2002))).

59. *See Wolgin v. Smith*, No. CIV.A.94-7471, 1996 WL 482943, at *4 (E.D. Pa. Aug. 21, 1996) (finding that trust and confidence in the lawyer-client relationship had been destroyed where the conflict between the client and the lawyer escalated to the point that they could only communicate in writing); *Miller v. State*, 29 P.3d 1077, 1087-88 (Okla. Crim. App. 2001) (finding a complete breakdown in the lawyer-client relationship where lawyers conceded that the defendant did not trust them and where communication between the defendant and his lawyers ultimately ceased entirely).

60. *See United States v. Adelzo-Gonzalez*, 268 F.3d 772, 780 (9th Cir. 2001) (holding that an "irreconcilable conflict" prevented the appointed lawyer from providing effective representation); *see also Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) (finding representation nonexistent where the lawyer and client were "embroiled in irreconcilable conflict"). This idea is also reflected in the Model Rules. *See supra* note 40 and accompanying text.

61. Model Rule 1.16 remains the operative standard for withdrawal from transactional and all other types of non-litigious representation. Model Rules of Prof'l Conduct R. 1.16 (1983) (amended 2003).

62. *See infra* Part I.C.2.a.

63. *See infra* Part I.C.2.b.

64. Model Rules of Prof'l Conduct R. 1.16.

65. *Id.* at R. 1.16(a).

66. *Id.* at R. 1.16(b).

lawyer to withdraw are fairly straightforward,⁶⁷ those that trigger the possibility of an optional withdrawal are far more imprecise.⁶⁸ For example, a lawyer may have the option to withdraw where “the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”⁶⁹ and where “other good cause for withdrawal exists.”⁷⁰ Notably, however, withdrawal under either the mandatory or permissive provisions requires approval by the relevant tribunal.⁷¹ In the event that the appropriate tribunal declines to approve the lawyer’s withdrawal, the lawyer is bound to continue the representation, regardless of the circumstances that may favor termination of the lawyer-client relationship.⁷² Finally, if the withdrawal is approved, the lawyer

67. Rule 1.16 requires a lawyer to withdraw from a representation where “(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or (3) the lawyer is discharged.” *Id.* at R. 1.16(a)(1)-(3).

68. Rule 1.16 permits a lawyer to withdraw from a representation where:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer’s services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.

Id. at R. 1.16(b)(1)-(7). The vagueness of Rule 1.16 serves at least one clear purpose. A lawyer’s full disclosure to the tribunal of the exact circumstances precipitating his motion to withdraw would likely violate the confidentiality mandate of Rule 1.6. *See id.* R. 1.6.

69. *Id.* at R. 1.16(b)(4).

70. *Id.* at R. 1.16(b)(7). For an in-depth discussion of what constitutes good cause, see *supra* Part I.B.2. Interestingly, Model Rule 1.16 does not explicitly mention breakdown of the lawyer-client relationship as an appropriate ground for withdrawal from a representation. The Restatement, however acknowledges that “[i]rreparable breakdown of the client-lawyer relationship . . . is likewise a ground for withdrawal.” Restatement (Third) of the Law Governing Lawyers § 32 cmt. 1 (2000).

71. Model Rules of Prof’l Conduct R. 1.16(c). At least one student commentator has suggested that the requirement of tribunal approval is ethically problematic for lawyers. *See* Jessica R. John, Note, *I Gotta Get Out of This Case: Withdrawal from Representation as a Public Defender*, 10 B.U. Pub. Int. L.J. 152, 165 (2000) (noting that “[l]awyers’ oaths bind them to these rules; however, judges can effectively force their violation”).

72. Model Rules of Prof’l Conduct R. 1.16(c). The Restatement suggests that “[i]f the tribunal improperly requires a lawyer to continue representation, the usual remedy for the lawyer or client is to appeal the order and obey it in the meantime.” Restatement (Third) of the Law Governing Lawyers § 31 cmt. c. It should be noted here that where a lawyer has a legal obligation to withdraw from the representation, the tribunal’s requirement that the lawyer continue the representation would not then subject the lawyer to disciplinary proceedings. The lawyer’s ethical obligations are considered legally satisfied upon his bringing the motion to withdraw, and not upon

retains a duty to protect the client's interests "to the extent reasonably practicable."⁷³ These standards provided by the Model Rules are, concededly, subject to tremendous judicial discretion and, therefore, might not be an accurate reflection of the judiciary's approach to the lawyer-client relationship. For this reason, standards for termination of the lawyer-client relationship, as articulated by the judiciary, are discussed below.

2. The Judiciary's Standards for Termination

The judiciary's primary opportunity to address termination of the lawyer-client relationship arises in conjunction with the disposition of withdrawal or substitution of counsel motions, most of which are resolved without a published opinion.⁷⁴ As a result, there is relatively limited decisional law that substantively discusses terminating the lawyer-client relationship due to its total breakdown.⁷⁵ Additionally, the procedural context in which these motions are raised, dramatically impacts the judge's analysis. Part I.C.2.a discusses the framework for judicial analysis of withdrawal motions in civil litigation. Then, Part I.C.2.b explores the much more complex task of evaluating motions to withdraw or to substitute counsel in the criminal justice system. Part I.C.2.b includes a discussion of the Sixth Amendment and its multifaceted impact on judicial review of motions to withdraw or to substitute counsel. One goal of this discussion is to discourage the direct comparison of judges' resolution of motions to withdraw or to substitute counsel in civil and in post-conviction criminal cases. Such a comparison would be inappropriate because of the heavy restraints the Sixth Amendment places on post-conviction judicial review of

the tribunal's approval of the motion. *See* *People v. Brown*, 250 Cal. Rptr. 762, 765 n.3 (Ct. App. 1988) ("Requiring defense counsel to generally continue representing defendant did not expose counsel to disciplinary or criminal action. He fulfilled his ethical obligation by bringing the motion to withdraw.").

73. Model Rules of Prof'l Conduct R. 1.16(d) & cmt. 9. This is consistent with the lawyer's fiduciary duties to the client, discussed *supra* notes 41-46 and accompanying text.

74. This is true in both the context of civil litigation and in the criminal justice system.

75. *See* *Malarkey v. Texaco, Inc.*, No. 81 Civ. 5224, 1989 WL 88709, at *1 (S.D.N.Y. July 31, 1989) ("The question of attorney withdrawal over a client's objections is not often litigated and as a result there is little written on the subject."); *Atl. Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469, 473 (D.C. 1990) ("Courts in other jurisdictions also have not provided much guidance for determining when an attorney/client relationship has deteriorated to a point which warrants the trial judge's decision to grant a motion to withdraw as counsel. Undoubtedly this is because of the variety of circumstances that may arise."). This poses a significant challenge to any comprehensive analysis of the judiciary's view of the lawyer-client relationship and is mentioned here to acknowledge that this Note's presentation of the themes present in judges' analyses of breakdowns of the lawyer-client relationship, *see infra* Parts II.A-B, is based on available material, but is likely only the tip of the iceberg with respect to these issues.

motions to withdraw or to substitute counsel in the criminal context.⁷⁶ Despite these limitations, however, judges' discussions of the lawyer-client relationship in post-conviction appeals remain relevant, and are therefore presented in Part II of this Note.

a. *Withdrawal During Civil Litigation*

Standards applied by judges to evaluate withdrawal motions in the context of civil litigation are relatively uncomplicated.⁷⁷ The trial court will weigh the adequacy of the lawyer's proffered justification for withdrawal against any possible prejudice to the client's rights resulting from the delay consequent to replacing the lawyer and, finally, consider whether the trial calendar of the court will be adversely affected by the delay, thereby hindering justice.⁷⁸ The timing of the motion, in particular its proximity to trial, will usually be a prominent factor in the court's analysis.⁷⁹ Appellate courts review these determinations for abuse of discretion,⁸⁰ but generally afford the trial court wide latitude in making determinations regarding a lawyer's withdrawal.⁸¹

b. *Withdrawal or Substitution of Counsel During a Criminal Representation*

In the context of the criminal justice system, the standards applied by judges to evaluate both withdrawal and substitution of counsel motions are, in large part, shaped by the Sixth Amendment's guarantee of legal representation to all criminal defendants,⁸² which "has come to be regarded as the sine qua non of our criminal justice system."⁸³ The Sixth Amendment requires that an accused be provided with a lawyer,⁸⁴ unless the defendant "knowingly and

76. See *infra* notes 92-93 and accompanying text.

77. This is particularly apparent when these standards are compared to the analytical framework, which is used by judges in criminal courts and which must account for complications raised by the Sixth Amendment. See *infra* Part I.C.2.b.

78. See *Goldsmith v. Pyramid Communications, Inc.*, 362 F. Supp. 694, 696-97 (S.D.N.Y. 1973).

79. See, e.g., *Whiting v. Lacara*, 187 F.3d 317, 323 (2d Cir. 1999) (noting that the court is "loath to allow an attorney to withdraw on the eve of trial"). But see *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 541 (7th Cir. 2002) (expressing the view that the motion to withdraw made after an extensive discovery period could reflect the attorney's desire to protect his client's interests by withdrawing during a "quiet period before trial").

80. E.g., *Whiting*, 187 F.3d at 320 ("We review a district court's denial of a motion to withdraw only for abuse of discretion.").

81. See *id.* ("The trial judge is closest to the parties and the facts, and we are very reluctant to interfere with district judges' management of their very busy dockets.").

82. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

83. *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994).

84. See *supra* note 82 and accompanying text.

intelligently” waives this right.⁸⁵ Importantly, the Supreme Court qualified the Sixth Amendment’s guarantee of counsel by holding that a criminal defendant is not entitled to a “meaningful relationship” with his defense lawyer.⁸⁶ Nor does the criminal defendant have “an unqualified right to the appointment of counsel of his own choosing.”⁸⁷ The Supreme Court, however, does recognize that “the right to counsel is the right to the *effective* assistance of counsel.”⁸⁸ Judges interpret this as implying some substance in the right, and, accordingly, have held that that effective assistance of counsel requires more than the lawyer’s mere presence in the courtroom.⁸⁹ Exactly how much more involvement by the lawyer is required by the Sixth Amendment is addressed by judges in their pre- and post-conviction reviews of motions to withdraw or to substitute counsel.

Before a verdict is rendered in a criminal case, the trial court retains broad discretion over whether or not to permit withdrawal or substitution of counsel.⁹⁰ Implicitly though, consideration of whether

85. *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). In practice, this requires judges granting withdrawal or substitution of counsel motions in a criminal proceeding to appoint replacement counsel unless the defendant makes a valid waiver of his right to representation. For a discussion of how this might affect judges’ institutional interests when evaluating the lawyer-client relationship, see *infra* note 107 and accompanying text.

86. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). *Contra id.* at 20-21 (Brennan, J., concurring) (“Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney.”).

87. *Slappy*, 461 U.S. at 10 (quoting *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981)).

88. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added)). The Supreme Court has also made clear, however, that the goal of the Sixth Amendment’s right to counsel “is not to improve the quality of legal representation The purpose is simply to ensure that criminal defendants receive a fair trial.” *Strickland*, 466 U.S. at 689.

89. See *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994) (“The right to counsel guaranteed by the Constitution, however, means more than just the opportunity to be physically accompanied by a person privileged to practice law.”).

90. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (holding that the district court did not abuse its discretion in denying a substitution of counsel motion where the defendant’s desired lawyer had only a potential conflict of interest). It is important to note that the trial judge has a duty to inquire into the extent and nature of the alleged breakdown in the lawyer-client relationship since “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir. 2001). Failure to conduct such an inquiry will constitute an abuse of discretion. See *id.* at 777 (“[A] district court must conduct such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.”) (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991) (internal quotations and citation omitted)); *People v. Marsden*, 465 P.2d 44, 47 (Cal. 1970) (en banc) (finding abuse of discretion where the trial court failed to permit the defendant to relate specific details supporting the alleged inadequate representation and stating that “[t]he defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom.”).

the denial of the motion to withdraw or substitute counsel will result in the violation of the defendant's Sixth Amendment rights must inform the judge's decision.⁹¹ After the criminal defendant's conviction, however, the inquiry is no longer a discretionary review of whether the breakdown in the lawyer-client relationship was sufficient to justify its termination, but only whether the trial court's ruling on the motion to withdraw or to substitute counsel resulted in a violation of the defendant's Sixth Amendment right to counsel.⁹² Consequently, the appellate court's ability to provide relief (reverse a defendant's conviction) is restricted.⁹³ As in the context of civil litigation,⁹⁴ the standard for appellate review in the criminal context is abuse of discretion,⁹⁵ and judges are generally deferential in their review.⁹⁶ The available cases suggest that judges conducting this inquiry with respect to withdrawal or substitution of counsel motions examine a combination of four factors in their analysis:

- (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the matter, (3) the extent of the conflict between the

91. See *supra* notes 59-60 and accompanying text. It is not accidental that the threshold for termination is when communication between the defendant and his lawyer entirely ceases. It is at this point that such a conflict renders the lawyer's assistance ineffective, thereby implicating the Sixth Amendment. See *Frazer*, 18 F.3d at 782 (noting that a constitutionally sufficient representation "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice").

92. A defendant's assertion of a Sixth Amendment violation is often framed as an ineffective assistance of counsel claim. *E.g.*, *Adelzo-Gonzalez*, 268 F.3d at 776 & n.1. Alternatively, a defendant may assert a Sixth Amendment claim premised on being denied the counsel of his choice. See *United States v. Myers*, 294 F.3d 203, 207 (1st Cir. 2002). For a discussion of the parameters of the Sixth Amendment's guarantees with respect to legal representation, see *supra* notes 84-89 and accompanying text.

93. For example, to prevail on an ineffective assistance of counsel claim, a defendant must show that his lawyer's poor performance likely affected the outcome of the representation. See *Strickland*, 466 U.S. at 694 (articulating the standard by which to judge ineffective assistance of counsel claims as "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Alternatively, a defendant must show that an actual conflict of interest existed. See *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (interpreting the term "actual conflict of interest" to mean "a conflict that affected counsel's performance"); *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) ("In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.").

94. See *supra* note 80 and accompanying text (noting that the standard of review by appellate courts in civil litigation is also abuse of discretion).

95. See *Myers*, 294 F.3d at 207; *United States v. Mack*, 258 F.3d 548, 556 (6th Cir. 2001).

96. See *Myers*, 294 F.3d at 207 ("Deference makes perfect sense, for the trial court is in the best position to assess the qualitative aspects of the complex relationship between a defendant and his appointed counsel."). *But see* *Wheat v. United States*, 486 U.S. 153, 168 (1988) (Marshall, J., dissenting) (arguing that a deferential standard of review is inappropriate where the Sixth Amendment right to counsel is implicated).

attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense, and (4) the balancing of these factors with the public's interest in the prompt and efficient administration of justice.⁹⁷

When considering the second factor, appellate courts seem to employ a range of approaches for evaluating the adequacy of the trial court's inquiry. One approach focuses primarily on the legal competence of the criminal defense lawyer and places less importance on the quality of the interaction between the lawyer and the defendant.⁹⁸ Another approach, while not explicitly contradicting the Supreme Court by requiring a "meaningful" lawyer-client

97. *Mack*, 258 F.3d at 556. While circuits differ with respect to the focus of their inquiry into the lawyer-client relationship, see *infra* notes 98-100 and accompanying text, appellate criminal courts consistently consider these general factors. See *Myers*, 294 F.3d at 207; *United States v. Barrow*, 287 F.3d 733, 738 (8th Cir. 2002); c.f. *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000) (considering only three factors "(1) the timeliness of the motion and the extent of resulting inconvenience or delay; (2) the adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense" and omitting any mention of the public's interest). Interestingly, in other areas of criminal law, judges have relinquished some of their discretion to conduct inquiries into the lawyer-client relationship. Where a judge must determine whether a criminal defendant's waiver of a conflict-free representation is knowing and intelligent, the Second Circuit has promulgated a procedure which relies largely on the defendant's own lawyer and, in some instances, on an independent lawyer, to advise the defendant of specific risks of proceeding with representation by a lawyer who may have a conflict of interest. See *United States v. Curcio*, 680 F.2d 881, 890 (2d Cir. 1982). The trial court's role is limited to advising the defendant of his right to a conflict-free representation and generally instructing the defendant on "problems inherent in being represented by an attorney with divided loyalties." *Id.* Then, the trial court should simply "allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision." *Id.* Commentators have identified this structure as one which is highly protective of the lawyer-client relationship, since the process of judicial fact-finding may "compromise privileged communications, undermine the defendant's faith in his attorney, and chill the attorney's enthusiasm for the case." Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201, 1232 (1989). Instead "[c]ourts have appropriately entrusted this inquiry to defense counsel, rather than undertaking it themselves, since such an inquiry could inadvertently undermine the very right to counsel it is intended to protect." *Id.* at 1232-33 (internal citation omitted).

98. See *Wheat*, 486 U.S. at 159 (discussing the proper approach to evaluate Sixth Amendment claims and noting that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." (quoting *United States v. Cronin*, 466 U.S. 648, 657 n.21 (1984))); see also *Myers*, 294 F.3d at 207 (rejecting petitioner's claim that lower court's focus on "performance rather than the deteriorated attorney-client relationship" when evaluating the lawyer's motion to withdraw was reversible error); *Barrow*, 287 F.3d at 738 (confirming that the lower court's focus when evaluating the lawyer-client relationship should be on the "adequacy of counsel in the adversarial process, not the accused's relationship with his attorney").

relationship,⁹⁹ suggests that a court should not disregard the qualitative aspects of the lawyer-client relationship when determining its adequacy.¹⁰⁰ In addition to these considerations, it has been suggested that judges' willingness to grant a motion for withdrawal or substitution of counsel may hinge on whether or not the defendant is indigent, and is therefore represented by an appointed lawyer.¹⁰¹

In 1948, Justice Black wrote the following:

Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer . . .¹⁰²

Since then, some judges continue to express the view that the lawyer-client relationship between an indigent defendant and his appointed counsel should be identical to one where the parties are bound by a fee agreement.¹⁰³ There are, however, judges and commentators who suggest this is an inaccurate portrayal, in part because where the lawyer is appointed, there are increased obstacles to the formation of trust and confidence in the lawyer-client relationship, including a notoriously crowded, underfunded public defense system, which permits appointed lawyers little time to cultivate a relationship of trust and confidence with their clients.¹⁰⁴ Additionally, appointed

99. See *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

100. See *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 778 (9th Cir. 2001) (reversing the lower court's denial of the defendant's substitution of counsel motion where "[t]here was too much emphasis on the appointed counsel's ability to provide adequate representation and not enough attention to the status and quality of the attorney-client relationship."); *Musa*, 220 F.3d at 1102 (rejecting competence as the sole factor on which to evaluate the adequacy of the lawyer-client relationship); *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) ("[T]o compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."); *People v. Wilson*, 204 N.W.2d 269, 271 (Mich. Ct. App. 1973) (noting that the trial judge's "conclusion that appointed counsel was competent was unresponsive to defendant's allegation regarding . . . the destruction of communication and confidence between the parties").

101. See *infra* notes 102-07 and accompanying text.

102. *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948).

103. See *Slappy*, 461 U.S. at 24 (Brennan, J., concurring) ("[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained." (quoting *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968))); *State ex. rel. Burns v. Erickson*, 129 N.W. 2d 712, 716 (S.D. 1964) ("The attorney's obligation and duty to his client is, and must be, the same whether he is paid much or little or nothing at all. Such is the tenor of the oath to which he subscribes when admitted to practice."). Consequently, it follows that an indigent defendant's relationship with his lawyer is entitled to the same protection as any other defendant. See *Slappy*, 461 U.S. at 22 (Brennan, J., concurring).

104. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 *Emory L.J.* 1169, 1178-85 (2003) (noting that inadequate funding of public defense systems combined with the excessive case loads of appointed lawyers

lawyers must overcome the historic mistrust of their allegiance and abilities by criminal defendants.¹⁰⁵ In this vein, Justice Brennan has acknowledged that “we must accept the harsh reality that the quality of a criminal defendant’s representation frequently may turn on his ability to retain the best counsel money can buy.”¹⁰⁶ Finally, commentators have suggested that when the defendant is indigent, judges are less likely to recognize a complete breakdown of the lawyer-client relationship that justifies its termination, because where the defendant is entitled to replacement counsel, the court has an overwhelming institutional interest in retaining the originally appointed defense lawyer.¹⁰⁷

Having described the historical import of trust and confidence in the lawyer-client relationship, as well as the existing procedural framework for its termination during civil litigation and criminal proceedings, this Note now turns to a more speculative task: determining judges’ current views of the lawyer-client relationship.

II. IN THEIR OWN WORDS: THE JUDICIARY’S VIEW OF THE LAWYER-CLIENT RELATIONSHIP

In an effort to ascertain judges’ current views of the lawyer-client relationship, this part considers the judiciary’s response to instances of alleged breakdown in the lawyer-client relationship by exploring recurrent themes in judicial decisions, from both civil litigation and the criminal justice system, that address either the withdrawal or the substitution of counsel. A comparison of judicial opinions from these two procedural contexts suggests that despite some congruence in

results in systemic neglect of indigent defendants and may provide an incentive for appointed lawyers to economize by encouraging guilty pleas).

105. See *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) (“It is no secret that indigent clients often mistrust the lawyers appointed to represent them.”).

106. *Slappy*, 461 U.S. at 23 (Brennan, J., concurring). Another court, finding that the Sixth Amendment rights of an indigent defendant were violated by the trial judge’s failure to investigate allegations that his appointed lawyer verbally assaulted him with racial slurs, pointed out the “improbability” of a non-indigent defendant receiving the same treatment by his retained lawyer. See *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir. 1994).

107. See Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. Rev. 531, 571 (1988) (“Any change of counsel causes delay and keeps the case on the judge’s calendar for a longer period of time. That reality leads trial judges to ignore defendants’ concerns as well as the proper responsibilities of the court.”); see also John, *supra* note 71, at 160 (“Due process requirements wage a constant battle with the need to process large numbers of cases.”). In contrast, civil litigants are not entitled to appointed counsel. See *Fidelity Nat’l Title Ins. Co. of N.Y. v. Intercounty Nat’l Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002) (“Litigants have no right to free legal aid in civil suits.”). Therefore, the institutional costs of permitting withdrawal or substitution of counsel during civil litigation are arguably much lower.

judges' approaches to breakdowns in the lawyer-client relationship,¹⁰⁸ judges in the criminal context seem more likely to reject even a worthy motion to withdraw or to substitute counsel. The apparent result of this disparate treatment is that trust and confidence in the lawyer-client relationship receives less protection in the criminal justice system than in civil litigation.¹⁰⁹ Why is this the case? The opinions presented below suggest that judges' skepticism of criminal defendants¹¹⁰ and of their lawyers,¹¹¹ combined with an imperfect procedure by which judges evaluate alleged breakdowns in the lawyer-client relationship,¹¹² might be largely responsible. This Note next introduces judges' approaches to alleged breakdowns in the lawyer-client relationship during civil litigation, followed by a similar analysis of cases from the criminal justice system.

A. *Approaching the Lawyer-Client Relationship in Civil Litigation*

Part II.A examines the judiciary's view of the lawyer-client relationship within the context of civil litigation, which appears to be largely consistent with the traditional views of the lawyer-client relationship held by the bench and the bar.¹¹³ Part II.A.1 begins with the acknowledgment that when certain circumstances are present, judges will act to terminate the lawyer-client relationship. Then, Parts II.A.2 and II.A.3 discuss judges' respect for the lawyer as an individual entity and the related theme of judges' readiness to permit a lawyer's withdrawal if they perceive the client to be at fault for the dysfunction of the lawyer-client relationship. Finally, Part II.A.4 discusses the role that extralegal factors play in judicial assessment of alleged breakdowns.

1. The Easy Case: Adversarial Lawyer-Client Relationships

Despite the largely idiosyncratic nature of the courts' decisions to permit withdrawal,¹¹⁴ the cases suggest that judges concur on the

108. See *infra* Parts II.A.1, II.B.1 (discussing judges' approaches to adversarial lawyer-client relationships in civil litigation and in the criminal justice system, respectively).

109. See *infra* Part III.A (concluding that the lawyer-client relationship receives less protection in the criminal justice system than in civil litigation).

110. See *infra* Part II.B.2.a.

111. See *infra* Part II.B.2.b.

112. See *infra* Part III.A; *infra* notes 246-50 and accompanying text (noting that the confidential nature of the lawyer-client relationship severely limits the scope of judicial inquiry into an alleged breakdown).

113. See *supra* Parts I.A.1-2 (discussing the historical expectations of trust and confidence in the lawyer-client relationship of both the bench and the bar, respectively).

114. See *Atl. Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469, 472 (D.C. 1990) (noting that "the decision turns on the trial judge's evaluation of an interpersonal relationship with nuances that often may fail to be revealed in a trial transcript").

appropriate response to what is alternatively described as an “irretrievable breakdown”¹¹⁵ or a “complete breakdown”¹¹⁶ of the lawyer-client relationship in a civil litigation. Judges will grant a lawyer’s motion to withdraw where the lawyer-client relationship is characterized by unambiguous hostility such that it becomes adversarial in nature.¹¹⁷ In *Wolgin v. Smith*, the client repeatedly “attacked [the lawyer’s] character and professional ethics”¹¹⁸ in a series of threatening letters in which he compared the lawyer to a “reptile”¹¹⁹ and complained of being “shaken down” by the law firm.¹²⁰ Additionally, the lawyer-client relationship was so severely strained that the parties could communicate in court only by writing notes to each other.¹²¹ Faced with these facts, the judge permitted the lawyer’s withdrawal.¹²² The primary consideration driving this analysis was the court’s conventional understanding of a well-functioning lawyer-client relationship.¹²³ Given the mutual antagonism of this relationship, the court recognized that the traditional elements of trust and confidence in the lawyer-client relationship were unattainable.¹²⁴ The judge also expressed concern regarding the possible negative effect of a dysfunctional lawyer-client relationship on the court’s administration of justice.¹²⁵ These factors remain prevalent in judges’ evaluations of the lawyer-client relationship; however, where the breakdown is less obvious, judges will also consider issues other than the role of trust and confidence within the lawyer-client relationship, such as protecting the lawyer’s individual freedom to contract.

115. *Wolgin v. Smith*, No. CIV.A.94-7471, 1996 WL 482943, at *1 (E.D. Pa. Aug. 21, 1996).

116. *Atl. Petroleum Corp.*, 572 A.2d at 473 (quoting *Blessing v. Dow Chemical Co.*, 521 A.2d 1176, 1180 (Me. 1987)).

117. *Wolgin*, 1996 WL 482943, at *3-4; see also *In re Dunn*, 98 N.E. 914, 915 (N.Y. 1912) (recognizing certain instances where it is “desirable to permit a termination of the relation rather than to attempt to coerce its continuance under adverse conditions”). The same trigger for termination exists in criminal matters. See *infra* note 165 and accompanying text.

118. *Wolgin*, 1996 WL 482943, at *3.

119. *Id.*

120. *Id.*

121. *Id.* at *4.

122. *Id.* at *5.

123. See *id.* at *4 (noting that mutual confidence between a lawyer and a client is critical for a successful representation and that “[s]hotgun weddings and enforced lawyer-client relationships fall into the same category” (citation omitted)). For a detailed discussion of the judiciary’s conventional view of the lawyer-client relationship see *supra* Part I.A.1.

124. See *Wolgin*, 1996 WL 482943, at *4 (“Mutual disrespect, disregard, and distrust are not the foundation of an effective attorney-client relationship.”). The same concern similarly prompts termination of the lawyer-client relationship in criminal proceedings. See *infra* text accompanying notes 171-72.

125. See *Wolgin*, 1996 WL 482943, at *4 (“[T]he Court is concerned that forcing [the lawyer] to continue to represent [the client] under circumstances such as these will interfere with the Court’s ability to effectively adjudicate this case.”).

2. The Contractual View

The reciprocal nature of the lawyer-client relationship is often understood by judges, at its most fundamental level, as a type of contract.¹²⁶ This contract has historically been understood as a “unique contract,”¹²⁷ in part because of the unusually central role trust and confidence play in its execution.¹²⁸ The lawyer-client contract also stands alone because it is governed by marked exceptions to traditional contract law,¹²⁹ including the lawyer’s inability to terminate the lawyer-client relationship during litigation without judicial approval.¹³⁰ In keeping with this distinction between “ordinary contracts”¹³¹ and the contract that forms the lawyer-client relationship, courts apply an amended version of classical contract theory to their analyses of the lawyer-client relationship.¹³² One example of this approach is judges’ use of the equitable doctrine of specific performance.¹³³ Even when a client objects to a lawyer’s

126. Restatement (Third) of the Law Governing Lawyers § 14(1)(a)-(b) (2000) (requiring manifestations of consent from both the lawyer and the client to form a lawyer-client relationship); *see also* Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694, 696 (S.D.N.Y. 1973) (referring to the agreement between a lawyer and client as a “contract”); Rindner v. Cannon Mills, Inc., 486 N.Y.S.2d 858, 859 (Sup. Ct. 1985) (referring to the agreement between lawyer and client as a “contract”). This characterization is less applicable in the criminal context where lawyers are often appointed by the court to provide representation thereby eliminating the element of mutual consent. *See* Restatement (Third) of the Law Governing Lawyers § 14(2).

127. *Battani, Ltd. v. Bar-Car, Ltd.*, 299 N.Y.S.2d 629, 631 (Civ. Ct. 1969).

128. *See supra* note 29 and accompanying text.

129. *See* Joseph M. Perillo, *The Law of Lawyers’ Contracts Is Different*, 67 *Fordham L. Rev.* 443, 445 (1998) (“As a result of lawyers’ special role in the legal system, contracts between lawyer and client receive different treatment than other contracts.”).

130. *See Battani*, 299 N.Y.S.2d at 631 (discussing the requirement that a lawyer obtain tribunal approval to terminate the lawyer-client relationship and stating that “[i]t may seem anomalous that a prospective breacher should ask the court’s permission to breach. There is no anomaly. This is merely another aspect of the uniqueness of the attorney-client contract.” (internal punctuation omitted)). The Model Rules also articulate the requirement of tribunal approval for termination of the lawyer-client relationship. *See supra* notes 71-72 and accompanying text.

131. *In re Dunn*, 98 N.E. 914, 916 (N.Y. 1912).

132. *See Perillo, supra* note 129, at 445. This article explores the variety of ways in which lawyers’ contracts are distinguished for special, often preferential, treatment by the bench and discusses the numerous ways in which lawyers’ contracts are subject to exceptions to classical contract law. *Id.* Professor Joseph M. Perillo discusses several exceptions, which are relevant to the scope of this Note. These include the client’s unilateral right to terminate the lawyer-client relationship, despite the presence of a retainer agreement, *id.* at 446-47, and the lawyer’s ability to withdraw from a (non-litigious) representation if the withdrawal will not have a “material adverse effect on the interests of the client,” *id.* at 449 (quoting Restatement (Third) of the Law Governing Lawyers §44(3)(a) (Proposed Final Draft No. 1, 1996)).

133. Specific performance is defined as follows:

The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif., a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are

withdrawal, judges are hesitant to require specific performance by the attorney,¹³⁴ and will do so only where the client's rights, or the court's calendar are unduly prejudiced by the delay resulting from withdrawal.¹³⁵ Judges' recognition of lawyers' independent professional interests¹³⁶ is echoed by their actions to protect the lawyers' financial interests in a representation. Courts have agreed that, in certain circumstances, appropriate grounds to terminate the lawyer-client relationship exist where "the representation will result in an unreasonable financial burden on the lawyer."¹³⁷ This recognition of the lawyer as an independent actor, one with separate professional and financial interests than those of his client,¹³⁸ is further reinforced by judges' responses to instances of client misconduct that strain the lawyer-client relationship.

3. The Blame Inquiry: Rewarding Client Misconduct

In civil litigation, where the lawyer-client relationship deteriorates completely, courts often look to assign blame to either the lawyer or

inappropriate or inadequate, as when the sale of real estate or a rare article is involved.

Black's Law Dictionary 1435 (8th ed. 2004); *see* *Rindner v. Cannon Mills, Inc.*, 486 N.Y.S.2d 858, 859 (Sup. Ct. 1985) ("Denying an attorney's application [to withdraw] amounts to enforcing specific performance of the attorney-client relationship."); *Battani*, 299 N.Y.S.2d at 631 (denying a motion to withdraw "runs afoul of the old rule that a court will not order specific performance of a contract for personal services").

134. Lawyers seeking permission to withdraw receive markedly different treatment in the criminal justice system. *See infra* Part II.B.2.b.

135. *See* *Goldsmith v. Pyramid Communications, Inc.*, 362 F. Supp. 694 (S.D.N.Y. 1973). The court held:

What amounts to specific performance by an attorney has been required, but such cases are extremely rare. They fall into two general classifications, that is, situations where the client's rights will be prejudiced by the delay consequent on replacing counsel and cases where the trial calendar of the Court will be dislocated, so as to impede the interests of justice.

Id. at 696 (internal citations omitted).

136. The courts' hesitancy to require specific performance of a lawyer should not be interpreted as recognition of a lawyer's property right in the lawyer-client contract. As evidenced by the fact that a client may terminate the lawyer-client relationship at will, the lawyer has no expectancy or property interest in the representation. *See* *Perillo*, *supra* note 129, at 446 ("If the client elects to fire the lawyer without cause, the lawyer is entitled to recover *in quantum meruit*, but, subject to a few exceptions, she has no right to expectancy damages.").

137. Model Rules of Prof'l Conduct R. 1.16(b)(6) (1983) (amended 2003); *see also* *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002) (reversing the district court's denial of a withdrawal motion where there was "\$470,000 in unpaid bills, with the meter still running and poor prospects of future payment" and declaring that "lawyers are entitled to stop working when clients stop paying"); Jill Schachner Chanen, *Unpaid Legal Bills Grounds for Withdrawal*, Corp. Legal Times, Feb. 2003, at 58.

138. *See supra* notes 135-37 and accompanying text.

the client for its failure.¹³⁹ Judges do so in the context of analyzing whether or not the lawyer had “good cause” to withdraw.¹⁴⁰ If the client is to blame for the breakdown, judges will regularly permit the lawyer to withdraw from the representation.¹⁴¹ Some judges have explained their willingness to permit withdrawal in these instances by analogizing the client’s misconduct to an implicit discharge of his lawyer.¹⁴² In *Ambrose v. Detroit Edison Co.*, the judge identified the client’s persistent refusal to follow certain legal procedures and his “irrational rejection”¹⁴³ of a reasonable settlement offer as factors that precipitated the breakdown of the lawyer-client relationship.¹⁴⁴ After finding that “it was [the client’s] unwillingness to cooperate with his attorneys which caused the problems,” the judge permitted the lawyers to withdraw.¹⁴⁵ Additionally, where the client’s misconduct is extreme, courts may view withdrawal as necessary to protect the lawyer’s professional reputation. One judge permitted a lawyer’s withdrawal where the client’s misconduct created a “functional

139. See, e.g., *Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520, 523-24 (Mich. Ct. App. 1975) (analyzing at length which party bore responsibility for the breakdown of the lawyer-client relationship).

140. See *id.* at 522 (discussing the role of good cause in terminating a lawyer-client relationship and finding “[i]t is clear that ‘good cause’ exists when the client has caused a total breakdown in the attorney-client relationship”). Notably, there are numerous grounds, not directly related to the lawyer-client relationship, which may constitute “good cause” for a lawyer to withdraw from civil litigation. These include where the lawyer is unable to perform her duties because of the unwelcome interference of co-counsel. See *Joseph Brenner Assocs. Inc. v. Starmaker Entm’t, Inc.*, 82 F.3d 55, 57 (2d Cir. 1996) (permitting the lawyer to withdraw where she perceived co-counsel as a “back-seat driver”). Another ground is where the lawyer concludes the client’s action is without merit. See *Rindner v. Cannon Mills, Inc.*, 486 N.Y.S.2d 858, 860 (Sup. Ct. 1985) (finding good cause for withdrawal where the lawyer no longer felt the client’s action was meritorious and where there was no indication of bad faith). A third ground is where the client fails to pay legal fees. See *Fidelity Nat’l Title Ins. Co. of N.Y.*, 310 F.3d at 541 (permitting withdrawal where the client had failed to pay almost \$500,000 in legal bills before the start of trial).

141. See *Whiting v. Lacara*, 187 F.3d 317, 322 (2d Cir. 1999) (permitting withdrawal where the client’s “desire both to dictate legal strategies to his counsel and to sue counsel if those strategies are not followed” placed the lawyer in an “impossible” situation); *Ambrose*, 237 N.W.2d at 524 (permitting withdrawal where the client refused to follow certain legal procedures and inexplicably rejected a favorable settlement offer). This is not to say, of course, that any instance of client misconduct will result in the termination of the representation. Courts do distinguish between those clients who are difficult and those whose behavior crosses the line to unreasonably difficult. See *Atl. Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469, 474 (D.C. 1990) (“That counsel had a difficult client is not the same as having a client who does not communicate at all.”). For a discussion of how judges’ blame inquiries differ in the context of the criminal justice system, see *infra* Part II.B.3.

142. *Ambrose*, 237 N.W.2d at 522 (“[I]t must be held that such conduct is equivalent to a discharge of his counsel, and a breaking off of the confidential and delicate relation theretofore existing between them.” (quoting *Genrow v. Flynn*, 131 N.W. 1115, 1116 (Mich. 1911))).

143. *Id.* at 523.

144. *Id.*

145. *Id.*

conflict of interest” since it would inevitably lead to the lawyer’s choosing between facing a frivolous malpractice action or Rule 11 sanctions.¹⁴⁶ Of course, assigning blame for the breakdown of the lawyer-client relationship is frequently not as straightforward as the above examples illustrate. In many instances, the courts’ analyses are further complicated by extralegal factors.

4. Consideration of Extralegal Factors

Even where judges recognize a breakdown in the lawyer-client relationship, they may still elect, on a discretionary basis, to deny a lawyer’s motion to withdraw.¹⁴⁷ There are numerous reasons why judges may choose this course; among them is the judiciary’s desire to protect third-party interests¹⁴⁸ and to promote the interests of fundamental justice.¹⁴⁹ Also, considerations of judicial economy may weigh heavily in the court’s evaluation of whether or not there are sufficient grounds to terminate the lawyer-client relationship.¹⁵⁰

a. Justice: Generally and for Third Parties

Where the lawyer’s withdrawal will unfairly prejudice a third party’s interests in the civil litigation, judges seem likely to deny the motion.¹⁵¹ This concern with preventing injustice to third parties is related to a broader theme present in these analyses, that of promoting justice generally.¹⁵² While judges have denied lawyers’

146. *Whiting*, 187 F.3d at 323. The court also noted that while the malpractice action would certainly be unfounded, “it would be actively pursued, and even frivolous malpractice claims can have substantial collateral consequences.” *Id.*

147. Model Rules of Prof’l Conduct R. 1.16(c) (1983) (amended 2003) (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”).

148. *See infra* note 151 and accompanying text.

149. *See infra* notes 152-56 and accompanying text.

150. *See infra* Part II.A.4.b.

151. *See Fidelity Nat’l Title Ins. Co. of N.Y. v. Intercounty Nat’l Title Ins. Co.*, 310 F.3d 537, 541 (7th Cir. 2002) (recognizing “[s]evere prejudice to third parties” as an appropriate ground on which to deny a lawyer’s motion to withdraw). Judge Frank H. Easterbrook further explained that “[t]his is not because [the lawyer] owes any obligation to protect the interests of [his client’s] *adversaries*; it is again a matter of timing, and a judge may insist that counsel resolve differences with clients in a fashion that curtails strangers’ avoidable losses.” *Id.* Judge Easterbrook went on to balance the interests of the third parties with those of the lawyer and to permit the lawyer’s withdrawal. *Id.*

152. *See Atl. Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469, 472 (D.C. 1990) (noting “the rules are designed to promote rather than frustrate the interests of fundamental justice”); *see also Wolgin v. Smith*, No. CIV.A.94-7471, 1996 WL 482943, at *4 (E.D. Pa. Aug. 21, 1996) (“Justice will not be served in this contested litigation by forcing the continuation of a lawyer/client relationship characterized by hostility and acrimony.”).

motions for withdrawal to promote “the interests of fundamental justice,”¹⁵³ such a denial appears more likely to occur where unusual factual circumstances or complex procedural history also exist.¹⁵⁴ Conversely, judges have also invoked “the interests of fundamental justice”¹⁵⁵ as a basis to permit withdrawal, but again, such permission seems to be granted where unusual circumstances complicate the analysis.¹⁵⁶

b. *Judicial Economy*

Another factor that may trigger a judge’s denial of a lawyer’s motion to withdraw from civil litigation, even where the lawyer-client relationship is obviously damaged, is the judiciary’s persistent interest in promoting judicial economy.¹⁵⁷ In one case, a judge refused to allow plaintiff’s lawyers to withdraw from an eight-year-old case because of the resulting inevitable delay to the proceedings, despite being “mindful of the fact that the working relationship between counsel and its client is, at the current time, not ideal.”¹⁵⁸ Conversely, some judges also recognize that there are instances where, despite disruption to the court’s calendar, withdrawal is necessary to preserve the integrity of the proceedings.¹⁵⁹ The consideration of judicial economy,¹⁶⁰ as well as many of the other themes discussed above

153. *See Atl. Petroleum Corp.*, 572 A.2d at 472.

154. *See id.* at 474-75 (reversing the trial judge’s grant of the plaintiff’s lawyer’s withdrawal motion where the plaintiff’s failure to follow the court’s instructions and arrive on time to trial preparation meetings did not constitute misconduct sufficient to justify withdrawal and where, due to a prior court ruling, the inevitable result of the lawyer’s withdrawal was the dismissal of the plaintiff’s suit).

155. *See id.* at 472.

156. *See Esteves v. Esteves*, 680 A.2d 398, 404-05 (D.C. 1996) (upholding trial court’s grant of withdrawal motion in post-matrimonial action where the wife’s lawyer had given his client over one month’s notice of his intention to withdraw, where the wife had taken no action to obtain substitute counsel, and where the husband’s interest in obtaining “fundamental justice” would have been thwarted by a continuance).

157. *See Whiting v. Lacara*, 187 F.3d 317, 323 (2d Cir. 1999) (noting the “interest of the district court in preventing counsel from withdrawing on the eve of trial is substantial”); *Malarkey v. Texaco, Inc.*, No. 81 Civ. 5224, 1989 WL 88709, at *2-3 (S.D.N.Y. July 31, 1989) (denying plaintiff’s lawyer’s withdrawal motion for reasons of judicial economy); *see also Law Firm’s Withdrawal Motion Denied as Not Promoting ‘Judicial Economy,’* N.Y. L.J., Oct. 30, 2003, at 20.

158. *See Malarkey*, 1989 WL 88709, at *3. The court stated:

It is clear that in this action where there has been extensive motion practice and the case is, after significant delay, on the verge of trial readiness, a change in counsel would do no more than extend the already protracted history of the litigation. . . . [T]he Court’s ability to manage its docket would certainly be impeded by a change in counsel at this late stage of the litigation.

Id. at *2.

159. *Whiting*, 187 F.3d at 321.

160. *See infra* Part II.B.4.b.

remain prevalent when considering the lawyer-client relationship in the context of the criminal justice system.

B. *Approaching the Lawyer-Client Relationship in the Criminal Justice System*

Part II.B addresses the judiciary's view of the lawyer-client relationship within the context of the criminal justice system, which often reflects a departure not only from the traditional expectations of the bar and the bench with respect to preserving trust and confidence in the lawyer-client relationship,¹⁶¹ but also from the approach taken by judges in civil litigation.¹⁶² Part II.B.1 recognizes that when presented with a lawyer-client relationship that is obviously adversarial in nature, judges will intervene to terminate the relationship. Then, Parts II.B.2 and II.B.3 discuss the overarching skepticism of the bench, and judges' related aversion to permitting withdrawal or substitution of counsel, particularly when the defendant's misconduct is the source of the lawyer-client relationship's failure. Finally, Part II.B.4 considers the extralegal factors that may overwhelm courts' analysis.

1. Another Easy Case: Adversarial Lawyer-Client Relationships

Since courts have interpreted the U.S. Constitution's guarantee of legal representation¹⁶³ as requiring advocacy, not merely an appearance,¹⁶⁴ it is perhaps not surprising that where the lawyer-client relationship is undermined such that the lawyer becomes the client's adversary, judges will recognize a complete breakdown in the lawyer-client relationship and terminate the representation.¹⁶⁵ In *United*

161. See *supra* Parts I.A.1-2 (discussing the historical expectations of trust and confidence in the lawyer-client relationship of both the bench and the bar, respectively).

162. See *supra* Part II.A.

163. U.S. Const. amend. VI.

164. *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant . . .").

165. See, e.g., *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 779 (9th Cir. 2001) (finding that the lawyer's "adversary and antagonistic stance" to his client resulted in the defendant's being "effectively unrepresented"). Courts have recognized though that "[i]t is not necessary that every instance of alleged disagreement between . . . counsel and an accused requires a substitution of counsel." *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979). Judges consistently distinguish between instances where the lawyer and defendant have taken positions adversarial to one another and other, lesser instances of conflict. For example, a mere "lack of rapport" between the lawyer and the defendant does not constitute a total breakdown of the lawyer-client relationship. See *State v. Johnsen*, No. 23856-0-II, 2000 WL 48516, at *2 (Wash. Ct. App. Jan. 21, 2000) (finding no breakdown in the lawyer-client relationship where the record merely showed "a lack of rapport"); *State v. Sherrill*, No. 19825-8-II, 1998 WL 97224, at *2 (Wash. Ct. App. Mar. 6, 1998) (noting that while a complete breakdown in communication between the lawyer and the client is sufficient to justify a substitution of appointed counsel, a mere disagreement or dislike of one another is

States v. Adelzo-Gonzalez, the defendant alleged that his appointed lawyer had used bad language, and threatened to testify against him and to “sink [him] for 105 years so that [he] wouldn’t be able to see [his] wife and children.”¹⁶⁶ The appellate court found that the appointed lawyer had “virtually abandoned his representation”¹⁶⁷ of the defendant by openly opposing the defendant’s numerous motions to substitute counsel, calling the defendant a liar in open court, and suggesting to the district judge that the defendant was “feigning ignorance” with regard to his understanding of the criminal proceedings.¹⁶⁸ Given these facts, the appellate court found that the district judge’s denial of the defendant’s motions to substitute counsel was an abuse of discretion.¹⁶⁹ While the lawyer-client relationship in this case may seem unusually strained, there are other, similar instances of appellate intervention where the lawyer takes a position adverse to his client.¹⁷⁰ Judges may provide relief in these cases for a variety of reasons, some of which may have little to do with the actual parties to the litigation,¹⁷¹ including their recognition that this type of

insufficient). Also, where the disagreement relates to trial strategy, judges will not find a breakdown in the lawyer-client relationship. See *United States v. Farrah*, 128 F. Supp. 2d 103, 115 (D. Conn. 2001) (finding the lawyer-client relationship intact where lawyer and client bitterly disagreed over legal strategy). Similarly, judges will terminate an openly adversarial lawyer-client relationship in civil litigation. See *supra* Part II.A.1.

166. *Adelzo-Gonzalez*, 268 F.3d at 778.

167. *Id.* at 779.

168. *Id.* at 778. The court went on to describe the lawyer-client relationship as “antagonistic, lacking in trust, and quarrelsome.” *Id.* at 780.

169. *Id.* at 773-74. The court stated that “the district court . . . failed to recognize a material breakdown in trust and communication between defendant and his court-appointed attorney.” *Id.* at 773.

170. See *Frazer v. United States*, 18 F.3d 778, 783-84 (9th Cir. 1994) (finding abuse of discretion where the district court denied defendant’s request for relief without holding an evidentiary hearing regarding defendant’s allegations that his appointed lawyer had verbally assaulted him with racial slurs and threatened to provide inferior representation if he elected to go to trial); *United States v. Wadsworth*, 830 F.2d 1500, 1506 (9th Cir. 1987) (finding abuse of discretion where the defendant’s lawyer acted as an “adverse ‘witness’” during a substitution of counsel hearing and the district court then denied the defendant’s motion (citation omitted)); *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (finding error where the court denied defendant’s motion to substitute counsel where the “course of the client-attorney relationship had been a stormy one with quarrels, bad language, threats and counter-threats”); cf. *State v. Chambers*, No. 50179-8-I, 2003 WL 23019947, at *5 (Wash. Ct. App. Dec. 29, 2003) (rejecting the claim that the lower court’s denial of a substitution of counsel motion was an abuse of discretion by stating that since the lawyer advocated for substitution on his client’s behalf “the proceeding never became adversarial, [so] it did not deny [the defendant’s] right to representation”).

171. See *Frazer*, 18 F.3d at 785 (citing the United States’ national policy against racial discrimination as support for finding that the lawyer-client relationship was fatally undermined by the possibility that the appointed lawyer verbally assaulted the defendant with racial slurs and discussing the disparity in treatment of defendants by retained and appointed lawyers as a factor in the analysis); *Williams*, 594 F.2d at 1260 (noting defendant’s pro se representation after the district court denied his substitution of counsel motions was a “disaster”).

antagonistic behavior fatally undermines the traditional goals and purposes of the lawyer-client relationship.¹⁷² Of course, it is not always the case that judges respond sympathetically to allegations of breakdown in the lawyer-client relationship. As the next part explains, often the exact opposite is true.

2. The Skeptical View

Judges often display marked skepticism when evaluating the veracity of allegations of breakdown in the lawyer-client relationship. While the majority of this skepticism is aimed at criminal defendants' motivations for requesting substitution of counsel,¹⁷³ criminal defense lawyers are not immune from judges' distrust and also face skepticism from the bench.¹⁷⁴ Finally, judges appear skeptical of the system itself, expressing doubt that termination of the lawyer-client relationship will effectively resolve conflicts inherent in criminal defense representation.¹⁷⁵

a. *Judicial Skepticism of Criminal Defendants*

Judges often appear wary of the motivations of a criminal defendant who alleges breakdown of the lawyer-client relationship, a response that reflects both procedural and substantive considerations of the bench. With regard to procedure, one possible reason for this guarded response is judges' concerns about being duped by a defendant's manipulative efforts to delay his trial.¹⁷⁶ Another possible reason is a more general concern that, if given the opportunity, the defendant will somehow abuse the judicial process.¹⁷⁷ Judges

172. *Frazer*, 18 F.3d at 785 (“Such behavior completely destroys and negates the channels of open communication needed for the [lawyer-client] relationship to function as contemplated in the Constitution.”).

173. *See infra* Part II.B.2.a.

174. *See infra* Part II.B.2.b.

175. *See infra* Part II.B.2.c.

176. *See* *United States v. Barrow*, 287 F.3d 733, 738 (8th Cir. 2002) (discussing the court's responsibility to “thwart abusive delay tactics” when evaluating a motion to substitute counsel (quoting *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995))); *see also* *United States v. Farrah*, 128 F. Supp. 2d 103, 115 (D. Conn. 2001) (warning that too much power in the hands of particularly difficult defendants would effectively halt the judicial process); *People v. Marsden*, 465 P.2d 44, 47 (Cal. 1970) (en banc) (noting that the trial court's refusal to consider the defendant's allegation of a breakdown of the lawyer-client relationship was based on a fear that doing so would set a precedent making completion of a trial impossible); *State v. Hill*, No. 20028, 2004 WL 870439, at *2 (Ohio Ct. App. Apr. 23, 2004) (finding that the timing of defendant's request to substitute counsel supported the conclusion that it “was made in bad faith and for purposes of delay”). *But see* *United States v. Wadsworth*, 830 F.2d 1500, 1510 (9th Cir. 1987) (condemning the trial judge's assumption that defendant's motion was made for the purposes of delaying the trial as “unreasonable”).

177. *See* *People v. Kirvin*, No. B156887, 2003 WL 21227993, at *7 (Cal. App. Dep't Super. Ct. May 28, 2003) (quoting the trial judge's response to defendant's numerous

sometimes explain this skepticism by pointing to the public's and the judicial system's interest in maintaining an orderly and efficient trial process,¹⁷⁸ and the ensuing need for the judiciary to balance these interests with the interests of the defendant.¹⁷⁹

A substantive aspect of judicial skepticism appears to be rooted in judges' assumptions that defendants' complaints about the quality of the lawyer-client relationship are merely symptoms of a larger issue: despondency at being the subject of a criminal prosecution.¹⁸⁰ This view is succinctly illustrated by one trial judge's statement that "[o]bviously [the defendant's] not happy. He's in a bad situation, it's not surprising he's not happy . . ."¹⁸¹ In this same vein, judges also suggest that defendants may claim the lawyer-client relationship has broken down when their real dissatisfaction lies with their lawyers' truthful assessments of their situations.¹⁸² In these instances, judges

requests to change counsel as, "I think you are manipulating the system." (citation omitted)); *see also* *United States v. Ramey*, 559 F. Supp. 60, 63 (E.D. Tenn. 1981) (discussing defendant's motion to substitute his retained lawyer and noting that "[t]he right of [the defendant] to counsel of his choice . . . 'cannot be used merely as a manipulative monkey wrench'" (quoting *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978))); *People v. Earp*, No. F041724, 2003 WL 22368871, at *6 (Cal. App. Dep't Super. Ct. Oct. 17, 2003) (expressing the view that defendant's claim of breakdown in the lawyer-client relationship was "an excuse for noncooperation" and an attempt at manipulation).

178. *See Ramey*, 559 F. Supp. at 63; *People v. Brown*, 250 Cal. Rptr. 762, 765 (Ct. App. 1988).

179. *See Barrow*, 287 F.3d at 738 (discussing the need for balancing analysis); *Ramey*, 559 F. Supp. at 63 (discussing need for balance).

180. *See State v. Johnsen*, No. 23856-0-II, 2000 WL 48516, at *1 (Wash. Ct. App. Jan. 21, 2000).

181. *Johnsen*, 2000 WL 48516, at *1; *accord Kirvin*, 2003 WL 21227993, at *3 (quoting trial judge's response to defendant's claim of breakdown of the lawyer-client relationship as "'I'm just hearing that he's frightened. He's nervous. He doesn't understand everything that's going on. . . . [N]o defendant ever does know everything that's going on.'").

182. *See People v. Cortes*, No. B167341, 2004 WL 1799749, at *11 (Cal. App. Dep't Super. Ct. Aug. 12, 2004) ("Appellant was angry because of disrespectful statements made to him by counsel. However . . . counsel's statement to appellant about the possibility of a gun charge appears to be counsel's frank assessment of the situation . . ."). The *Kirvin* court quoted the trial judge's explanation of the source of conflict in a lawyer-client relationship as follows:

[D]efendants get frustrated and angry at their defense counsel because their defense counsel is urging them to consider the risks of rejecting the offer by the People, and they don't like it. But that does not mean that defense counsel is not doing an adequate job of representing you. It's just they're delivering [a very] unpleasant message. But that he has to do.

Kirvin, 2003 WL 21227993, at *5 (second alteration in original); *see also* *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 776 (9th Cir. 2001) (quoting the trial court's response to defendant as "'[b]ecause of the delay in accepting [the lower charge], the charges are now higher, and that causes you to believe somehow that [the appointed counsel] is responsible for that, when simply he's just giving you the sad news that the prosecutor has raised the stakes.'" (third alteration in original) (citation omitted)); *Earp*, 2003 WL 22368871, at *6 (commenting that a conflict between lawyer and client

may recognize that a legitimate disagreement exists, but not one that rises to the level of a complete breakdown in the lawyer-client relationship.¹⁸³ Interestingly, judicial skepticism of assertions that the lawyer-client relationship has broken down is not limited to those instances where defendants raise claims to the court, but is also evident where lawyers request relief.¹⁸⁴

b. *Judicial Skepticism of Defense Lawyers*

Cases suggest that a defense lawyer seeking permission to withdraw because the lawyer-client relationship has broken down will likely encounter a judge unwilling to accept his claim at face value.¹⁸⁵ This skepticism is partially because judges suspect that defense counsel may make the claim for tactical reasons.¹⁸⁶ At least one judge has also expressed concern that lawyers may improperly use withdrawal motions to secure a more desirable caseload.¹⁸⁷ For these reasons, judges may be reluctant to relieve a defense lawyer where they are unable to obtain specific details of the breakdown in the lawyer-client relationship,¹⁸⁸ a situation further complicated by the restraints placed

is “not uncommon whenever an attorney is required in a lawsuit to communicate with a client untrained in the complexities and technicalities of the law”).

183. See *Johnsen*, 2000 WL 48516, at *2 (acknowledging that lawyer and client did not get along and affirming the trial court’s denial of withdrawal motion); see also *Barrow*, 287 F.3d at 738 (noting “the reality that a person accused of a crime is often genuinely unhappy with an appointed counsel who is nonetheless doing a good job” (quoting *Hunter*, 62 F.3d at 274)).

184. See *infra* Part II.B.2.b.

185. See *Earp*, 2003 WL 22368871, at *5 (noting with regard to the existence of a breakdown in the lawyer-client relationship that “[c]ounsel saying so did not make it so”); see also *United States v. Mack*, 258 F.3d 548, 556 (6th Cir. 2001) (refusing to find abuse of discretion where the trial court denied the lawyer’s motion to withdraw after the lawyer suggested that a breakdown of the lawyer-client relationship had occurred but defendant did not express dissatisfaction); *Aceves v. Superior Court*, 59 Cal. Rptr. 2d 280, 284 (Ct. App. 1996) (rejecting the proposition that “the trial court must accept a sweeping claim of conflict and ‘rubber stamp’ counsel’s request to withdraw”). But see *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) (finding it persuasive justification for separate counsel in a conflict of interest case that “attorneys are officers of the court, and ‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.’” (quoting *State v. Brazile*, 75 So. 2d 856, 861 (La. 1954))). Generally, judges seem to display less skepticism when assessing a lawyer’s claims in civil litigation. See *supra* notes 134-35 and accompanying text.

186. See *People v. Anderson*, No. A099051, 2003 WL 22093909, at *11 (Cal. App. Dep’t Super. Ct. Sept. 10, 2003) (noting the withdrawal motion “appeared to be merely an attempt to circumvent the trial court’s earlier refusal to appoint substitute counsel”).

187. See *Earp*, 2003 WL 22368871, at *6 (“The trial court is not bound to accept the appraisal of a defense counsel who may be only too happy to get out from under a difficult representation.”).

188. See *Manfredi & Levine v. Superior Court*, 78 Cal. Rptr. 2d 494 (1998). The trial judge found that defense counsel’s refusal to provide any disclosure regarding the basis of the asserted conflict, combined with a history of delay tactics, justified

on lawyers by their duty to maintain client confidentiality.¹⁸⁹ Additionally, at least one commentator has suggested that judicial mistrust of defense lawyers is particularly pronounced when the lawyer in question is a public defender.¹⁹⁰ Finally, the cases suggest that much of the judges' skepticism results from their views that a change in counsel is an inadequate remedy to truly settle the underlying conflict between the lawyer and the client.

c. Judicial Skepticism of the Remedy

The language of judicial opinions suggests a practical resignation to the idea that conflict in the relationship between a criminal defendant and his defense lawyer is, to a certain extent, inevitable.¹⁹¹ Judges attribute this to a number of factors, including the defendant's understandable objection to being prosecuted,¹⁹² the fact that fundamental disagreements regarding trial strategy may exist between a defendant and his lawyer,¹⁹³ and the defendant's inability to work with other people.¹⁹⁴ Where these factors are present, judges are less likely to replace the lawyer because they assume that notwithstanding

denying the motion to withdraw. *Id.* at 496-97. The appellate court affirmed, noting with approval that the "[r]espondent court viewed with a jaundiced eye counsel's portrayal of his ethical dilemma." *Id.* at 499; *cf. Aceves*, 59 Cal. Rptr. 2d at 284 (approving defense counsel's motion to withdraw despite only receiving limited disclosure as to the basis of the conflict because "[w]here as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal").

189. See Model Rules of Prof'l Conduct R. 1.6 (1983) (amended 2003).

190. John, *supra* note 71, at 162-63 (suggesting the judicial system is stacked against public defenders, noting a "mistrust of appointed counsel" and that "judges often accommodate the private bar's requests, but rarely extend the same courtesies to defenders"). One student commentator examines withdrawal from representation as a public defender and concludes that, for reasons of policy (the desire to promote efficiency), economics, and judicial prejudice, the rules for withdrawal, while "facially neutral," are applied inequitably, resulting in "public defenders more often than not [being] forced to remain on cases while private attorneys are excused." *Id.* at 168. This student commentator suggests that this disparity in application lowers the morale of both public defenders and indigent defendants, thereby undermining the justice system as a whole. *Id.* at 165-69.

191. One trial judge hinted at this systemic frustration when he remarked, "We just don't have the capability in this county to have perfect client communications." *People v. Kirvin*, No. B156887, 2003 WL 21227993, at *3 (Cal. App. Dep't Super. Ct. May 28, 2003).

192. See *supra* notes 180-81 and accompanying text.

193. See *People v. Welch*, 976 P.2d 754, 771 (Cal. 1999) ("At the heart of the conflict was a fundamental disagreement as to the defense to be presented.") (quoting defendant's appellate brief); *State v. Chambers*, No. 50179-8-I, 2003 WL 23019947, at *2-3 (Wash. Ct. App. Dec. 29, 2003).

194. See *People v. Willis*, Nos. D040076, D040219, 2003 WL 22853767, at *3 (Cal. App. Dep't Super. Ct. Dec. 3, 2003) (noting "the communication difficulties [the defendant] had working with his attorney were due to [the defendant's] difficulty in working with people").

judicial action, these problems will carry over into any subsequent representation.¹⁹⁵ This reticence is also present where judges find that a defendant's conduct is the source of the breakdown in the lawyer-client relationship.

3. The Blame Inquiry: Punishing Defendant Misconduct

Where a lawyer requests permission to withdraw or a criminal defendant requests permission to substitute counsel, judges seem reluctant to grant these motions if the breakdown in the lawyer-client relationship may be attributed to the defendant's refusal to cooperate with his lawyer.¹⁹⁶ In one such instance, the trial court admonished the defendant by saying the following:

[Y]ou may not like [your counsel] right now, and you may be mad at him and you may decide, what my mother used to say, [to] cut off your nose to spite your face . . . but what you are doing by doing that is destroying the chance you do have . . . I'm convinced from everything that he's said that he's able to work with you, and it's you, that you have elected not to take his advice and to not discuss things with him.¹⁹⁷

The trial judge went on to deny the defendant's motion to substitute counsel,¹⁹⁸ which was later affirmed since the record reflected that, "the breakdown in the attorney/client relationship was obviously [the defendant's] own fault."¹⁹⁹ This analysis is repeated in many cases,²⁰⁰ suggesting that judges often view the breakdown of the lawyer-client

195. *See id.* (noting "it was likely [the defendant] would have problems with whomever was appointed to represent him"); *see also* *People v. Anderson*, No. A 099051, 2003 WL 22093909, at *6 (Cal. App. Dep't Super. Ct. Sept. 10, 2003) (denying lawyer's request for appointment of substitute counsel since, given the facts of the case, the new lawyer would experience the same ethical dilemma as the current defense counsel); *Chambers*, 2003 WL 23019947, at *3 (finding "any substituted counsel would be in the same position as the [current defense counsel] with respect to veracity issues").

196. *E.g.*, *People v. Cumbus*, 371 N.W.2d 493, 496 (Mich. Ct. App. 1985) (holding that "[d]efendant was not entitled to a substitution of counsel because the breakdown in his relationship was caused by defendant's admitted refusal to cooperate with his attorney"). For a discussion of how this differs in the context of civil litigation, see *supra* note 141 and accompanying text.

197. *State v. Irvine*, 547 N.W.2d 177, 180-81 (S.D. 1996) (second and third alterations in original).

198. *Id.* It is worth noting here that the defense lawyer in this case joined in his client's motion to substitute counsel and concurred that there had been "a complete breakdown" in the lawyer-client relationship. *Id.* at 179.

199. *Id.* at 182.

200. *See* *United States v. Barrow*, 287 F.3d 733, 738 (8th Cir. 2002); *People v. Earp*, No. F041724, 2003 WL 22368871, at *6 (Cal. App. Dep't Super. Ct. Oct. 17, 2003); *Cumbus*, 371 N.W.2d at 496; *State v. Sherrill*, No. 19825-8-II, 1998 WL 97224, at *2 (Wash. App. Div. 2 Mar. 6, 1988).

relationship as a consequence of the defendant's choosing.²⁰¹ Where judges believe that the defendant has intentionally caused the breakdown, they will deny a motion to withdraw or to substitute counsel,²⁰² in part because they view the conflict as one that has the potential for resolution.²⁰³ Additionally, there are factors peripheral to the lawyer-client relationship that may influence the judge's analysis.

4. Consideration of Extralegal Factors

If evaluating claims of breakdown of the lawyer-client relationship only required judges to examine the personal and working relationship between a criminal defendant and his lawyer, it is possible that the judiciary would breathe a collective sigh of relief. The reality, however, is that judges assessing the quality of the lawyer-client relationship must balance numerous extraneous factors.²⁰⁴ These include matters of economic policy²⁰⁵ and concerns of achieving judicial economy.²⁰⁶

201. See *Sherrill*, 1998 WL 97224, at *2. The appellate court quoted the trial court as stating the following:

[T]he Court finds that the defendant's unhappiness with the counselors appointed to represent him has strained the attorney client relationship. However, the Court finds that the defendant has the ability, if he chooses, to work with his attorneys and to effectively communicate with them. . . . [T]he Court is satisfied that if the defendant chooses to do so he is able to assist his attorneys in preparing his defense.

Id.; see also *Barrow*, 287 F.3d at 738 (affirming "there was no total breakdown in communication, only an unwillingness on [the defendant's] part to communicate with counsel").

202. These denials are not, however, the most severe consequence of a defendant's misconduct. Where the court determines that the defendant's misconduct is "extremely serious" the court may find that the defendant forfeited his right to counsel. *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004) (internal citation omitted). In *Thomas*, the court noted, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.* at 362 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995)). In this case, four defense lawyers (one retained, three appointed) were permitted to withdraw before the court found that the defendant forfeited his right to counsel. *Id.* at 359-61. In affirming the finding of forfeiture, the appellate court emphasized that the defendant threatened his counsel with physical aggression, was uncooperative in preparing a defense, was verbally abusive, and had attempted to force his lawyer to file frivolous claims with the court. *Id.* at 363. In particular, the court was persuaded by the fact that the defendant's misconduct was consistent during representation by four different lawyers. *Id.*

203. See *Earp*, 2003 WL 22368871, at *6 (suggesting where conflict resulted from defendant's misconduct there was the possibility that it could be "worked out" and that the facts "do not compel a finding that appellant could not cooperate with his attorney in the future").

204. See *supra* 178-79 and accompanying text.

205. See *infra* Part II.B.4.a.

206. See *infra* Part II.B.4.b.

a. *Economic Policy*

Economic policy plays a crucial, if frequently unstated, role in shaping judges' views of the lawyer-client relationship. While traditional judicial rhetoric dismisses economic policy as a legitimate ground on which to base a judicial decision,²⁰⁷ the reality is that judges face numerous financial constraints on their administration of justice.²⁰⁸ Accordingly, judges' analyses of alleged breakdowns in the lawyer-client relationship occasionally reflect concern for the economic implications of their decisions.²⁰⁹ One judge revealingly framed his inquiry into the breakdown of the lawyer-client relationship by asking the defendant why the public should bear the expense of appointing a new lawyer.²¹⁰ Judges' concerns with fiscal economy are paralleled by their related concerns with maximizing judicial economy.

b. *Judicial Economy*

The U.S. Supreme Court has recognized that "crowded calendars throughout the Nation impose a constant pressure on our judges to finish the business at hand. Generally, they have an interest in having the trial completed as promptly as possible . . ." ²¹¹ It has been suggested that this concern encourages judges to process criminal cases quickly, sometimes to the detriment of other values.²¹² Specifically, this consideration may play a significant role in judges'

207. See *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring) ("An affluent society ought not be miserly in support of justice, for economy is not an objective of the system . . .").

208. See John, *supra* note 71, at 159-60 (discussing the numerous financial constraints facing judges and asserting that "[l]imited judicial resources force judges to conduct their courtroom cost-effectively and allocate scarce resources efficiently").

209. See *United States v. Williams*, 594 F.2d 1258 (9th Cir. 1979). In *Williams*, the appellate court noted of the trial judge that

[o]n each of the two occasions when the Court denied the Motion for Substitution of Appointed Counsel, he indicated his view that it was improper, apparently from a policy standpoint, to allow an indigent defendant with counsel appointed at the expense of the Government to "fire" his attorney and have another lawyer appointed to act for him.

Id. at 1260.

210. *United States v. Myers*, 294 F.3d 203, 205 (1st Cir. 2002).

211. *Arizona v. Washington*, 434 U.S. 497, 516 n.35 (1978). Consideration for maximizing judicial economy is also prevalent in civil litigation. See *supra* note 157 and accompanying text.

212. See Klein, *supra* note 107, at 552 ("The unfortunate reality in the criminal courts today is that the judge's primary concern is not with the adequacy of the representation . . . but rather to convey the message with which the criminal justice system is most concerned: move the calendar and process cases as rapidly as possible."). For an in-depth discussion of how judicial economy impacts judicial decisions, particularly with respect to plea bargains, see *id.* at 552-64.

evaluations of breakdowns of the lawyer-client relationship,²¹³ particularly where judges fear that motions to withdraw or to substitute counsel will be used as a tool to halt the judicial process.²¹⁴ One trial judge clearly articulated this concern by explaining his denial of the defendant's motion to substitute counsel by saying the following:

If this were done, and the Court has this type of thing come up from time to time, you never could complete a case, you'd get in the middle of the case, a defendant, particularly a bright one, raises some question and you never could come to the completion of a trial.²¹⁵

In another case, the reviewing court succinctly characterized the district court's inquiry into the alleged breakdown in the lawyer-client relationship as "at bottom geared towards forcing the parties to meet the trial schedule."²¹⁶ While the cases do acknowledge that judges' desires to achieve maximum judicial economy are not always controlling,²¹⁷ the above examples illustrate that it is often a key factor in judges' decisions.²¹⁸

The comparative analysis presented in Part II of this Note continues to be important in Part III, which draws conclusions regarding judges' current views of the lawyer-client relationship, and suggests a procedural revision for its enhanced protection in the criminal justice system.

213. See Klein, *supra* note 107, at 571 (describing courts' reluctance to permit withdrawal or substitution, specifically with regard to appointed lawyers for indigent criminal defendants, and suggesting a corresponding deterioration of representation); John, *supra* note 71, at 160 ("Judges feel pressure to keep their courtrooms and dockets running smoothly and efficiently. These concerns weigh heavily in judges' decisions, making delays less desirable and withdrawal less likely."); see also State v. Irvine, 547 N.W.2d 177, 181 (S.D. 1996) (approving the trial court's denial of defendant's motion to substitute counsel where "[g]ranting the motion would have only served to further protract the matter. In short, it would have unreasonably disrupted the judicial process.").

214. See *supra* notes 176-77 and accompanying text.

215. People v. Marsden, 465 P.2d 44, 47 (Cal. 1970) (en banc).

216. United States v. Moore, 159 F.3d 1154, 1161 (9th Cir. 1998).

217. See United States v. Adelzo-Gonzalez, 268 F.3d 772, 780 (9th Cir. 2001) ("The fact that the motion [to substitute counsel] was made on the eve of trial alone is not dispositive.").

218. See United States v. Barrow, 287 F.3d 733, 738 (8th Cir. 2002) ("Last minute requests to substitute defense counsel are not favored." (quoting United States v. Klein, 13 F.3d 1182, 1185 (8th Cir. 1994))); State v. Johnsen, No. 23856-0-II, 2000 WL 48516, at *2-3 (Wash. Ct. App. Jan. 21, 2000) (affirming trial judge's denial of motion to withdraw despite recognizing discord in the lawyer-client relationship because of the relatively advanced procedural posture of the case).

III. ADDRESSING THE THREAT TO TRUST AND CONFIDENCE IN THE LAWYER-CLIENT RELATIONSHIP: AN ARGUMENT FOR PROCEDURAL REFORM

Extreme breakdowns in the lawyer-client relationship provoke a consistent response from judges in civil litigation and in the criminal justice system: swift termination of the lawyer-client relationship.²¹⁹ The more interesting and difficult cases arise where the breakdown in the lawyer-client relationship does not render the relationship adversarial, but merely unpleasant or difficult. In these more subtle cases, judges perform either an implicit or explicit balancing analysis to determine whether the lawyer-client relationship should be sustained.²²⁰ This balancing analysis nets markedly different results in the civil and criminal contexts as judges seem more likely to reject a motion to withdraw or to substitute counsel in the criminal context, even where such a motion might be deserving.²²¹ Paradoxically, this inequity results in less protection for trust and confidence in the lawyer-client relationship in the criminal justice system, where a criminal defendant's constitutional rights²²² and liberty are at stake, than in civil litigation. Given our traditional understanding of the essential role that trust and confidence plays in an effective legal representation,²²³ this situation is unavoidably problematic.

This Note argues that judges' skepticism of criminal defendants and their lawyers, combined with a flawed procedure by which judges evaluate alleged breakdowns of the lawyer-client relationship, is largely to blame. While judges are expected to respond to claims of breakdown in the lawyer-client relationship by conducting their own inquiry into the matter,²²⁴ this inquiry is necessarily limited by the confidential nature of the lawyer-client relationship.²²⁵ As a result, judges' inquiries often provide insufficient information by which to distinguish legitimate and illegitimate breakdowns in the lawyer-client relationship. Unable to identify the instances of genuine breakdown

219. See *supra* Parts II.A.1, II.B.1 (discussing the termination of adversarial lawyer-client relationships in civil litigation and the criminal justice system, respectively).

220. See *supra* Part I.C.2.a; *supra* notes 90-97 and accompanying text (describing the factors that judges consider when evaluating motions to withdraw in civil litigation and motions to withdraw and to substitute counsel during a criminal proceeding).

221. The conclusions expressed in Part III regarding the views and behavior of judges are necessarily based on a small representative sample of cases. See *supra* note 75 and accompanying text.

222. See *supra* notes 82-89 and accompanying text (explaining the scope of a criminal defendant's Sixth Amendment right to legal representation).

223. See *supra* Part I.A (discussing the role of trust and confidence in the lawyer-client relationship).

224. See *supra* note 90 (noting the duty of the trial court to inquire into the alleged breakdown of the lawyer-client relationship).

225. See *supra* notes 39-40 and accompanying text (discussing the lawyer's ethical duty to maintain client confidentiality).

in the lawyer-client relationship, judges in the criminal justice system appear to rely on their own, often skeptical, presumptions regarding a criminal defendant's²²⁶ or his lawyer's²²⁷ motivations for alleging a breakdown in the lawyer-client relationship. Part III.A discusses this argument in more detail, and compares the impact of client misconduct on judges' resolutions of withdrawal and substitution of counsel motions in civil litigation and the criminal justice system to illustrate this position. Then, Part III.B proposes altering the procedure for addressing breakdowns in the lawyer-client relationship in a criminal proceeding so that judges are able to evaluate more fairly the lawyer-client relationship.

A. *A Theory of Judicial Skepticism*

Judges' apparent tendency to reject even worthy motions to withdraw and to substitute counsel in the criminal context²²⁸ undermines the fundamental principles of trust and confidence which define the efficacy of the lawyer-client relationship. If we continue to accept the long-standing premise that trust and confidence are essential prerequisites for an effective legal representation,²²⁹ then it follows that a lawyer-client relationship in which these elements are either wholly lacking or severely compromised should be deemed ineffective. On the contrary, however, judges frequently deny motions to withdraw or to substitute counsel where the relationship between a criminal defendant and his lawyer is indeed strained such that trust and confidence is impaired.²³⁰ This contradiction may be attributed to judges' skeptical views of criminal defendants and their

226. See *supra* Part II.B.2.a (discussing judges' apparent skepticism of criminal defendants' claims of breakdowns in the lawyer-client relationship).

227. See *supra* Part II.B.2.b (discussing judges' skepticism of criminal defense lawyers' claims of breakdowns in the lawyer-client relationship). For further discussion of why skepticism directed towards criminal defense lawyers may be problematic, see *infra* note 233.

228. One student commentator observed this apparent tendency regarding the inequitable treatment of motions to withdraw made by appointed and retained criminal defense lawyers. See John, *supra* note 71, at 168 ("[P]ublic defenders more often than not are forced to remain on cases while private attorneys are excused. Thus, indigency places the defendant in a worse position to obtain a fair defense and trial than a wealthy client."). Importantly, this Note contends that this inequity between the civil and criminal contexts exists only where the breakdown of the lawyer-client relationship is not egregious. As previously discussed, where the breakdown is so extreme that the lawyer-client relationship becomes adversarial, judges in both civil and criminal litigation will terminate the lawyer-client relationship. See *supra* Parts II.A.1, II.B.1.

229. See *supra* notes 27-29 and accompanying text (identifying trust and confidence in the lawyer-client relationship as an essential precursor to an effective legal representation).

230. This may be inferred from the number of appellate court reversals of lower court decisions denying motions to withdraw or to substitute counsel. *E.g.*, *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 773 (9th Cir. 2001) (finding that the district court failed to identify an obvious breakdown in the lawyer-client relationship).

lawyers, which heavily influences their evaluations of alleged breakdowns in the lawyer-client relationship.

Judges' opinions regarding motions to withdraw or to substitute counsel reflect an extreme distrust of criminal defendants generally,²³¹ and reveal a more specific concern that criminal defendants will either create or allege artificial breakdowns in the lawyer-client relationship in order to manipulate the judicial system to their advantage.²³² Alarming, some judges seem to have similar concerns of criminal defense lawyers.²³³ This skepticism is conspicuously absent from judges' treatment of civil litigants and litigators, which may be explained by noting that the structure of the criminal justice system, particularly with respect to indigent defendants and appointed lawyers,²³⁴ provides far greater incentives for the abuse of motions to withdraw and to substitute counsel. Since indigent defendants' Sixth Amendment rights to legal representation do not extend to the right to choose a certain lawyer,²³⁵ criminal defendants who are dissatisfied with their appointed lawyer must resort to a substitution of counsel motion in order to secure a new lawyer. Lawyers appointed to represent indigent defendants are similarly constrained,²³⁶ and must rely on a judge's grant of their withdrawal motion in order to be released from a representation.²³⁷ In contrast, civil litigants may

231. See *supra* Part II.B.2.a (suggesting that judicial skepticism of a criminal defendant's motivation for requesting substitution of counsel is present in a variety of situations, even extending to those instances where judges recognize the defendant's genuine dissatisfaction with the representation).

232. See *supra* notes 176-77 and accompanying text (discussing judges' unflagging concerns that criminal defendants will manipulate the court).

233. See *supra* Part II.B.2.b (noting judges' emerging skepticism of criminal defense lawyers' reasons for seeking withdrawal from a representation). Judges' skepticism towards lawyers is particularly problematic since it seems to undermine the lawyer's role as a trusted officer of the court. See *supra* note 185 (explaining the *Holloway* court's presumptive faith in a lawyer's truthful representations).

234. This Note limits its consideration of the effect of the criminal justice system's incentive structure on defense lawyers to appointed lawyers only. Since the lawyer-client relationship between a criminal defendant and his retained lawyer is somewhat analogous to the lawyer-client relationship between civil litigants and litigators, its usefulness as a comparative tool in this Note is minimal. Therefore, for the sake of a clear comparison of the judiciary's view of the lawyer-client relationship in civil litigation and in the criminal justice system, discussion of the lawyer-client relationship between a criminal defendant and his retained lawyer is excluded from the following analysis and proposal for reform.

235. See *supra* note 87 and accompanying text (describing the limitations of an indigent criminal defendant's constitutional right to the counsel of his choice).

236. All lawyers are limited in their ability to refuse a court appointment. See Model Rules of Prof'l Conduct R. 6.2 (1983) (amended 2003). However, those working as appointed lawyers in the criminal justice system by definition receive the lion's share of court appointments.

237. This incentive structure raises a very specific ethical concern: If criminal defense lawyers will only be relieved from a failed lawyer-client relationship when they state a claim of egregious breakdown, judges' skepticism of criminal defense lawyers may actually provide an incentive for these lawyers to breach their ethical

conduct countless interviews before hiring the lawyer of their choice and then are free to fire the lawyer at any time.²³⁸ It is true that civil litigators are limited in their ability to withdraw from the lawyer-client relationship²³⁹ but they face significantly less reluctance from the bench when requesting relief.²⁴⁰ Judges must be acutely aware of these differing incentive structures and, perhaps as a result, are understandably reluctant to credit assertions of a breakdown in the lawyer-client relationship made by a criminal defendant or his lawyer, except in the most extreme instances. The following discussion illustrates how this disbelief translates into judges' seeming inclination to deny motions to withdraw or to substitute counsel in the criminal context.

A breakdown in the lawyer-client relationship caused by client misconduct will have a radically different resolution depending on the context in which it occurs. In civil litigation, client misconduct excuses the civil lawyer and affords the civil litigant either a second chance to achieve a state of trust and confidence with an alternate lawyer or the option of continuing *pro se*.²⁴¹ Since there is little incentive to manufacture a breakdown in the lawyer-client relationship in civil litigation, judges have no reason to doubt that client misconduct in civil litigation is anything other than a visible symptom of breakdown in the lawyer-client relationship. In the criminal justice system, however, where the incentive for abuse of motions to withdraw and to substitute counsel is high, the same type of misconduct by the criminal defendant will bind the criminal defense lawyer to the representation and compel a criminal defendant to choose between continuing with the same lawyer or proceeding *pro se*.²⁴² The cases suggest that judges are reluctant to appoint a replacement lawyer in response to a criminal defendant's misconduct because judges either assume that the criminal defendant's misconduct is a ploy to gain a tactical advantage,²⁴³ such as a continuance, or dismiss the misconduct as the

duty of candor to the court, *see* Model Rules of Prof'l Conduct R. 3.3, and exaggerate the nature of the breakdown in order to be relieved from the representation.

238. *See supra* note 49 and accompanying text (discussing the client's ability to terminate the lawyer-client relationship at will).

239. *See supra* note 50 and accompanying text (noting the limitations on a lawyer's ability to withdraw from an ongoing representation); *see also supra* Part I.C.1 (discussing the Model Rules' restrictions on a lawyer's ability to withdraw from the lawyer-client relationship).

240. *See supra* notes 134-35 and accompanying text (explaining judges' reluctance to require specific performance of civil litigators).

241. *See supra* Part II.A.3 (discussing judges' responses to client misconduct during civil litigation).

242. *See supra* Part II.B.3 (discussing judges' responses to client misconduct during a criminal proceeding).

243. *See supra* note 232 and accompanying text.

criminal defendant's reaction to being the subject of prosecution.²⁴⁴ Since an assertion of breakdown in the lawyer-client relationship is one of the few ways in which to terminate the relationship between the indigent defendant and his appointed counsel, this skepticism may not be entirely undeserved. Judges are not, however, supposed to make decisions based on their own assumptions regarding the source of breakdown in the lawyer-client relationship. Instead, judges are ordinarily expected to conduct inquiries that permit them to make an informed judgment about the efficacy of the relationship between a criminal defendant and his lawyer.²⁴⁵ As the next paragraph of this Note explains, under the current procedure for evaluating an alleged breakdown in the lawyer-client relationship, this may be an unreasonable demand to make of the judiciary.

The current procedure used to evaluate an alleged breakdown in the lawyer-client relationship fails to provide judges with sufficient information by which to distinguish manipulative claims from those that are made in good faith and are deserving of relief. A judge must act as the sole fact-finder, conducting his own inquiry into the extent of the breakdown, before ruling on a motion to withdraw or to substitute counsel.²⁴⁶ The usefulness of such an inquiry, however, is severely limited by the confidential nature of the lawyer-client relationship,²⁴⁷ which prevents the judge from asking specific questions about the nature of the conflict, questions that are arguably essential for an in-depth understanding of the alleged breakdown,²⁴⁸ but which may result in the revelation of information that is prejudicial to the defendant.²⁴⁹ Further confounding the judge's inquiry, the defense lawyer is prohibited from disclosing details of the lawyer-client relationship, and may answer the judges' questions only in a way that protects lawyer-client confidentiality.²⁵⁰ Too often, these

244. *See supra* notes 180-81 and accompanying text (noting that criminal defendants are often understandably upset by the circumstances surrounding their arrest and prosecution).

245. *See supra* note 224 and accompanying text.

246. *See supra* note 224 and accompanying text.

247. *See supra* note 225 and accompanying text.

248. Conceivably, a defendant might voluntarily disclose details, which would adequately describe the alleged breakdown in the lawyer-client relationship so that a judge might make an informed decision about its efficacy. However, the case law suggests that, given the complexities of the lawyer-client relationship, some sort of targeted inquiry will typically be necessary to fully understand the extent of the alleged breakdown. *See supra* note 90 and accompanying text.

249. Before such inquiries were required, one judge responded to a defendant's request to discuss specific instances of breakdown in the lawyer-client relationship by saying "I don't want you to say anything that might prejudice you before me as to the case, you see." *People v. Marsden*, 465 P.2d 44, 46 (Cal. 1970) (en banc) (quoting colloquy in trial judge's chambers).

250. *See supra* notes 188-89 and accompanying text (discussing the effect that a lawyer's duty of confidentiality might have on the assessment of an alleged breakdown in the lawyer-client relationship).

limitations result in a perfunctory judicial inquiry, one that rarely yields information sufficient to overcome judges' default stances of skepticism towards criminal defendants and their lawyers. To cure this procedural deficiency, it might be necessary for judges to adopt a revised approach to ruling on motions to withdraw or to substitute counsel in the criminal justice system, one that facilitates a closer analysis of claims of breakdown in the lawyer-client relationship.

B. *Overcoming Judicial Skepticism: A Proposal for Reform*

Crafting a procedure to rule on withdrawal or substitution of counsel motions that maintains the sanctity of lawyer-client confidentiality, and provides judges with a tool to meaningfully distinguish between legitimate and illegitimate claims that the lawyer-client relationship has been irreparably broken, may be accomplished by adopting an alternative fact-finding procedure, one that is already in place for evaluating whether a criminal defendant's waiver of a conflict-free representation is knowing and intelligent.²⁵¹ The central component of this proposal is the appointment of an independent lawyer who could, in this context, serve a dual purpose. First, the independent lawyer could substitute for the judge as fact-finder. Second, the independent lawyer could serve as an intermediary, helping to restore trust and confidence between a criminal defendant and his lawyer, and to preserve the efficacy of the original lawyer-client relationship. This part discusses this proposal in detail,²⁵² and advocates for its adoption in those criminal cases where the alleged breakdown does not render the lawyer-client relationship obviously adversarial.

The appointment of an independent lawyer to act as a fact-finder and a temporary co-counsel to the defendant addresses several problems inherent in the judiciary's current evaluative procedure. Importantly, this appointment would reduce the risk that an inquiry by the judge into the alleged breakdown would intrude on the lawyer-

251. See *supra* note 97 and accompanying text (describing the *Curcio* court's alternative to judicial fact-finding). Analogously, the context in which this alternative fact-finding procedure is already used, conflicts of interest cases, also requires judges to consider replacing lawyers in order to avoid a possible impediment to the quality of the defendant's legal representation.

252. This Note's discussion of this proposal is limited to its substantive elements, and excludes an analysis of the financial costs associated with appointing an independent lawyer to assist in evaluating claims of breakdown in the lawyer-client relationship. Opponents may argue that these costs are prohibitive, particularly given the current economic pressures facing the criminal justice system. See *supra* Part II.B.4.a. However, since a similar procedure is available in conflict of interest cases, see *United States v. Curcio*, 680 F.2d 881, 890 (2d Cir. 1982), the author assumes its continued feasibility in a new context.

client relationship.²⁵³ Such an intrusion by the independent lawyer would be impossible since he is, briefly, in a privileged relationship with the defendant.²⁵⁴ The scope of this relationship would be limited to assisting and advising the defendant where a claim of breakdown has been asserted.²⁵⁵ Therefore, any inquiry made by the independent lawyer into the circumstances surrounding the alleged breakdown falls squarely within his confidential lawyer-client relationship with the defendant, and is consequently protected.²⁵⁶ Significantly, this protection also permits the independent lawyer to conduct an exhaustive inquiry into the circumstances of the alleged breakdown, an advantage that would surely help cure the informational deficiencies of the present evaluative model.²⁵⁷ Finally, the appointment of an independent lawyer as a fact-finder may encourage judges' more trusting considerations of claims of breakdown by criminal defendants or their defense lawyers. Although the confidential nature of his lawyer-client relationship with the defendant limits the independent lawyer's ability to disclose certain details of the alleged breakdown to the judge, he, like the defense lawyer, may make general statements to the judge regarding the quality of the lawyer-client relationship at issue.²⁵⁸ While judges typically seem unreceptive to these conclusory representations,²⁵⁹ they may carry more weight when made by an independent lawyer since, unlike the criminal defendant or the defense lawyer, the independent

253. For a detailed discussion of the threat posed by judicial fact-finding to the lawyer-client relationship in conflict of interest cases, see Green, *supra* note 97, at 1232-33.

254. It is important to note that, unlike his co-counsel, the independent lawyer could not accurately be described as purely an advocate for the defendant. Instead, the independent lawyer's role would be better characterized as a hybrid: The independent lawyer's advocacy for the defendant must be tempered by his duty to honestly represent to the court the extent of the breakdown in the original lawyer-client relationship.

255. See *supra* note 97 (describing the *Curcio* court's conception of the role of the independent lawyer in conflict of interest cases).

256. Model Rules of Prof'l Conduct R. 1.6 (1983) (amended 2003).

257. See *supra* Part III.A (explaining the lack of information regarding an alleged breakdown in the lawyer-client relationship that is available to judges under the current evaluative procedure).

258. See *supra* note 10 and accompanying text (quoting Joe Ed Earp's defense lawyer's conclusory representation regarding the breakdown in the lawyer-client relationship). The Model Rules specifically contemplate the use of general statements as a way in which to communicate a breakdown in the lawyer-client relationship to the court, without compromising the confidentiality of the lawyer-client relationship. See *supra* note 68; see also Model Rules of Prof'l Conduct R. 1.16 cmt. 3 ("The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.").

259. See *supra* note 185 (discussing the *Earp* and *Aceves* courts' unwillingness to credit the defense lawyers' conclusory representations of breakdown in the lawyer-client relationship at face value).

lawyer does not have an incentive to create or exaggerate a breakdown in the lawyer-client relationship. In addition to providing informational advantages and increased protection for the lawyer-client relationship, the appointment of an independent lawyer to assist in evaluating breakdowns in the lawyer-client relationship might, in some cases, facilitate its repair.

An independent lawyer's uniquely disinterested position to assess the alleged breakdown of the lawyer-client relationship may make him an ideal candidate to broker reconciliation between the criminal defendant and his lawyer. Judges have already hinted that there are instances where such reconciliation might be possible by basing their denials of motions to withdraw or to substitute counsel on the premise that the particular lawyer-client relationship at issue could be salvaged.²⁶⁰ Unfortunately, judges' current procedure for evaluating breakdowns in the lawyer-client relationship does little to foster this desired restoration, since the denial of a motion to withdraw or to substitute counsel effectively shifts the burden back to the criminal defendant and his lawyer to resolve their differences. The independent lawyer contemplated by this proposal might fill this void by serving as an intermediary between the criminal defendant and his defense lawyer.

In particular, the independent lawyer might be successful at mending the lawyer-client relationship where the conflict at issue arises from the criminal defendant's unreasonable expectations of his lawyer, which judges often seem to attribute to the defendant's unfamiliarity with court procedure.²⁶¹ Another example of this type of conflict is where the lawyer's candid assessment of the defendant's chances at trial causes resentment.²⁶² While judges have found these types of conflicts insufficient to trigger the complete breakdown of the lawyer-client relationship, they have identified them as causing genuine dissatisfaction to criminal defendants.²⁶³ The independent lawyer's relationship with the defendant could put him in a position to counsel the defendant with respect to these types of grievances. If, as judges suggest, these conflicts are really due to the defendant's misunderstanding of the prosecutorial process, this increased attention to the defendant's "dissatisfaction, distrust, and concern"²⁶⁴

260. See *supra* note 203 and accompanying text (noting judges' refusals to end the lawyer-client relationship where the conflict between the defendant and his lawyer appears to have a potential resolution).

261. See *supra* note 181 (noting the *Kirvin* court's recognition that defendants often become anxious and frightened if they do not fully understand court proceedings).

262. See *supra* note 182 and accompanying text (citing numerous instances where judges attributed a defendant's dissatisfaction with his lawyer to the lawyer's role as the bearer of bad news).

263. See *supra* note 183 and accompanying text.

264. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991)).

might in fact restore the defendant's trust and confidence in his defense lawyer.

As an example of how this proposal might be practically applied in the criminal justice system, consider, once again, the case of Joe Ed Earp.²⁶⁵ In *Earp*, the trial judge's inquiry into the alleged breakdown of the lawyer-client relationship yielded predictably little information. Earp's explanation of the breakdown was too succinct to be helpful,²⁶⁶ and Earp's defense lawyer, due to the confidential nature of his relationship with Earp, was able to share only limited information regarding the breakdown of the lawyer-client relationship with the court.²⁶⁷ This information proved unpersuasive, and the trial judge quickly denied Earp's motion to substitute counsel.²⁶⁸ Later, an appellate court affirmed this denial, and expressly approved of the trial judge's skepticism of Earp and his defense lawyer.²⁶⁹ Perhaps if an independent lawyer had been appointed to serve as the *Earp* court's fact-finder and as Earp's temporary co-counsel, the trial judge might have been able to reach a decision more consistent with protecting trust and confidence in the lawyer-client relationship, or at least one that was better informed.

The assistance of an independent lawyer to evaluate Earp's claim of breakdown in the lawyer-client relationship would have been beneficial for several reasons. First, the independent lawyer's ability to conduct a more searching inquiry into the alleged breakdown,²⁷⁰ coupled with the fact that he would not personally benefit if Earp's motion were granted,²⁷¹ might have successfully countered the judge's skepticism of Earp and his lawyer. Also, if counseled by an

265. *People v. Earp*, No. F041724, 2003 WL 22368871, at *1 (Cal. App. Dep't Super. Ct. Oct. 17, 2003); see also *supra* notes 6-13 and accompanying text (introducing *Earp* as illustrative of the systemic problem in the criminal justice system with regard to evaluating alleged breakdowns in the lawyer-client relationship, which is the subject of this Note).

266. Initially, Earp's statement was only that "I want somebody else. This is bullshit here." *Earp*, 2003 WL 22368871, at *4. Later, in response to the judge's explanation that substitution of counsel required a specific ground for terminating the existing lawyer-client relationship, Earp replied that "anybody . . . could see I was set up on the whole thing." *Id.* (alteration in original).

267. See *supra* note 10 and accompanying text (quoting Earp's defense lawyer's statement to the court, which confirmed the alleged breakdown in the lawyer-client relationship and specifically noted that his disclosure was necessarily limited). Additionally, the appellate court noted that "[t]here was nothing concrete adduced at the hearing which supported a conclusion that defense counsel could not adequately represent [Earp] despite the difficulties he had with [Earp]." *Earp*, 2003 WL 22368871, at *6.

268. See *supra* note 11 and accompanying text (noting the lower court's denial of Earp's motion to substitute counsel).

269. See *supra* note 13 and accompanying text.

270. See *supra* notes 253-57 and accompanying text.

271. See *supra* note 187 and accompanying text (discussing one judge's belief that criminal defense lawyers might seek to withdraw from a representation where doing so would assure them a more attractive caseload).

independent lawyer, Earp might have been able to give a statement to the judge that more clearly articulated his dissatisfaction with the lawyer-client relationship.²⁷² Finally, with regard to the independent lawyer's restorative function, it is possible that if an independent lawyer had been available to explain the intricacies of the court proceedings to Joe Ed Earp, he might have understood his appointed lawyer's "collusion"²⁷³ with the prosecutor not as disloyalty, but rather as merely the routine interaction between opposing advocates during criminal litigation.²⁷⁴ As this discussion suggests, the proposal advocated by this Note provides several alternative avenues for protection of trust and confidence in the lawyer-client relationship in the criminal justice system. Therefore, its adoption deserves serious consideration.

CONCLUSION

The lawyer-client relationship lies at the very foundation of the American legal system and its continued preservation is therefore imperative. Historically, the bench and the bar have fulfilled this mandate by emphasizing trust and confidence as the central principles of the lawyer-client relationship.²⁷⁵ Currently the procedure for assessing claims of breakdown in the lawyer-client relationship,²⁷⁶ which is unavoidably limited by the confidential nature of the lawyer-client relationship,²⁷⁷ presents a significant obstacle to the judiciary's continual focus on trust and confidence.²⁷⁸ Still, these core values

272. On appeal, the appellate court noted that Earp "admits that he did not demonstrate by his own statements sufficient cause . . . for substitution of counsel." *Earp*, 2003 WL 22368871, at *5. Since Earp clearly expressed his dissatisfaction with his representation, *see supra* note 266 and accompanying text, this statement by the appellate court supports the widely held belief that something more than the defendant's dissatisfaction is required to terminate the lawyer-client relationship, *see supra* note 165 and accompanying text. Where the facts and circumstances genuinely support that an irreconcilable breakdown in the lawyer-client relationship exists, an independent lawyer might be helpful in advising a criminal defendant on how to best articulate this conflict to the court.

273. *Earp*, 2003 WL 22368871, at *4.

274. As this Note argues, an independent lawyer might have been particularly successful at restoring Earp's trust and confidence in his defense lawyer since the appellate court attributed Earp's dissatisfaction in part to the fact that he was unfamiliar with the complexities of the criminal proceedings. *See supra* note 182 and accompanying text.

275. *See supra* notes 25-30 and accompanying text (discussing the central role of trust and confidence in the lawyer-client relationship).

276. *See supra* Parts I.C.2.a-b (discussing the procedural framework for resolving motions to withdraw or to substitute counsel in civil litigation and the criminal justice system, respectively).

277. *See supra* notes 247-49 and accompanying text (discussing the way in which confidentiality limits judges' inquiries into an alleged breakdown of the lawyer-client relationship).

278. *See supra* Part III.A (analyzing in depth the limitations of the current procedure for evaluating alleged breakdowns of the lawyer-client relationship).

seem relatively secure in the context of civil litigation.²⁷⁹ In the criminal justice system, however, judges' skepticism of criminal defendants and their lawyers,²⁸⁰ exacerbated by a lack of reliable information regarding the circumstances of alleged breakdowns,²⁸¹ results in comparably less protection for trust and confidence.²⁸²

Reforming the procedure by which judges evaluate a breakdown in the lawyer-client relationship is therefore a critical step towards protecting trust and confidence in the lawyer-client relationship. Appointing an independent lawyer as the court's fact-finder removes the risk that an inquiry into the breakdown would undermine the confidentiality of the lawyer-client relationship²⁸³ and solves the informational deficiency posed by the current evaluative model.²⁸⁴ Additionally, the independent lawyer may be able to reconcile the differences between a criminal defendant and his lawyer.²⁸⁵ Surely, we should not abandon our historical aspirations so readily. Criminal defendants, such as Joe Ed Earp, are entitled to the same level of trust and confidence in the lawyer-client relationship as is routinely found in civil litigation.

279. *See supra* Part II.A (presenting a thematic analysis of judges' views of the lawyer-client relationship, and approach to its termination, in civil litigation).

280. *See supra* Parts II.B.2.a-b (exploring judges' apparent skepticism of criminal defendants and defense lawyers).

281. *See supra* note 259 and accompanying text (discussing judges' hesitancy to act on general information regarding the alleged breakdown of the lawyer-client relationship).

282. *See supra* Part III.A (concluding that trust and confidence receives less protection in the criminal justice system than in civil litigation).

283. *See supra* note 253 and accompanying text (discussing how this proposal mitigates the risk of judicial fact-finding).

284. *See supra* note 257 and accompanying text (explaining the informational advantages provided by this proposal).

285. *See supra* notes 260-64 and accompanying text (discussing the possibility that the independent lawyer contemplated by this proposal might aid in the reconciliation of a criminal defendant and his lawyer).

Notes & Observations