The Case of John Salvi: Ethical Binds When Representing the Incompetent Defendant

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I. INTRODUCTION

When a defense attorney, prosecutor, or judge has a reasonable doubt concerning a defendant’s competence to stand trial, she has a duty to raise the issue with the court, or in the case of a judge, to investigate the issue. At times, this duty may conflict with other duties imposed upon counsel, such as a defense attorney’s duty to represent the wishes of her client. It is this conflict that is the focus of this comment, with some emphasis placed on the law in Massachusetts.

The history and current state of the law regarding defendants’ competency to stand trial is analyzed in the next section, followed by a section devoted to a discussion of conflicts that can arise around the issue of defendants’ competence to stand trial. A section is then devoted to distinguishing the related question of whether defense counsel may assert an insanity defense over the defendant’s objection.

Section V introduces the case of John Salvi and the ethical conflict his attorneys faced when confronted with what they believed to be an incompetent client. The law of amicus curiae is discussed in section VI. Section VII examines the use of amicus counsel in Salvi to resolve the conflict faced by Salvi’s counsel and the problems that arose. Finally, this comment concludes with a discussion of the use of amicus counsel in Salvi, together with some slight variations, as potential answers to the ethical conflict that arises when counsel has a reasonable doubt as to the competence of the defendant, but the defendant does not want his competency questioned.

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1 See ABA Standard for Criminal Justice 7-4.2 (2d ed. 1986).
II. COMPETENCY TO STAND TRIAL

"The conviction of an accused person while he is legally incompetent violates due process." This prohibition is fundamental to an adversary system of justice and predates the practice of legal representation.

The concept that a defendant must have the mental capacity to stand trial, of course, arose at a time when a defendant was not entitled to have counsel assigned. Since it was contemplated that a defendant would be conducting his own defense, it was held that he could not be brought to trial unless he had sufficient mental capacity.

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4 See Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (per curiam) (explaining that prohibition against trial of incompetent defendant is "fundamental" to adversary system of justice). "The constitutional implications of the competency issue rest upon principles fundamental to our adversary system of justice." Manning v. Texas, 766 S.W.2d at 554.
capacity to understand the proceedings and assist in his own defense.\(^5\)

This concept dates back even to the time of Blackstone, who wrote:

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\text{[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?}^6
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Though the prohibition against trial of an incompetent defendant precedes the modern practice of representation by counsel, the fact that an incompetent defendant may be represented does not vitiate the bar against his being tried.\(^7\) This has its roots in the English common law:

Assuming the prisoner to be insane at the time of arraignment, he cannot be tried at all, with or without counsel, for, even assuming that he has appointed counsel at a time when he was sane, it is not fit that he should be tried, as he cannot understand the evidence, nor the proceedings, and so is unable to instruct.

\(^5\) See New York v. Reason, 334 N.E.2d 572, 574 (N.Y. 1975). See also H. Weihofen, Mental Disorder as a Criminal Defense 428-29, 431 (1954). "It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense." Id. For a relatively in-depth exposition of the related topic of the development of the right to counsel and self-representation, see Faretta v. California, 422 U.S. 806 (1975). It should be noted that competence is distinguished from criminal responsibility. Criminal responsibility goes to the merits of the case, and may be dispositive regarding the defendant's guilt. See Commonwealth v. Crowley, 393 Mass. 393, 402, 471 N.E.2d 353, 359 n. 2 (1984) (distinguishing competence to stand trial from insanity defense).

\(^6\) 4 W. Blackstone, Commentaries 24.

\(^7\) See infra note 8 and accompanying text.
counsel, or to withdraw his authority if he acts improperly, as a prisoner may always do.\(^8\)

The standard for competency to stand trial is identical to the standard for competency to waive Constitutional rights.\(^9\) The Supreme Court, in \textit{Dusky v. United States},\(^10\) articulated the standard to be applied when determining the competency of a defendant to be tried as "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."\(^11\) In \textit{Drope v. Missouri},\(^12\) the Supreme Court further held that the defendant must have the capacity to assist in preparing his defense.\(^13\) The court in \textit{Drope} went on to note that


\(^9\) See Godinez v. Moran, 509 U.S. 389, 397-98 (1993), noted in Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1995). \textit{But cf.} Godinez v. Moran, 509 U.S. at 412-13 (Blackmun, J., dissenting) (arguing that standard of competency should be different depending on the purpose for which it is disputed).


\(^11\) Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). \textit{Accord} Commonwealth v. Crowley, 393 Mass. at 398-99, 471 N.E.2d at 356-57; Commonwealth v. Hill, 375 Mass. 50, 52, 375 N.E.2d 1168, 1169 (1978); Manning v. Texas, 766 S.W.2d 551, 554 (Tex. Ct. App. 1989). "The focus of the Dusky standard is on a particular level of mental functioning, which the ability to consult counsel helps identify." Godinez v. Moran, 509 U.S. at 404 (Kennedy, J. dissenting). \textit{Accord} Manning v. Texas, 766 S.W.2d at 554 ("[T]he defendant must be able to participate in or assist counsel in the conduct of the defense ... [and] have the mental ability to control the decision-making process."). The court in \textit{Manning} went on to say:

Our judicial system assumes that truth and justice result from the clash of adversaries. The adversaries in a criminal case, however, are not lawyers but are a defendant and the State. The United States Constitution guarantees more than a right to counsel. The fundamental guarantee of the Sixth Amendment is the defendant's right to control and participate in his defense.

\(^12\) 420 U.S. 162 (1965).

"[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine [competency]; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated."14

Among the evidence that may require a hearing to investigate the defendant's competency to stand trial are evidence of prior irrational behavior, prior medical opinions, and demeanor at trial.15 This hearing is, in theory, essentially non-adversarial, as the question to be determined is not guilt or innocence but simply whether the trial can continue at that time.16 Jurisdictions differ on who carries the burden of proof in a competency hearing and by what standard competence or incompetence must be proven.17 Thus, though the Supreme Court has held that it is permissible to put the burden on the defendant to prove he is incompetent, Massachusetts, for one, has placed the burden on the prosecution to prove that a defendant is competent once the question has been raised.18 Likewise, Massachusetts requires that competence can be established by a preponderance of

14 Drope v. Missouri, 420 U.S. at 180.

15 See Drope v. Missouri, 420 U.S. at 180; Commonwealth v. Hill, 375 Mass. at 54-55, 375 N.E.2d at 1171; Moran v. Godinez, 57 F.3d 690, 695 (9th Cir. 1995); Harding v. Lewis, 834 F.2d 853, 856 (9th Cir. 1987). But see Commonwealth v. Martin, 35 Mass. App. Ct. 96, 98, 616 N.E.2d 814, 816 (1993) (holding that not every instance of abnormal behavior or sign of mental disorder will compel a competency hearing). Cf. Dusky v. United States, 362 U.S. at 402 ("It is not enough [to establish competency] for the ... judge to find that the defendant is oriented to time and place and has some recollection of events.").

16 See Manning v. Texas, 766 S.W.2d 551, 554-55 (Tex. Ct. App. 1989). Jurisdictions are split on which party carries the burden of proving competency or incompetency once the issue has been raised. Most jurisdictions require only a preponderance of the evidence to prove competence, but at least one requires proof beyond a reasonable doubt. See infra note 19 and accompanying text.

17 See infra notes 18-19.

the evidence, as do most jurisdictions, while Maryland, for one, has held that competence must be proven beyond a reasonable doubt.\(^{19}\)

The burden of ensuring that an incompetent defendant is not tried falls both on the court and the attorneys.\(^{20}\) The judge has a responsibility imposed by the Constitution to ensure that an incompetent defendant is not tried.\(^{21}\) In Massachusetts and in most federal circuits, the judge must hold a competency hearing whenever "a substantial question of possible doubt" is raised regarding the defendant's competency.\(^{22}\) Under a recent Massachusetts decision, even appellate courts have explicit authority to raise the question of a defendant's competency sua sponte, even when the issue was not raised at the trial level.\(^{23}\) Under *Commonwealth v. Simpson*,\(^{24}\) the correct remedy in such a situation is for the court to order a hearing on a motion for a new trial, rather than reversal of the conviction.\(^{25}\)

\(^{19}\) Compare *Commonwealth v. Crowley*, 393 Mass. at 401-02, 471 N.E.2d at 358-59 (requiring competence to be proven by preponderance of the evidence), and *Commonwealth v. Simpson*, 428 Mass. 646, 654, 704 N.E.2d 1131, 1136 (1999) (recognizing that competence must be proven by preponderance of evidence), with *Jolley v. Maryland*, 384 A.2d 92, 94, 282 Md. 353, 357 (1978) (holding that competence must be proven beyond reasonable doubt).

\(^{20}\) See *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987) (holding that due process requires court to initiate competency proceedings); *Manning v. Texas*, 766 S.W.2d at 554 (ruling that state must protect defendant's due process right not to be tried when incompetent); *New York v. Reason*, 353 N.Y.S.2d 449, 452 (App. Div. 1974) (Murphy, J., dissenting) ("The state may not, and must provide adequate safeguards to ensure that it will not, convict a legally incompetent person of a crime.").

\(^{21}\) See *supra* notes 3, 20 and accompanying text.


\(^{25}\) *Id.* at 654, 704 N.E.2d at 1136. The facts giving rise to the question of the defendant's competence arose during trial, after jeopardy had attached. *Id.* at 652-53, 704 N.E.2d at 1135. The court acknowledged that typically a judge
In other jurisdictions, such as Maine, the standard is slightly different: only if the trial court learns from "observation, reasonable claim or credible source that there is a genuine doubt of the accused's competency" does the court have a duty to inquire concerning the defendant's competence to stand trial. Under ABA Standard for Criminal Justice 7-4.2, in jurisdictions such as Massachusetts that have either adopted or credited these standards, and in other jurisdictions by judicial decision, both the prosecutor and defense counsel have an ethical obligation to raise the issue of the defendant's competency whenever they have a good faith doubt concerning the defendant's competence to stand trial.

should conduct a competency hearing if and when the judge should suspect the defendant may be incompetent, even if in the middle of a trial. Id. at 653 n.6, 704 N.E.2d at 1135 n.6. The court then stated, without explanation, that the possibility of conducting such a hearing in this case was "nil." Id.


See ABA Standard for Criminal Justice 7-4.2 (2d ed. 1986) [hereinafter Standard 7-4.2]. The Supreme Court of Kansas, for example, stated prior to the adoption of the ABA Standards:

It is a well-settled rule in this state that whenever counsel for defendant or the state becomes possessed of knowledge of a defendant's lack of mental capacity to comprehend his situation or to properly make his defense, it becomes the duty of each to promptly bring the matter to the attention of the court.

Kansas v. Smith, 173 Kan. 813, 815, 252 P.2d 922, 923 (1953). See also Evans v. Kropp, 254 F. Supp 218, 220-21 (E.D. Mich. 1966) (holding that failure of prosecutor to raise issue of defendant's incompetence violates due process); Chernoff & Schaffer, Defending the Mentally Ill: Ethical Quicksand, 10 AM. CRIM. L. REV. 505, 519 (1972) (suggesting that failure of defense counsel to notify court of defendant's incompetence may constitute fraud upon the court). The ABA Standards for Criminal Justice also place the burden on the prosecutor, defense counsel and the court. Standard 7-4.2 reads, in part:

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to
Other jurisdictions place no duty to raise competency issues on the prosecutor, relying instead on the judgment of defense counsel.\textsuperscript{28} Thus, in all jurisdictions, and under the ABA Standards for Criminal Justice, defense counsel in particular has an obligation to raise the issue of the defendant's competency whenever he has a good faith doubt whether the defendant is competent to stand trial, regardless of the defendant's wishes.\textsuperscript{29} ABA Standards for Criminal Justice 7-4.2(c), the paragraph pertaining to the responsibility of defense counsel, reads:

Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.\textsuperscript{30}

\textsuperscript{28} See Thursby v. Maine, 223 A.2d at 68 (initial responsibility for raising question of incompetence is on defense counsel); Illinois v. Maynard, 347 Ill. 422, 430, 179 N.E. 833, 837 (1932) (same).

\textsuperscript{29} See infra note 30 and accompanying text.

\textsuperscript{30} ABA Standards for Criminal Justice 7-4.2(c) (2d ed. 1986). Chapter 7, the Mental Health Standards, was adopted by the ABA House of Delegates on August 7, 1984.
As the Commentary to ABA Standard for Criminal Justice 7-4.2 acknowledges, this obligation may put defense counsel in an ethical bind, involving issues of attorney-client confidentiality, the attorney's duty to represent the wishes of the client, and the duty to advocate zealously. Where

**III. CONFLICTING RESPONSIBILITIES**

There are four issues that arise from the juxtaposition of potentially conflicting duties owed by an attorney both to the attorney's client and as an officer of the court. First, the prosecution or defense counsel may misuse the issue of competence and the competency determination process. Secondly, Defense

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31 See Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate of Officer of the Court?* 1988 Wis. L. Rev. 65 (Jan.-Feb. 1988). Uphoff's article provides an in-depth and very critical discussion of defense attorneys' obligation to raise the issue of incompetency, as well as a proposal for relief from that obligation. *Id.* The conclusion of Uphoff's client-centered argument is that defense counsel should be left to make a case-by-case decision based on what the lawyer determines to be in the best interest of the defendant. *Id.* at 109. This approach, though perhaps resulting in preferable results for the defendant when they have competent counsel, seems to ignore the fact that trial of an incompetent defendant is an affront to the United States Constitution. *See supra* note 3 and accompanying text.

32 See Gerald Bennett, *Symposium of the ABA Criminal Justice Mental Health Standards: A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial,* 53 Geo. Wash. L. Rev. 375, 381 (1985) (identifying three areas of conflict); *see generally* Uphoff, *supra* note 31 (discussing distinct conflict when finding of incompetency would be adverse to defendant).

33 *Id.* "It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiations, or to delay the proceedings against the defendant." ABA Standards for Criminal Justice 7-4.2(e) (2d ed. 1986). Studies have indicated that misuse of the competency determination process in these ways is quite common. Bennett, *supra* note 32, at 381-83 (citing studies on the misuse of competency procedures). In an interview conducted during research for this article, an experienced defense attorney
counsel's obligation to relay to the court information that is relevant to an assessment of competence can conflict with a client's assertion of the attorney-client privilege or a promise of confidentiality.\textsuperscript{34} Third, the defendant's best interests may be adverse to a finding of incompetency.\textsuperscript{35} Finally, there is a potential conflict between a defense attorney's obligation to raise the issue of competence and his client's wishes.\textsuperscript{36} This article is primarily concerned with the last of these potential conflicts.

There have been several studies conducted concerning the misuse of the doctrine of incompetence to stand trial.\textsuperscript{37} For example, one study determined that the competency issue was frequently used not to ensure a fair trial, but for "handling situations and solving problems for which there seemed to be no other recourse under the law."\textsuperscript{38} Another study found that attorneys used the competency issue not only to ensure a constitutionally sound trial, but also "to remove public pressure for severe punishment, to avoid a jury trial on the responsibility issue, or to lay the groundwork for a not guilty by reason of insanity plea where the crime would result in a long sentence."\textsuperscript{39} Other misuses have included the use of the system by defense counsel as a substitute for civil commitment proceedings, to obtain a free psychiatric evaluation, or to delay the proceedings in referred to the "competency defense," in perhaps tacit acknowledgement of the potentially tactical applications of the issue.

\textsuperscript{34} See Bennett, supra note 32, at 381-83. See also ABA Standards for Criminal Justice 7-4.2(f) (2d ed. 1986) (discouraging disclosure during competency determination process of confidential communications or communications protected by attorney-client privilege); ABA Model Rule of Professional Conduct 1.6 (1997).

\textsuperscript{35} See Uphoff, supra note 31, at 71-72 (discussing conflicting duties when finding of incompetency adverse to best interest of defendant).

\textsuperscript{36} See Bennett, supra note 32, at 381.

\textsuperscript{37} See Bennett, supra note 32, at 381 (citing studies concerning misuse of competency procedures).

\textsuperscript{38} See id. at 382 (quoting Hess & Thomas, Incompetency to Stand Trial: Procedures, Results and Problems, 119 AM. J. PSYCHIATRY 713, 715 (1963)).

\textsuperscript{39} See Bennett, supra note 32, at 382 (quoting Cooke, Johnston & Pogany, Factors Affecting Referral to Determine Competency to Stand Trial, 130 AM. J. PSYCHIATRY 870, 874 (1973)).
hope of some favorable result. Prosecutors, it has been alleged, misuse the process to incapacitate a defendant when they lack sufficient evidence for a conviction at trial.

To varying degrees depending on jurisdiction, attorneys are prohibited from disclosing information concerning the case without the permission of their client. When compelled to raise the issue of competence to stand trial, though, defense counsel must submit to the court "the specific facts that have formed the basis for the motion." Thus, the problems involved with disclosure of information and communications by defense counsel must be weighed against the court’s need to obtain the information necessary to order a competency hearing and to make an informed decision concerning the defendant’s competence. To resolve this conflict, the ABA Standards for Criminal Justice conclude that an attorney must disclose the facts on which a motion for a competency evaluation is based and may testify or be questioned by the court concerning her observations of the client. Defense counsel may not, however, disclose the substance of attorney-client communications and neither the court nor

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40 See Bennett, supra note 32, at 382; see, e.g., Eizenstat, Mental Competency to Stand Trial, 4 Harv. C.R.-C.L. L. Rev. 379, 384 (1968) (citing use of incompetency procedures in place of civil commitment); Estelle v. Smith, 451 U.S. 454, 466 (1981) (condemning use of competency hearing to obtain psychiatric evaluations for later use); Roesch, A Brief, Immediate Screening Interview to Determine Competency to Stand Trial, 5 Crim. Just. & Behav. 241, 242 (1978) (finding use of competency proceeding to obtain advance psychiatric information); Slovenko, The Developing Law on Competency to Stand Trial, 5 J. Psychiatry & L. 165, 166 (1977) (same); Wesler & Scoville, Incompetency to Stand Trial, 13 Ariz. L. Rev. 160, 161-62 (1971) (delaying proceedings by raising competency issue).

41 See Bennett, supra note 32, at 382.

42 See ABA Model Rule of Professional Conduct 1.6 (1997). Different jurisdictions have adopted different variations of Model Rule 1.6, though most changes concern the exceptions allowing disclosure, rather than the prohibition. See Stephen Gillers & Roy D. Simon, Regulation of Lawyers 74-78 (1998 ed.) (listing variations on rule by state).

43 ABA Standards for Criminal Justice 7-4.2(d) (2d ed. 1986).

44 See Bennett, supra note 32, at 386-87.

45 See ABA Standards for Criminal Justice 7-4.2(c) (2d ed. 1986).
prosecution may obtain from defense counsel the substance of communications protected by the attorney-client privilege.\textsuperscript{46}

Competency evaluations are usually conducted on an inpatient basis and may result in lengthy hospitalization.\textsuperscript{47} Therefore, when attorneys for defendants charged with relatively minor offenses raise competency, the defendants may be deprived of more of their liberty than they would lose if convicted.\textsuperscript{48} Prior to the United States Supreme Court’s 1972 decision in \textit{Jackson v. Indiana},\textsuperscript{49} commitment for treatment to restore competence was indeterminate, often unreviewed, and sometimes resulted in commitment for life rather than a short-term stay for treatment.\textsuperscript{50} Sometimes a defense attorney will believe it to be in the defendant’s best interest not to raise the issue of competency due to the weakness of the prosecution’s case and the likelihood of a verdict of not guilty.\textsuperscript{51}

Finally, at times a defendant will not want to be found incompetent and may instruct the attorney not to raise the issue.\textsuperscript{52} This is often the case where the alleged crime was motivated by loyalty to a political “cause.”\textsuperscript{53} In such cases, the defendant is loath to be found incompetent or insane because such a finding could detract from the credibility of the political message they hope to

\textsuperscript{46}Compare ABA Standards for Criminal Justice 7-4.2(f) (2d ed. 1986) (mandating certain disclosures), with ABA Standards for Criminal Justice 7-4.8(b)(i)-(ii) \& commentary at 229-31 (2d ed. 1986) (prohibiting certain disclosures).

\textsuperscript{47}See Uphoff, \textit{supra} note 31, at 71.

\textsuperscript{48}See Uphoff, \textit{supra} note 31, at 72.

\textsuperscript{49}406 U.S. 715, 738 (1972). The Court limited the length of time a defendant may be committed for determination of competency to the amount of time it takes to determine the likelihood of treatment resulting in competency. \textit{Id.} For longer commitments, the government must commence civil commitment proceedings. \textit{Id.}

\textsuperscript{50}See Hess \& Thomas, \textit{supra} note 38, at 716 (finding that competency evaluation procedures often result in “incarceration, for life”).

\textsuperscript{51}See Bennett, \textit{supra} note 32, at 384.

\textsuperscript{52}\textit{Id.} at 385.

Whatever the motivation for refusing to raise incompetence, such a refusal on the part of the defendant can put defense counsel in an ethical bind between the duty to advocate zealously for their client and the duty to raise the issue of competency to stand trial. If a lawyer raises competency over the objection of the defendant, he may be fired, resulting in a defense the likes of that given by Colin Ferguson in his New York trial for murder. While competent defendants have the constitutional right to defend themselves pro se, commentators seem to agree that this is not preferable.

IV. CONFLICTS DISTINGUISHED

There is a related issue that has recently received much publicity through the trial of Theodore Kaczynski: may defense counsel assert a defense of lack of criminal responsibility, or insanity, over the defendant’s objection? In cases such as Kaczynski’s, defense counsel may be caught between the wishes of the defendant and a sincere belief that an insanity defense is in the defendant’s best interest. Counsel has an obligation to exercise professional

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54 Id. at 391-92.
55 See Uphoff, supra note 31, at 65 (“The role of the criminal defense lawyer is to provide zealous representation within the bounds of the law.”); ABA Model Rules of Professional Conduct, Preamble (1997) (“As advocate, a lawyer zealously asserts the client’s position....”).
56 See infra note 57 and accompanying text.
57 See, e.g., Jon Kerr, Kentucky and Wisconsin Cases Point Out Legal, Ethical Complexities of Raising an Insanity Defense Over a Client’s Opposition, 11-17-95 WEST’S LEGAL NEWS 3860. For example, following the case of Colin Ferguson, who represented himself in his defense against ninety-three counts for the killing of six people and wounding of nineteen, it was predicted that the “bizarre example of the right to self-representation... might provoke a backlash against other criminal defendants seeking to exercise their rights to represent themselves in court.” Id.
58 United States v. Theodore John Kaczynski, No. Cr. S-96-259 GEB (E.D. Ca. 1996). Theodore Kaczynski was charged with numerous offenses involving the mailing of bombs as the Unabomber. Id.
59 The law is far from clear on whether the defendant or the attorneys control the choice of what defense to raise. In Kaczynski, after months of ex parte negotiations between the defendant and his counsel, in which the trial judge mediated, the defendant attempted to dismiss his lawyers because of their intent
judgment in zealous advocacy of the client's cause, but the defendant has the last say concerning what plea to assert, which may include the decision whether to assert an insanity defense. This contrasts with the conflict surrounding competency because of the constitutional implications of the trial of an incompetent defendant. Moreover, the context in which competency issues are addressed further distinguishes the two situations: competency is addressed in a theoretically non-adversarial proceeding while the insanity defense is asserted in the midst of the adversarial arena. Nonetheless, the pressures on defense counsel who believe their client is not guilty by reason of insanity are very similar to those on defense counsel who


See ABA Standard for Criminal Justice 4-5.2 (1992) (advising that choice of plea is for defendant after consultation with attorney). ABA Standard 4-5.2 also assigns tactical decisions, including the choice of what evidence to introduce, to counsel after consultation with the defendant. Id. Compare Ohio v. Smith, 3 Ohio App. 3d 115, 118, 444 N.E.2d 85, 89 (1981) (allowing "tactical" decision of counsel to withdraw plea of "not guilty by reason of insanity" over defendant's objection), and Weber v. Israel, 730 F.2d 499, 508 (7th Cir. 1984) (ruling that decision to withdraw insanity plea was tactical), with California v. Medina, 51 Cal. 3d 870, 900, 799 P.2d 1282, 1301 (1990) (ruling that decision of whether to plead not guilty by reason of insanity was personal to defendant), and Alvord v. Wainwright, 725 F.2d 1282, 1288 (11th Cir. 1984) (holding defense counsel ethically responsible not to enter insanity plea when so directed by defendant). Following the court's decision in Alvord, a petition for certiorari was filed and denied. Alvord v. Wainwright, 469 U.S. 956, 956 (1984). Justice Marshall dissented, noting that "[t]he decision established that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable." Id. at 959. As noted by the court in Ohio v. Smith, there is "some uncertainty" regarding whether the decision to withdraw an insanity defense is a strategy decision for the lawyer or a decision exclusively up to the defendant. Ohio v. Smith, 3 Ohio App. 3d at 118, 444 N.E.2d at 89.

See supra note 3 and accompanying text.

See supra note 16 and accompanying text.
believe their client is incompetent. Defendants' motivations for refusing to assert an insanity defense are often similar to defendants' motivations for objecting to the raising of a competency issue.

There have been several high-profile cases in the past few years that have highlighted the potential for conflict between attorneys and clients who wish to be found competent and perceived as sane. Colin Ferguson, accused of killing six people and wounding nineteen, fired his lawyers when they suggested an insanity defense, then proceeded pro se in a spectacle that most people concerned with the law hope to avoid in the future. Ted Kaczynski, when facing trial last year for mailing bombs as the Unabomber, attempted to fire his lawyers for pressuring him to assert a defense of not guilty by reason of insanity. The case of John Salvi provides an excellent example of the potential conflict over competency that a defense attorney may face: the conflict becomes most acute and complicated when the client expressly wishes not to be found incompetent.

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63 See supra notes 27-31 and accompanying text. The duties imposed by ABA Standard 7-4.2 obviously don't apply to the situation wherein a defendant is opposed to raising a mental illness defense but the attorney believes it is the best defense. The duty to advocate zealously, however, does apply and imposes an affirmative obligation on defense counsel. See also supra note 60 and accompanying text.

64 See supra notes 47-54 and accompanying text.

65 See supra note 56 and accompanying text.

66 See United States v. Kaczynski, Transcript of Proceedings January 8, 1998 (No. Cr. S-96-259 GEB). On the morning that the oft-delayed trial was to begin, Kaczynski's counsel addressed the court as follows:

Your Honor, if I may address the Court, Mr. Kaczynski had a request that we alert the Court to, on his behalf-- it is his request that he be permitted to proceed in this case as his own counsel. This is a very difficult position for him. He believes that he has no choice but to go forward as his own lawyer. It is a very heartfelt reaction, I believe, to the presentation of a mental illness defense, a situation in which he simply cannot endure. So it is his request that the Court permit him to proceed on his own behalf.

Id.
V. COMMONWEALTH OF MASSACHUSETTS v. JOHN SALVI

John Salvi was indicted for two counts of murder in the first degree and five counts of assault with the intent to murder. He was sent to Bridgewater State Hospital for a competency evaluation at defense counsel’s request. In the Motion for Appointment of Amicus Counsel, Salvi’s attorney reported that the doctor who evaluated Salvi at Bridgewater could not determine if Salvi was competent to stand trial. Salvi’s counsel argued that he was not competent under at least one prong of the Dusky standard, as he was not able to “consult with his lawyer with a reasonable degree of rational understanding.” Noting that Salvi was adamant that he was


68 Id. at 1.

69 See Motion for Examination of the Defendant Concerning His Competency to Stand Trial, Commonwealth v. Salvi (Mass. Super. Ct.) (Nos. 99518-24). Defense counsel stated in the motion for a competency examination that a substantial question had been raised as to “whether the defendant has sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding.” Id. Attached as an exhibit to the motion were copies of several pages of Salvi’s writings. Among his statements: “If convicted of the charge I am accused of I wish to receive the death penalty.... If I am not proven guilty upon release I will become a catholic priest.... What the catholic church needs to do is to start printing a currency.... Why do the free masons persecute the Catholic Church? Because their good at it.... Written from Norfolk City Jail on 1/4/95 after refusing to eat tampered food for 4 days.”

70 See Motion for Appointment of Amicus Counsel, supra, at 1. See also Transcript of Competency Hearing 33-34 (July 24, 1994).

71 Motion for Appointment of Amicus Counsel, supra note 67, at 2. The motion also states that Salvi would neither provide counsel with any information regarding the day of the alleged offenses, nor explain why he wouldn’t:

He has asserted his Fifth Amendment privilege with both counsel and all evaluators. He has shifted the subject to a rambling and loosely associated monologues concerning the Catholic Church and the persecution of Catholics. He has insisted on his right to remain silent
competent to stand trial, counsel addressed the conflict that arose between the duty to raise the issue of competency when there was a reasonable doubt as to Salvi’s competency and the duty to represent the wishes of the client.\textsuperscript{72}

As the Commentary Introduction to ABA Standard for Criminal Justice 7-4.2 indicates, defense counsel has a “professional responsibility toward the court and the fair administration of justice, as well as an allegiance to the client....”\textsuperscript{73} As discussed previously, these two responsibilities may at times conflict.\textsuperscript{74} Thus, the ABA Standards propose two options: move for an evaluation over the client’s objections, or, if that would deleteriously affect the attorney-client relationship, to simply advise the court of the information that led to counsel’s doubt as to the defendant’s competence.\textsuperscript{75} As several

while the government proves its case against him. He has insisted that many issues, even those which appear to be innocuous, are “private” or “personal.” He refuses to provide counsel with any information which might lead to the discussion of viable defenses. At the same time, the defendant is anxious to be found competent and proceed to trial.

\textit{Id.}

\textsuperscript{72} \textit{Id.} at 4-5. The motion also cited the Commentary Introduction to ABA Standard 7-4.2, see \textit{supra} note 30, which acknowledges that moving for a competency evaluation over the client’s objection may deleteriously affect the attorney-client relationship. Counsel was apparently convinced that to raise the competency issue would prompt Salvi to fire his counsel and proceed pro se. Motion for Appointment of Amicus Counsel, \textit{supra} note 67, at 5. See also Commonwealth’s Response to Defendant’s Motion for Appointment of Amicus Counsel to Argue Incompetency, Commonwealth v. Salvi 4-5, n.3 (Mass. Super. Ct.) (NOS. 99518-24). The other option suggested by the Commentary to ABA Standard 7-4.2 is for counsel to give the court the information leading to counsel’s doubt about competency, and to then withdraw to resolve the conflict of interest.

\textsuperscript{73} ABA Standards for Criminal Justice 7-4.2 (2d ed. 1986).

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} The second option, however, as the Commentary notes, may require counsel to seek permission to withdraw from further representation. \textit{Id.}; see ABA Model Rules of Professional Conduct 1.7 (1987). On the other hand, it is not uncommon for defendants to fire their attorney for choosing the alternative. \textit{See} Commonwealth v. Simpson, 428 Mass. 646, 650 n.3, 704 N.E.2d 1131, 1134
high profile cases have demonstrated, many criminal defendants sincerely wish to be found sane, whether to avoid undermining the perceived credibility of a political message, to avoid stigma, or because of a perception that conditions in a state hospital are worse than in jail. Rather than pursue either to the exclusion of the other, counsel moved the court to appoint amicus counsel to represent the defendant in the competency hearing.

VI. AMICUS CURIAE

"It has been said that an amicus curiae is one who gives information to the court on some matter of law in respect to which the court is doubtful..." Most courts have traditionally held that the function of amici is to give service, advice, or suggestions to the court, not to serve a party.

Not all courts have defined the role of amicus counsel in so limited a fashion. The Ninth Circuit Court of Appeals has said that "[t]here is no rule... that amici must be totally disinterested." Another court, in Wyatt v. Rawlins, has gone further, holding that "the concept of amicus curiae is flexible and... as long as the amicus does not intrude on the rights of the parties, it can have a range of roles: from a passive one of providing information to a more active participatory one." The court in Wyatt went on to identify eight factors that can be used to determine whether the role of amicus should active, passive, or somewhere in between: (1) the nature of

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76 See supra notes 66-67.
77 See Motion for Appointment of Amicus Counsel, supra, at 1, 5.
78 City of Columbus v. Tullos, 204 N.E.2d 67 (Ohio 1964).
79 See Givens v. Goldstein, 52 A.2d 725, 726 (D.C. 1947) (limiting amicus counsel's role to that of advisor to court and disallowing amicus' management of case); Briggs v. United States, 597 A.2d 370, 373 (D.C. 1991) (refusing appeal by amicus curiae); Brown v. Wright, 137 F.2d 484, 487 (4th Cir. 1943) (holding that party appearing as amicus is not bound by judgment because not party). But see infra notes 80-82, and accompanying text.
80 Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982).
82 Id. at 1359.
the litigation and the issues presented; (2) the nature of the amicus; (3) whether the court has invited the participation of the amicus; (4) whether the parties object to the amicus; (5) the history of the participation of the amicus in the litigation and whether that participation has been helpful to the court; (6) how the amicus has handled its responsibility in the past; (7) whether participation by the amicus will be currently helpful to the court and will not prejudice the parties; and (8) whether the amicus is manipulating that role as a substitute for intervention.  

Courts in Massachusetts, however, have scarcely addressed the concept of amicus curiae. In 1875, the Supreme Judicial Court held that amicus curiae are heard only by leave of court and for the assistance of the court.  

Earlier, in 1866, the Supreme Judicial Court held, in the only other case on point, that amicus curiae can not be heard where the parties are represented by competent counsel and the court has not asked for further argument.  

VII. A SOLUTION GONE AWRY

The court determined that given the circumstances, it was appropriate to appoint amicus counsel to represent the defendant in his competency hearing. In an order dated June 29, 1995, Judge Dortch-Okara appointed an attorney to serve as counsel amicus curiae to "present arguments, oral or written, as to the defendant’s competency to stand trial."  

The judge determined that amicus counsel can not be partisan, nor given to the use of a litigant. Without any substantial precedential authority from the higher courts of Massachusetts, the judge devised explicit instructions governing the interaction of the amicus with the defense attorney:

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83 Id. at 1359-60.
85 Nauer v. Thomas, 95 Mass. (12 Allen) 572, 574 (1866).
86 See Memorandum of Decision and Order on Defendant’s Motion to appoint Amicus Curiae to Litigate Competency Issue, Commonwealth v. Salvi (Mass. Super. Ct.) (Nos. 99518-24).
87 Id. at 6.
88 Id. at 5, quoting 3A C.J.S. Amicus Curiae § 4, 426, n.45.
Amicus curiae shall take an objective and neutral role in his communications with defense counsel. Amicus curiae is allowed to communicate freely with defense counsel, to the extent he sees fit, for assistance in gathering factual data only. Defense counsel and amicus curiae shall not discuss legal opinions, legal strategy, or legal conclusions. Amicus curiae shall interact with defense counsel only to the extent necessary to gather evidence and to formulate his own opinions, conclusions, and strategy for the competency hearing. Again, the role of amicus curiae is that of an advisor to the court and not of a private attorney for the defendant. 89

At the competency hearing, the amicus counsel examined and cross-examined witnesses. 90 He did not discuss legal opinions, legal strategy, or legal conclusions with the defendant’s counsel. 91 Moreover, because the amicus counsel was not, technically, representing Salvi, he never consulted with Salvi, never had a confidential relationship with him, and did not believe that an attorney-client relationship would exist between them. 92 Furthermore, because he was not representing Salvi, he could not waive the attorney-client privilege or turn work product over to the prosecution. 93 Perhaps most importantly, amicus never attempted to have Salvi testify at the hearing, because of the court’s instructions. 94

At the competency hearing itself, counsel for the defendant attempted to object to a question. 95 The court instructed counsel that

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89 Id. at 6.
91 Id.
92 See id.
93 See Transcript of Competency Hearing 113.
94 Id. at 2. “I did not attempt to call the defendant as a witness because I determined that whether the defendant should testify at the proceeding was a strategic decision which should be made by the defendant in consultation with his counsel.” Id.
95 See Transcript of Competency Hearing 72.
he was not permitted to participate or object in the hearing.\textsuperscript{96} On multiple occasions during the hearing, counsel attempted to be heard on the record and was not permitted by the court, despite the express wishes of amicus counsel.\textsuperscript{97} The defendant himself attempted to address the court, but was also not permitted to speak.\textsuperscript{98}

This raises the troubling question of whether the defendant was denied his right to counsel during the competency hearing.\textsuperscript{99} It is clear that amicus counsel was not representing the defendant in any way, indeed was instructed by the court not to represent the defendant.\textsuperscript{100} Counsel for the defendant was not allowed to

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\textsuperscript{96} See Defendant's Motion for a New Competency Hearing, supra note 95, at 5. See also supra note 89, and accompanying text.

\textsuperscript{97} See also supra note 89, and accompanying text.

\textsuperscript{98} Id. at ¶ 6. "On two occasions, the defendant had to be removed from the courtroom because he had persisted in requesting permission to address the court." Id.

\textsuperscript{99} See Defendant's Motion for a New Competency Hearing, supra note 95, ¶ 8. In the motion for a new competency hearing, which was denied, counsel for the defendant alleged that the lack of representation at the competency hearing was a violation of the defendant's Constitutional rights under the Sixth and Fourteenth Amendments and under Articles X and XII of the Massachusetts Declaration of Rights. Id.

\textsuperscript{100} See supra note 89 and accompanying text.
participate. The defendant was not allowed to participate. The result was a hearing in which the defendant had absolutely no part.

VIII. CONCLUSION

Given the conflict faced by defense counsel when they have a good faith doubt as to the defendant’s competence to stand trial but the defendant wants to be found competent, it seems that use of amicus counsel may be an appropriate solution. There are seemingly two modifications that can be made to the procedures employed in Salvi’s case that could resolve the conflict without creating the problem of nonrepresentation.

The first modification that could be made is that defense counsel could be allowed to participate in the competency proceedings. The holding of the court in Salvi’s case that amicus’ presence precluded Salvi’s counsel from participating appears to be inexplicable. In seemingly all cases, the involvement of amicus curiae is supplementary to the representation by counsel for the parties, and it is contrary to the very nature of amicus curiae to allow them to supplant one party to the proceedings.

The second possible solution would be to adopt a more expansive definition of the role of amicus curiae. Courts in other jurisdictions have, when appropriate, adopted an expanded definition of what amicus curiae can be and do, including at times allowing them to take an advocacy role. This seems most appropriate given the non-adversarial nature of the competency hearing, the sole goal of which is to allow the court to render a fair assessment of the defendant’s competency. It also seems that this would allow defense counsel to continue to represent the defendant’s wishes without the risk that the defendant’s Constitutional rights are not being advocated.

101 See supra note 97 and accompanying text.
102 See supra note 98 and accompanying text.
103 See supra note 99. No appellate court had a chance to rule on the propriety of Salvi’s competency hearing, as he died after conviction and before appeal.
104 See supra note 78, et. seq., and accompanying text.
105 See supra notes 80-83 and accompanying text.
Whichever course the courts take in the future, the use of amicus counsel can play a significant role. The law of amicus curiae must develop, especially in Massachusetts. As demonstrated, however, the use of amicus counsel to ensure the constitutionality of criminal proceedings by preserving the attorney-client relationship and at the same time ensuring the competency of the defendant is a viable alternative to the potentially embarrassing spectacles of defendants proceeding pro se, or the potential expense of new trials following appeal.

Gregory Brown