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## Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia

Francis A. Gilligan

*United States Court of Appeals for the Armed Services*

Edward J. Imwinkelried

*University of California, Davis*

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**WAIVER RAISED TO THE SECOND POWER:  
WAIVERS OF EVIDENTIARY PRIVILEGES BY LAWYERS  
REPRESENTING ACCUSED BEING TRIED *IN ABSENTIA***

FRANCIS A. GILLIGAN\* & EDWARD J. IMWINKELRIED\*\*

“[I]f . . . [the accused] voluntarily absents himself, this . . . leaves the court free to proceed with the trial in like manner . . . as if he were present.” *Diaz v. United States*, 223 U.S. 442, 455 (1912).

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\* Senior Legal Advisor to Chief Judge Crawford, United States Court of Appeals for the Armed Forces; B.S., Alfred University; J.D., State University of New York, at Buffalo School of Law; LL.M., George Washington University; S.J.D., George Washington University.

\*\* Edward L. Barrett, Jr. Professor of Law, University of California, at Davis; B.A., University of San Francisco; J.D., University of San Francisco.

## I. INTRODUCTION

The scenario begins in an uneventful manner. The state has already charged the accused, and he has either hired counsel or had counsel appointed. Prior to trial, the accused and counsel have a private meeting where the accused and counsel share confidential communications to which the attorney-client privilege attaches.<sup>1</sup>

The scene then shifts to trial. The accused is present at the commencement of the trial. But after trial begins, the accused flees, voluntarily<sup>2</sup> absenting himself from the remainder of the trial. The prevailing view is that at least when the accused is present at the outset of the trial,<sup>3</sup> the accused “waives” or, more precisely, forfeits his or her right to attend the trial, and the trial may therefore continue in his or her absence—in *absentia*.<sup>4</sup> After the judge decides to continue the trial, the

1. Most jurisdictions recognize a crime–fraud exception to the attorney-client privilege. *United States v. Zolin*, 491 U.S. 554, 556 (1989). But that exception comes into play only if, at the very time of the communication, the client sought the attorney’s advice to facilitate the commission of a future crime or fraud. 2 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.13.2.d(1), at 972–75 (2002). Thus, if a client in custody sought the attorney’s advice in order to help the client later illegally escape from custody, the exception would apply and privilege would not attach to their communication. For purposes of this hypothetical scenario, however, this Article assumes that the client forms the intent to flee after the communication with the attorney.

2. At a later point in time, the accused may attempt to establish that his absence was involuntary. Suppose, for example, that the accused has persuasive evidence that he was absent because he had been kidnapped. In that event, the court can set aside the conviction and grant the accused a new trial *de novo*. See UNIF. R. CRIM. P. 713(b) cmt., 10 U.L.A. 197 (1987); 5 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 24.2(d), at 464 n.51 (2d ed. 1999); Myra L. Willis, Note, *Criminal Trials in Absentia: A Proposed Reform for Indiana*, 56 IND. L.J. 103, 118 (1980). Alternatively, the accused can argue that he or she lacked notice of the time of the hearing which he or she missed. For instance, in *State v. Whitley*, 85 P.3d 116 (Ariz. Ct. App. 2004), the accused was absent when the jury returned to open court and announced its verdict at 3:35 p.m. The defense counsel had evidently instructed the accused to return to court at 4:30 p.m.

3. See, e.g., FED. R. CRIM. P. 43; *United States v. Bradford*, 237 F.3d 1306, 1308 (11th Cir. 2001) (recognizing that a trial actually begins for Rule 43 purposes when jury selection begins); *Stoddard v. State*, 112 N.W. 453, 454–55 (Wis. 1907) (holding that although “every person tried for a felony has the right to be present at the trial, and the whole of it[,] . . . the right is one which a defendant may voluntarily waive, to the extent at least of absenting himself during a portion of the trial”); *Lynch v. Commonwealth*, 88 Pa. 189, 194 (1879) (acknowledging that defendant, having been called in while voluntarily absent, need not be present when the jury reads its verdict); *Wilson v. State*, 2 Ohio St. 319, 321–22 (1853) (holding that a defendant cannot be present throughout the entire trial and then “voluntarily absent himself at the moment the verdict is rendered, and take advantage of that absence to avoid judgment”); 5 LAFAYE ET AL., *supra* note 2, § 24.2(d) (noting that in a case where a defendant was voluntarily absent from his trial, the logical approach is to view this scenario as effecting a “forfeiture of a right by misconduct”) (footnote omitted); 24 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 643.08[2] (3d ed. 2003) (“In any noncapital case, the defendant may impliedly waive the right to be present if he or she is voluntarily absent after the trial has begun” so long as the defendant was “initially present at the trial.”); Neil P. Cohen, *Trial in Absentia Re-Examined*, 40 TENN. L. REV. 155, 158–61 (1973) (“Once begun in the defendant’s presence, a non-capital felony trial can proceed without him if he subsequently ‘voluntarily’ absents himself from the proceedings.”); Willis, *supra* note 2, at 116–17 (noting that Indiana courts acknowledge “a defendant’s absence at the commencement of trial should be treated differently from an absence after the trial has begun” for a variety of reasons).

4. See *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir. 1972); *People v. Smith*, 721 N.E.2d 553, 557 (Ill. 1999); *Pinkney v. State*, 711 A.2d 205, 210–28 (Md. 1998); see also 3 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* 223–24 (2d ed. 1999) (setting out Rule 804, which governs when the accused’s presence is and is not required at trial proceedings); 1 GILLIGAN & LEDERER, *supra*, § 13-32.20 (discussing the ways an accused may waive his right to be present at trial); Neil P. Cohen, *Can They Kill Me If I’m Gone: Trial in Absentia in Capital Cases*, 36 U. FLA. L. REV. 273, 276–77 (1984) (explaining that, although Rule 43 does not distinguish between capital and noncapital cases when determining whether a defendant has waived his right to be present at trial, the Supreme Court seems to have articulated a rule that capital case defendants have to be

defense counsel realizes that one of the accused's pretrial communications with counsel would be relevant exculpatory evidence. Counsel attempts to introduce the statement as defense testimony.

The question posed is whether the defense counsel should be empowered to waive the accused's attorney-client privilege, which would otherwise bar the introduction of testimony about the statement. The question is not merely hypothetical. Rather, the question is one the United States Court of Appeals for the Armed Forces faced in *United States v. Marcum*.<sup>5</sup> In *Marcum*, during the innocence phase of his trial, the accused testified but was nevertheless found guilty. After a recess, the accused went absent without leave (AWOL). During the sentencing phase, as military law permits, the trial defense counsel offered into evidence the accused's unsworn statement. The trial judge admitted the statement which was a writing that the accused had prepared before trial. On appeal, the accused had new counsel; appellate defense counsel contended that the trial judge had erred in permitting defense counsel to waive the accused's personal attorney-client privilege.

In 2002, the intermediate appellate court, the United States Air Force Court of Criminal Appeals (C.C.A.), refused to reverse.<sup>6</sup> Of the several grounds the court cited for doing so, one was that the accused had already waived the privilege.<sup>7</sup> The appellate court found that in his earlier trial testimony, the accused referred to "a significant part of the matters contained in the" written statement.<sup>8</sup> Another ground was that even if the trial defense attorney had violated the accused's attorney-client privilege, the error was harmless.<sup>9</sup> The court stated that the contents of the statement were not prejudicial but largely favorable to the accused. The third and final ground, though, is of immediate interest. The court concluded that the trial defense counsel had the authority to waive the accused's privilege:

Even if . . . the appellant did not waive the attorney-client privilege himself, "the [attorney] generally has implicit authority to waive the privilege as well in the course of the representation." Our superior court recognized this authority in *United States v. Province*, 45 M.J. 359 (1996). In that case, the accused gave a copy of 4 ½ year-old "stragglers' orders" to his trial defense counsel. In effect, these orders documented the accused's prior uncharged period of unauthorized absence. Trial defense counsel used the orders during pretrial negotiations in an attempt to get an administrative separation for the accused. He also gave a copy of the orders to [the prosecutor] out of concern that the information would come out during the providence inquiry and complicate the plea . . . . Our superior court held that "the disclosure of the stragglers' orders was made in facilitation of representation, and

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present at trial); James G. Starkey, *Trial In Absentia*, 53 ST. JOHN'S L. REV. 721, 741-45 (1979) (examining the history of trial *in absentia* and the nature of waiver by voluntary absence and concluding that a defendant's presence at trial is not required as it once was—proceeding without him does not necessarily offend the fairness of the system).

5. 60 M.J. 198 (C.A.A.F. 2004).

6. *United States v. Marcum*, No. ACM 34216, 2002 CCA LEXIS 173, at \*2 (A.F.C.C.A. July 25, 2002).

7. *Id.* at \*10-11.

8. *Id.*

9. *Id.* at \*13.

defense counsel would be impliedly authorized to disclose this information for [that] purpose.”<sup>10</sup>

The C.C.A. decision in *Marcum* hardly answers whether counsel can waive the attorney-client privilege. To begin with, the *Marcum* court itself lacked sufficient confidence in its analysis of defense counsel’s authority to rest the decision squarely on the basis that the attorney can waive a client’s privilege. Instead, the court cited that argument as one of three separate grounds for its disposition. Moreover, the primary and secondary authorities are not compelling. The primary authority, the *Province* case, involved the defense counsel’s use of otherwise privileged statements during plea negotiations. Like the civilian Federal Rules of Evidence,<sup>11</sup> the Military Rules of Evidence provide limited protection for the use of matters disclosed during plea negotiations.<sup>12</sup> Thus, a defense counsel’s revelation of an otherwise privileged statement in the plea negotiation context might not compromise the defense’s ability to later exclude testimony about the statement.<sup>13</sup> The secondary authority is indeed a highly respected treatise. But the entire discussion of the defense counsel’s authority in the treatise consists of a single sentence: “The lawyer generally has implicit authority to waive the privilege . . . in the course of the representation.”<sup>14</sup> Not only does this particular passage fail to cite any authority supporting the proposition, it also seems at odds with the virtually axiomatic notion that only the client can waive the client’s privilege.<sup>15</sup> In short, the *Marcum* decision by the intermediate court cannot be the final word on the question.

In August 2004, the higher court, the United States Court of Appeals for the Armed Forces (C.A.A.F.), reviewed *Marcum*.<sup>16</sup> The majority reversed the C.C.A. decision and set aside the accused’s sentence.<sup>17</sup> At the beginning of its evaluation of the defense counsel’s conduct, the majority stressed that the decision of whether to make an unsworn statement is “personal to the accused.”<sup>18</sup> The court stated that “if an accused is absent without leave his right to make an unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a specific statement on his behalf.”<sup>19</sup> Because the majority found no evidence that the accused had authorized the defense counsel to introduce the writing as an unsworn statement, the defense counsel should not have proffered the statement. The majority concluded that the writing in question contained information subject to the attorney-client privilege and that the defense counsel had not obtained a waiver from the accused.<sup>20</sup> As support for its conclusion, the majority cited Military Rule

10. *Id.* at \*11–12 (internal citations omitted).

11. FED. R. EVID. 410.

12. *See* MIL. R. EVID. 410; DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI & EDWARD J. IMWINKELRIED, *MILITARY EVIDENTIARY FOUNDATIONS* § 7-10(B) (2d ed. 2000).

13. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 cmt. d (2000) (“In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. [Thus], a lawyer must use due care . . . to avoid unintended waiver of the attorney-client privilege . . .”).

14. 2 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* § 501.02[5][k][ii], at 501–47 (8th ed. 2002).

15. 2 IMWINKELRIED, *supra* note 1, § 6.12.3, at 847 n.36 (collecting authorities that “only a holder may consent to a waiver”).

16. 60 M.J. 198 (C.A.A.F. 2004).

17. *Id.* at 211.

18. *Id.* at 209.

19. *Id.* at 210.

20. *Id.*

of Evidence 511—the provision designating the client as the holder of the attorney-client privilege.<sup>21</sup>

While the C.A.A.F. majority asserted that the defense counsel could not waive the accused's privilege, Chief Judge Crawford filed a dissent addressing the sentencing statement issue.<sup>22</sup> She advanced four distinct arguments for her conclusion that permitting the defense counsel to include the information in question in the unsworn statement was not error. The initial three theories were: (1) the communication was not privileged to begin with,<sup>23</sup> (2) the accused waived any privilege by allowing the defense counsel to use the information contained in the statement to cross-examine prosecution witnesses,<sup>24</sup> and (3) the accused also waived privilege by testifying to many of the matters reflected in the writing.<sup>25</sup> The fourth and final ground for her dissent was that, assuming *arguendo* that the information was privileged, the defense counsel had implied authority under the circumstances to waive the privilege and reveal the information.<sup>26</sup>

Neither the majority nor the dissent supplies a definitive answer to the present question. The majority's rejection of defense counsel's authority to waive the privilege purports to be an alternative holding, but the analysis is arguably dictum. If, as a threshold matter, the defense counsel had no authority to introduce an unsworn statement at all, whether the contents were privileged *vel non* should make no difference. Moreover, although the majority cited the Military Rule of Evidence designating the client as the holder of the privilege, that rule does not explicitly address the question of whether the attorney should ever be granted implied-in-law authority to waive the privilege. For her part, Chief Judge Crawford marshaled several authorities cutting in favor of conferring such implied-in-law authority.<sup>27</sup> She added no policy argument to justify the conferral, however, and merely reprised the authorities cited by the court below. Thus, neither the intermediate court nor the Court of Appeals for the Armed Forces has provided a fully satisfactory answer to the question.

Consequently, despite the *Marcum* litigation, the waiver issue requires more extended analysis. This Article maintains that in *Marcum*, Chief Judge Crawford and the Court of Criminal Appeals reached the correct conclusion: Counsel representing an accused being tried *in absentia* should have the authority to waive the accused's privilege. The analysis must begin with some much broader issues than waiver. The first Part of this Article surveys the authorities dealing with counsel's implied authority to waive the client's privilege and concludes that the existing authorities do not provide a firm answer to this question.

The second Part undertakes a critical evaluation of the question, addressing the larger questions referred to above: What constitutional rights would the accused otherwise enjoy? To what extent does the accused "waive" or forfeit those rights by voluntarily absenting himself or herself from the trial? If the accused retains the right to introduce favorable evidence to which a privilege applies, should the

21. *Id.* at 211.

22. *United States v. Marcum*, 60 M.J. 198, 211 (C.A.A.F. 2004) (Crawford, C.J., dissenting).

23. *Id.* The thrust of this argument appeared to be that the defense counsel informed the accused that the writing might be used as a trial exhibit; hence, the accused did not have the requisite intent to maintain the confidentiality of the communication. The Chief Judge stated that "defense counsel's declaration of intent to submit the exhibit as Appellant's unsworn statement establishes that the statement was *not* privileged in the first place." *Id.*

24. *Id.*

25. *Id.* at 212.

26. *Id.*

27. *United States v. Marcum*, 60 M.J. 198, 212 n.8 (C.A.A.F. 2004).

defense counsel hold the power to waive the client's privilege? In the course of reaching the more narrow question posed by *Marcum*, this Article grapples with broader issues such as the concept of forfeiture, constitutional rights, and the trial attorney's role as client surrogate.

## II. A SURVEY OF THE AUTHORITIES RELEVANT TO AN ATTORNEY'S IMPLIED POWER TO WAIVE HIS OR HER CLIENT'S ATTORNEY-CLIENT PRIVILEGE WITHOUT A GRANT OF ACTUAL AUTHORITY FROM THE CLIENT

Four distinct, but related, bodies of law exist that are relevant to whether the defense counsel holds implied authority to waive the evidentiary privilege of a client being tried *in absentia*.

### A. Legal Ethics

Legal ethics is a body of law relevant to the waiver question. The American Bar Association's Model Rule of Professional Conduct 1.6 governs confidentiality of information.<sup>28</sup> Rule 1.6(a) announces the general rule that a lawyer may not reveal confidential information. The rule states in the alternative that a lawyer may reveal "information relating to the representation of a client" either when "the client gives informed consent" or when "the disclosure is impliedly authorized . . . to carry out the representation."<sup>29</sup> The Official Comment to Rule 1.6 explains:

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be implicitly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.<sup>30</sup>

This body of law does not furnish a definitive answer to the question posed in *United States v. Marcum*. The Official Comment to Rule 1.6 emphasizes that under the Model Rules, the concept of "confidential information" includes not only technically privileged communications from the client, but also "all information relating to the representation, whatever its source."<sup>31</sup> Thus, in some cases Rule 1.6(b)(1) disclosures will involve information in which the client has a less intense privacy interest than privileged client communications. Moreover, the original Official Note to Rule 1.6 acknowledged that some states rejected the position taken by the Rule and demanded the client's "express consent" to any disclosure.<sup>32</sup> Furthermore, one of the examples cited in the Comment is disclosure during

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28. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 25 (2003).

29. *Id.* at 25–26.

30. *Id.* at 27.

31. *Id.*

32. MODEL RULES OF PROF'L CONDUCT note (Draft 1981) (Exceptions to Confidentiality) (citing *People v. Gerold*, 107 N.E. 165 (Ill. 1914)).

negotiation.<sup>33</sup> As previously stated, other exclusionary rules of evidence come into play in that context and may prevent the subsequent evidentiary use of the disclosed information.<sup>34</sup> Finally and most fundamentally, the Model Rule regulates only a question of legal ethics; the Rule does not purport to control the evidentiary question. In short, even if, as a matter of legal ethics,<sup>35</sup> an attorney could reveal privileged information, the attorney might lack the authority to do so under evidence law.

### B. General Agency

The second pertinent body is the general law of agency. Just as the American Bar Association's Model Rules address the legal ethical issue, the American Law Institute's new Restatement (Third) of the Law Governing Lawyers speaks to the agency question. Section 61 of the Restatement is on point and is strikingly similar to Model Rule 1.6(b)(1).<sup>36</sup> Section 61 reads as follows: "A lawyer may . . . disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation."<sup>37</sup> The Official Comment states that section 61 is intended to define "the agency power of lawyers."<sup>38</sup> The Comment asserts that "[a] lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation."<sup>39</sup>

Further parallels to the Model Rule exist. In explaining the scope of section 61, the Official Comment gives the example of disclosure during settlement negotiations.<sup>40</sup> After citing that example, the Comment indicates that "[i]n most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who, or whose lawyer, made the statement."<sup>41</sup> Again, the example given is one in which the lawyer's disclosure might not prevent the client from barring subsequent evidentiary use of the statement.

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33. The prior version of the Official Comment expressly referred to "negotiation." MORGAN & ROTUNDA, *supra* note 28, at 27. The current version uses broader language, "facilitates a satisfactory conclusion to a matter." *Id.* Of course, a fair negotiated settlement is "a satisfactory conclusion to [the] matter."

34. FED. R. EVID. 408–10.

35. The ABA Model Rules are not the only authority relevant to the ethical propriety of a counsel's conduct in disclosing privileged information without a client's actual consent. In criminal practice, the ABA's Criminal Justice Standards are also pertinent. See ABA, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE]. Defense Function Standard § 4-5.2(a) provides that certain decisions such as the entry of a plea, the type of forum, entry into a pretrial agreement, the choice whether to testify, and the choice whether to forego an appeal must be made by the defendant. *Id.* § 4-5.2(a), at 199–200. But other strategic and tactical decisions are to be made by the "lawyer after consultation with the client." *Id.* § 4-5.2(b), at 200. "If a disagreement" arises between the lawyer and client on "significant matters of tactics or strategy," the Standards require the lawyer to record the circumstances, noting both the advice given and the conclusion reached. *Id.* § 4-5.2(c), at 200. The Army, Air Force, and Coast Guard have adopted these standards. 1 GILLIGAN & LEDERER, *supra* note 4, § 5-54.00, at 199.

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000).

37. *Id.*

38. *Id.* § 61 cmt. a, at 480.

39. *Id.* § 61 cmt. b, at 480.

40. *Id.* § 61 cmt. d, at 481.

41. *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 61, at 482 (2000) ("The law permits a lawyer negotiating a settlement to make statements 'without prejudice.'").



The Comment also discusses the applicability of section 61 to disclosures during litigation. The language of section 61 is certainly broad enough to extend to the trial context. The Comment makes it clear that the drafters also intended section 61 to apply at trial.<sup>42</sup> The Comment illustrates this application of section 61 as follows:

A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege . . . . For example, a lawyer may acquiesce in an adversary's eliciting testimony from the lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.<sup>43</sup>

In another passage, the Comment refers to a lawyer's "fail[ure] to object to an adversary's introduction in evidence of a client's privileged communication."<sup>44</sup> Thus, despite the breadth of the language of section 61, all the cited examples are situations in which the waiver of the privilege results from the lawyer's failure to object to the opponent's presentation of privileged information. None of the examples involves the lawyer waiving the attorney-client privilege by affirmatively introducing privileged communications, as in the *Marcum* fact pattern.

### C. Evidence

While the Restatement discusses the general agency issue, the Reporter's Note cites Dean Wigmore's Evidence treatise as authority.<sup>45</sup> The treatise addresses the specific and narrower question of whether the lawyer has authority to waive the attorney-client privilege. Dean Wigmore takes the position that the lawyer sometimes possesses such authority.<sup>46</sup> Like the official comments to the Model Rules and Restatement provisions, however, Dean Wigmore's text focuses primarily on the question of whether the attorney has authority to make disclosures during pretrial negotiations:

[T]he attorney must be credited with some authority for negotiating with the opposing party, and in the course of such negotiations it becomes necessary to make communications and to deliver documents or copies which . . . may afterwards with propriety form the subject of proof as part of the transactions between the parties. Indeed, to refuse to examine them would often be to sanction the breaking of faith with the opponent.<sup>47</sup>

Dean Wigmore further asserts:

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42. *Id.* § 61, at 480–81.

43. *Id.* § 61 cmt. d, at 481.

44. *Id.* § 61 cmt. b, at 480–81.

45. *Id.* § 61 Reporter's Note cmt. b, at 482.

46. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2325, at 632 (John T. McNaughton ed., rev. ed. 1961).

47. *Id.*

Since the attorney has implied authority from the client . . . to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) voluntarily made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation (e.g., in serving notices), are receivable as being made under an implied waiver of privilege, giving authority to disclose the confidences when necessary in the opinion of the attorney.<sup>48</sup>

In short, like the comments to the Model Rules and Restatement provisions, Dean Wigmore's text stops short of giving even a hypothetical example of an attorney affirmatively introducing privileged information at trial. Further, after defending his position, Dean Wigmore concedes that "[t]he judicial rulings are in some confusion."<sup>49</sup>

#### D. Constitutional Law

Like the evidence doctrine, constitutional law is germane to this Article's topic. On occasion, the United States Supreme Court has indicated that the accused must personally make certain trial-related decisions. In *New York v. Hill*,<sup>50</sup> the Court stated that "[f]or certain fundamental [constitutional] rights, the defendant must personally make an informed waiver."<sup>51</sup> The Court has forcefully held that only the accused has a constitutional right to testify,<sup>52</sup> and the emphatic nature of the Court's language has convinced the lower courts that only the accused may choose whether to testify; the defense counsel may not usurp that decision.<sup>53</sup> The decision whether to waive the right to trial by petit jury falls into the same category.<sup>54</sup> Further, the Court has either held or implied that the accused must personally make several other choices,<sup>55</sup> including whether to move to suppress evidence on the ground that it is a product of a constitutional violation<sup>56</sup> and whether to move to dismiss an indictment due to racial discrimination in the selection of the grand jury.<sup>57</sup> The Court has never suggested, much less ruled, however, that the accused must personally decide whether to waive a non-constitutional evidentiary privilege. Thus, in the current state of constitutional law, a jurisdiction apparently could

48. *Id.*

49. *Id.*; see also Starkey, *supra* note 4, at 740 (citing *People v. Vargas*, 126 Cal. Rptr. 88 (Ct. App. 1975) as authority for the following: "Nor may counsel, during the inquiry concerning the reasons for defendant's absence, properly disclose communications from his client which arose out of the attorney-client relationship and which were clearly meant to be confidential.").

50. 528 U.S. 110 (2000).

51. *Id.* at 114. The Court gave the examples of the right to counsel and the right to plead not guilty.

52. *Rock v. Arkansas*, 483 U.S. 44 *passim* (1987).

53. EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE § 4-2.a(1), at 133 n.30 (3d ed. 2004).

54. *Patton v. United States*, 281 U.S. 276 (1930); see also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.1(h), at 1041-43 (4th ed. 2000) (summarizing *Patton* and other similar case law).

55. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 745 (1983) (holding the defendant has the ultimate authority to make certain decisions); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) ("[O]nce a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.").

56. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

57. *Francis v. Henderson*, 425 U.S. 536, 537-38, 542 (1976).

confer that authority on a defense counsel representing an accused being tried *in absentia*. The mere fact that a practice would be constitutional, though, does not dictate the conclusion that the practice is either necessary or even desirable.

None of these bodies of law supplies a clear-cut answer to the policy question posed in *Marcum*. Consequently, to answer that question, this Article must undertake an original analysis of the merits of the issue. Part III of this Article assays that analysis.

### III. A CRITICAL EVALUATION OF THE QUESTION OF WHETHER THE LAWYER REPRESENTING A CLIENT BEING TRIED *IN ABSENTIA* SHOULD BE GRANTED THE POWER TO WAIVE THE CLIENT'S ATTORNEY-CLIENT PRIVILEGE

As the Introduction noted, the question presented by *United States v. Marcum*<sup>58</sup> is seemingly a narrow one. Yet, before that question can be intelligently evaluated, several much larger issues warrant examination. Subpart A addresses the threshold question of what constitutional rights an accused ordinarily possesses, and subpart B shifts to the thornier question of which rights the accused forfeits by voluntarily absenting himself or herself from trial. Moreover, subpart B concludes that the accused does not forfeit the right to introduce exculpatory testimony at the trial *in absentia*. Subpart C then turns to the ultimate question of whether the lawyer representing the accused tried *in absentia* is a proper surrogate for deciding whether to exercise the right, even when doing so entails the waiver of the accused's attorney-client privilege.

#### A. *The Constitutional Trial Rights an Accused Normally Possesses*

Any discussion of which rights the accused being tried *in absentia* retains requires identification of the rights which an accused normally possesses.<sup>59</sup> Many of those normally possessed rights are set out in the Sixth Amendment to the United States Constitution.<sup>60</sup> In pertinent part, the amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."<sup>61</sup>

The Sixth Amendment thus guarantees the accused several types of rights, one being the right to counsel.<sup>62</sup> The Assistance of Counsel provision is a two-way street. On the one hand, the accused citizen is entitled to receive assistance from the lawyer. The accused "requires the guiding hand of counsel at every step in" a criminal proceeding.<sup>63</sup> On the other hand, to the extent that he or she can, the accused is entitled to assist counsel<sup>64</sup> by, for example, providing counsel with investigative leads for exculpatory evidence.

58. 60 M.J. 198 (C.A.A.F. 2004).

59. Willis, *supra* note 2, at 104-12.

60. U.S. CONST. amend. VI.

61. *Id.*

62. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 339-44 (1963) (holding that a defendant's fundamental right to counsel also applies to the states through the Fourteenth Amendment).

63. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); see also 1 MCCORMICK ON EVIDENCE § 87, at 344 (John William Strong ed., 5th ed. 1999) ("[T]hey require the assistance of expert lawyers.").

64. Cohen, *supra* note 4, at 279; Starkey, *supra* note 4, at 731.

Assisted by his or her lawyer, what Sixth Amendment rights may the accused assert at trial? Some of the rights are negative in nature; in one way or another, they allow the defense team to attack prosecution evidence. These rights derive from the Confrontation Clause guarantee. For instance, when the prosecution's witnesses testify, they must ordinarily do so in the accused's presence. The testimony is a face-to-face confrontation with the accused, which may unsettle a perjurious witness for the prosecution and prompt the witness to display demeanor leading the jury to question the witness's credibility.<sup>65</sup> The Confrontation Clause not only gives the accused a right to passively observe the prosecution's witnesses; the Clause also subsumes a right to actively cross-examine the prosecution's witnesses. In *Davis v. Alaska*,<sup>66</sup> the Supreme Court underscored the importance of that right. In that case, the accused wanted to cross-examine the star prosecution witness to expose the witness's bias. In part, the inference of bias arose from the fact that at the time of trial, the witness was still on probation for a juvenile offense.<sup>67</sup> The rub was that a state statute and court rule barred any inquiry about juvenile adjudications.<sup>68</sup> The Court acknowledged that there is a legitimate, important state interest in cloaking juvenile court proceedings with confidentiality.<sup>69</sup> Yet, the Court ruled that the accused's right to cross-examination was paramount, trumping the statute and court rule.<sup>70</sup>

Although the Confrontation Clause's right to cross-examination is a fundamental one, the Sixth Amendment grants the accused far more than negative rights to attack the prosecution's evidence. The Sixth Amendment constitutionalizes the ideal of a fair, adversarial hearing at which the defense can present its perspective of the case.<sup>71</sup> For instance, the accused's personal right to testify is of a constitutional dimension.<sup>72</sup> More broadly—and of greater interest for the present inquiry—the accused has a right to introduce favorable exculpatory evidence at trial.

The seminal case recognizing this right is the Supreme Court's 1967 decision in *Washington v. Texas*.<sup>73</sup> Washington was charged with murder, and at trial, he attempted to call Charles Fuller as a witness. As a defense offer of proof indicated, Fuller was prepared to testify that Washington endeavored to prevent Fuller from committing the homicide. Fuller had already been convicted of the homicide, though, and two state statutes precluded an accused from calling as a witness anyone who had either been charged with or convicted as coparticipants of the same crime. After the Court denied Fuller's testimony to Washington, a jury convicted Washington, and ultimately, he appealed to the United States Supreme Court.<sup>74</sup>

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65. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 846 (1990) ("We have recognized . . . that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."); *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.").

66. 415 U.S. 308 (1974).

67. *Id.* at 311.

68. *Id.*

69. *Id.* at 319.

70. *Id.* at 320. See IMWINKELRIED & GARLAND, *supra* note 53, § 8-7.

71. See generally IMWINKELRIED & GARLAND, *supra* note 53, at 26-40 (discussing the evolution and historical background of the Sixth Amendment and the various theories for the constitutional right to present defense evidence).

72. See *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (holding that testimony by a defendant that has been recalled after hypnosis is not per se unreliable).

73. 388 U.S. 14 (1967).

74. *Id.* at 17.

When the case reached the Court, Chief Justice Warren issued two significant rulings. The first was that the Fourteenth Amendment Due Process Clause incorporates the Sixth Amendment Compulsory Process guarantee and renders the guarantee directly enforceable against the states.<sup>75</sup> The second was that in addition to enjoying the express Compulsory Process guarantee, the accused has an implied Sixth Amendment right to "offer [exculpatory] testimony."<sup>76</sup> Texas had argued that it satisfied Washington's Compulsory Process rights by giving Washington process to compel Fuller's attendance at trial. Texas merely denied Washington the right to put Fuller on the stand and elicit his favorable testimony. Texas urged a literal reading of the clause, entitling the accused only to compulsory process. The Court refused to adopt such a narrow reading of the clause. Writing for the majority, the Chief Justice declared the following:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.<sup>77</sup>

In sum, the accused not only has a defensive right to attack inculpatory prosecution evidence, but the accused also possesses a positive right to introduce exculpatory testimony.

*B. The Constitutional Rights of an Accused Being Tried In Absentia—The Rights Which the Accused Forfeits and Those Which the Accused Retains*

Assuming that an accused is being tried *in absentia*, the accused has certain constitutional rights that he or she obviously cannot exercise. For example, while the accused typically has a right to assist his or her counsel, the absent accused is not able to exercise this right.<sup>78</sup> Nor can the absent accused avail himself or herself of face-to-face confrontation with the prosecution's witnesses.<sup>79</sup> Finally, the absent accused cannot personally testify in his or her own defense.<sup>80</sup> The accused necessarily loses these rights by absconding from the trial. If the trial continues in the accused's absence, as the law permits, it is physically impossible for the accused to exercise these rights.

The question remains: Which other trial rights, if any, has the accused lost in the event the trial continues? Importantly, if the accused has lost the Sixth Amendment right to present exculpatory evidence, the question posed in *United States v. Marcum*<sup>81</sup> becomes moot in a sense. If the defense no longer has a right

75. *Id.* at 17–19.

76. *Id.* at 18 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

77. *Id.* at 18.

78. Cohen, *supra* note 4, at 279, 283.

79. *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995); Cohen, *supra* note 4, at 279; Starkey, *supra* note 4, at 735.

80. Starkey, *supra* note 4, at 735, 740–41; Willis, *supra* note 2, at 117.

81. 60 M.J. 198 (C.A.A.F. 2004).

to introduce favorable evidence, the trial judge need not reach the issue of whether the defense counsel may waive the accused's attorney-client privilege applicable to the evidence. The judge should exclude the evidence on the ground that the defense is no longer entitled to introduce evidence. The waiver issue arises only if the defense counsel otherwise has the right to introduce the statement to which the privilege attaches. Has the absent accused waived or forfeited his or her other constitutional rights, including the affirmative right to introduce exculpatory evidence?

### C. Waiver

In 1938 in *Johnson v. Zerbst*,<sup>82</sup> the United States Supreme Court coined the classic definition of true waiver: the "intentional relinquishment or abandonment of a known right."<sup>83</sup> In a subsequent decision, *Schneekloth v. Bustamonte*,<sup>84</sup> the Court confined that strict definition of waiver to trial rights.<sup>85</sup> The *Johnson* definition is applicable, however, because this Article's focus is rights retained by an accused being tried *in absentia*. If that definition is rigorously applied to the facts of many *in absentia* trials, waiver will be difficult to find. Unless the accused was notified of both his trial rights and the fact that his absence would not prevent the trial from continuing,<sup>86</sup> the court will be hard-pressed to conclude that a waiver in the strict, *Johnson* sense exists.

### D. The Distinction Between Waiver and Forfeiture

The analysis continues because courts have long distinguished between true waiver and forfeiture.<sup>87</sup> In the case of a convicted accused who flees after initiating an appeal, a wealth of authority indicates that the court may dismiss the appeal under the fugitive disentitlement doctrine.<sup>88</sup> Under the doctrine, the fugitive forfeits

82. 304 U.S. 458 (1938).

83. *Id.* at 464; see also *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting the *Johnson* definition of a waiver); Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970) (noting that a waiver must be "consensual" and that some "procedural incidents of the criminal process" cannot be waived).

84. 412 U.S. 218 (1973).

85. *Id.* at 235–46.

86. See Starkey, *supra* note 4, at 736; Willis, *supra* note 2, at 117.

87. *United States v. Thomas*, 357 F.3d 357, 362–63 (3d Cir. 2004); *In re Sealed Case*, 356 F.3d 313, 317–18 (D.C. Cir. 2004); *United States v. Jacques*, 345 F.3d 960, 962 (7th Cir. 2003); *United States v. Johnson*, 289 F.3d 1034, 1040–41 (7th Cir. 2002); *United States v. Richardson*, 238 F.3d 837, 841 (7th Cir. 2001); *Krumme v. Westpoint Stevens Inc.*, 238 F.3d 133, 141–42 (2d Cir. 2000); *United States v. Davenport*, 151 F.3d 1325, 1328 n.4 (11th Cir. 1998); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996); *United States v. McLeod*, 53 F.3d 322, 325 n.6 (11th Cir. 1995); *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994); *United States v. Broce*, 781 F.2d 792, 799 n.1 (10th Cir. 1986).

88. See *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1064 (9th Cir. 2004); *Lynn v. United States*, 365 F.3d 1225, 1239–44 (11th Cir. 2004); *United States v. Awadalla*, 357 F.3d 243, 245 (2d Cir. 2004); *Parretti v. United States*, 112 F.3d 1363, 1380–81 n.21 (9th Cir. 1997); *Daccarett-Ghia v. Comm'r*, 70 F.3d 621, 622–23, 627 (D.C. Cir. 1995); *United States v. Real Prop. Located at Incline Vill.*, 47 F.3d 1511, 1515 (9th Cir. 1995); *United States v. Sudthisa-Ard*, 17 F.3d 1205, 1206–07 (9th Cir. 1994); *Katz v. United States*, 920 F.2d 610, 611–12 (9th Cir. 1990); *United States v. Glomb*, 877 F.2d 1, 3 (5th Cir. 1989); *United States v. Puzanghera*, 820 F.2d 25, 26 (1st Cir. 1987); *United States v. Holmes*, 680 F.2d 1372, 1373–74 (11th Cir. 1982); *Lewis v. Duckworth*, 680 F.2d 508, 509 (7th Cir. 1982); *United States v. Macklin*, 671 F.2d 60, 67 n.9 (2d Cir. 1982); *Gov't of Virgin Islands v. James*, 621 F.2d 588, 589 (3d Cir. 1980); *Joensen v. Wainwright*, 615 F.2d 1077, 1079 (5th Cir. 1980); *Taylor v. Egeler*, 575 F.2d 773, 773 (6th Cir. 1978); *United States v. Wood*, 550 F.2d 435, 437–38 (9th Cir.

all of his or her appellate rights. At first blush, an extensive forfeiture appears more defensible at the trial level. The appellant's absence has little or no practical impact on the appeal since the appeal is largely confined to the already-completed trial record. In contrast, at trial the accused can make a meaningful contribution to the defense by testifying and providing investigative leads. If an appellant's absence justifies dismissing the appeal and forfeiting the procedural rights the appellant would otherwise enjoy, perhaps the accused's absence at trial should have a similar effect.

Two major differences exist between the trial and appellate settings. First, in the case of an appellant, the trial has provided a formal, presumably reliable determination of guilt. Second, as subpart B explains, although the accused at trial would otherwise have many constitutional rights, no constitutional right to an appeal exists.<sup>89</sup> Thus, the loss of an accused's appellate right does not have the same constitutional implications as a loss of the same accused's trial rights.

What standard governs the propriety of the accused's forfeiture of trial rights? Professor Peter Westen's analysis takes the best approach to this question.<sup>90</sup> Westen distinguishes a true *Johnson* waiver, which depends on a showing of subjective intent, from forfeiture, which occurs by operation of law without regard to the accused's state of mind.<sup>91</sup> To formulate the forfeiture test, Westen primarily draws on the Supreme Court's decisions addressing the extent to which an accused's guilty plea effects a forfeiture.<sup>92</sup> Synthesizing those cases, Westen states that an accused's conduct should work a forfeiture only when that conduct is

1976); *United States v. Villegas-Codillos*, 543 F.2d 1124, 1125 (9th Cir. 1976); *Ruetz v. Lash*, 500 F.2d 1225, 1229–30 (7th Cir. 1974); *Brinlee v. United States*, 483 F.2d 925, 926 (8th Cir. 1973); *United States v. Sanchez*, 258 F. Supp. 2d 650, 660 (S.D. Tex. 2003); *Lewis v. Del. State Hosp.*, 490 F. Supp. 177, 181–82 (D. Del. 1980); *People v. Buffalo*, 123 Cal. Rptr. 308, 309 (Ct. App. 1975); *State v. Peck*, 652 S.W.2d 244, 245 (Mo. Ct. App. 1983); *Wayne v. State*, 579 S.W.2d 780, 781 (Mo. Ct. App. 1979). *But see* *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 (1993) (noting that if an accused's "flight and recapture" occurs prior to appeal, it may not be sufficient grounds for dismissal).

89. *Abney v. United States*, 431 U.S. 651, 656 (1977); *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975); *Adsani v. Miller*, 139 F.3d 67, 76 (2d Cir. 1998); *Miller v. Smith*, 99 F.3d 120, 124 (4th Cir. 1996); *United States v. Pridgen*, 64 F.3d 147, 148 (4th Cir. 1995); *Nickens v. Melton*, 38 F.3d 183, 185 (5th Cir. 1994); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Matista*, 932 F.2d 1055, 1056 (2d Cir. 1991); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *United States v. Parrish*, 887 F.2d 1107, 1108 (D.C. Cir. 1989); *Barnes v. Lynaugh*, 817 F.2d 336, 340 (5th Cir. 1987); *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983); *United States ex rel. Burton v. Greer*, 643 F.2d 466, 469–70 (7th Cir. 1981); *Williams v. Missouri*, 640 F.2d 140, 143 (8th Cir. 1981); *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980); *Joensen v. Wainwright*, 615 F.2d 1077, 1078 (5th Cir. 1980); *Bell v. Hongisto*, 501 F.2d 346, 354 (9th Cir. 1974); *Mitchell v. McCaughtry*, 291 F. Supp. 2d 823, 832 (E.D. Wis. 2003); *Sinatra v. Barkley*, 741 F. Supp. 39, 40 (E.D.N.Y. 1990); *Mirrer v. Smyley*, 703 F. Supp. 10, 12 (S.D.N.Y.), *aff'd without opinion*, 876 F.2d 890 (2d Cir. 1989); *Jones v. Michigan*, 525 F. Supp. 636, 641 (E.D. Mich. 1981), *aff'd without opinion*, 705 F.2d 454 (6th Cir. 1982); *Martin v. Blackburn*, 521 F. Supp. 685, 713 (E.D. La. 1981), *aff'd sub nom. Martin v. Maggio*, 711 F.2d 1273 (5th Cir. 1983); *Edwards v. Va. State Dept. of Corrections*, 462 F. Supp. 164, 165 (W.D. Va. 1978); *People v. Vargas*, 11 Cal. Rptr. 2d 661, 663 (Ct. App. 1992); *People v. Baltor*, 143 Cal. Rptr. 478, 481 (Ct. App. 1978); *Pierce v. State*, 636 S.W.2d 734, 735 (Tex. App. 1982). *But see* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (arguing that a constitutional right to a criminal appeal should be included in the due process clause based on history and modern usage).

90. Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977); *see* 5 LAFAYETTE AL., *supra* note 2, § 24.2(c), at 461–62 n.37 (citing Professor Westen's article to explain the difference between forfeiture and waiver).

91. Westen, *supra* note 90, at 1214.

92. *See id.* at 1215–47.

detrimental to the prosecution's litigating position.<sup>93</sup> Thus, guilty pleas forfeit most of the accused's trial rights because the plea can impair the government's ability to prove the accused's guilt at trial.<sup>94</sup> Suppose the accused initially pleads guilty but is later permitted to withdraw the plea. In the interim, the "trail of evidence [may have] grown cold."<sup>95</sup> Between unpreserved evidence and eroded memories, the prosecution may not be in a position to prove the accused's guilt beyond a reasonable doubt at trial.<sup>96</sup> In short, the prosecution is no longer in the same position in its case against the accused;<sup>97</sup> but if the accused's conduct does not place the prosecution in a diminished position to establish guilt, that conduct should not result in a forfeiture.<sup>98</sup>

The application of Professor Westen's standard to an *in absentia* trial dictates the conclusion that, while the accused has necessarily lost rights such as the right to assist counsel and personally testify, the accused's absence does not justify a forfeiture of other trial rights. If the accused is absent, not only is the prosecution in no worse position to prove the accused's guilt, but the prosecution is realistically in a better position.

Conceivably, in a rare case, the accused's absence would disadvantage the prosecution. Identity is the key issue in many cases. For example, consider a case where someone clearly committed a criminal act with the requisite mens rea. The only issue remaining is whether the accused was the perpetrator. In most of those cases, the prosecution has a variety of means to establish the accused's identity: DNA, fingerprints, or at least an eyewitness's identification of a photograph of the accused, for example. Assume an extraordinary fact situation, however, in which the only method of establishing the accused's identity is an eyewitness's in-court identification of the accused. The government should have a fair opportunity to establish the accused's identity as the perpetrator.<sup>99</sup> Arguably, the accused's absence ought to have a waiver effect. (Even in this case, though, it is difficult to believe that a court would find that the accused has forfeited any right to a hearing adjudicating guilt. At early common law, however, if an accused absconded before a conviction, the accused was "subject to summary execution by anyone who came upon him."<sup>100</sup> That treatment occurred only after the accused had been declared an outlaw, and the declaration substituted for a conviction).<sup>101</sup>

While such fact situations turning on the issue of identity are conceivable, no published opinions exist presenting such extreme facts. In any realistic *in absentia* trial, the prosecution is certainly no worse off. It is true that the prosecution is denied the accused's testimony, but the prosecution is not entitled to that testimony. Under the Fifth Amendment, the accused has a privilege to refuse to testify at trial.<sup>102</sup> Further, the prosecution cannot rely on the accused's unfavorable appearance or nonverbal, non-testimonial demeanor at trial to bolster its case. The only demeanor the trier may properly consider is a witness's demeanor on the stand

93. *Id.* at 1237.

94. *Id.* at 1235–36.

95. *Id.* at 1248.

96. *Id.* at 1238, 1248–49.

97. See Westen, *supra* note 90, at 1248.

98. See *id.* at 1236, 1248.

99. See Cohen, *supra* note 3, at 190.

100. Starkey, *supra* note 4, at 722–23.

101. See *id.*

102. *Wilson v. United States*, 149 U.S. 60, 66 (1893).



during testimony.<sup>103</sup> Thus, the only demeanor the prosecutor could discuss during closing argument would be the demeanor of the accused while testifying. Further, since the accused has a right to refuse to testify, the prosecution is not entitled to present demeanor evidence to the trier of fact if the accused elects not to testify. The accused's absence, however, does not have any negative impact on the prosecution's ability to introduce the accused's pretrial statements because the prosecution can still introduce any relevant<sup>104</sup> statement as an admission of a party-opponent.<sup>105</sup> When a hearsay statement qualifies as an admission, it is immaterial whether the declarant is available at trial.<sup>106</sup>

In the typical case, the accused's absence makes it easier for the prosecution to obtain a conviction. First, the accused's absence will reduce the amount of evidence potentially available to the defense<sup>107</sup> because the accused's absence necessarily deprives the defense of the accused's personal testimony. Second, the accused's absence deprives the defense and the factfinder access to the accused's knowledge about the case.<sup>108</sup> If the accused has exclusive knowledge of the existence of a potential defense witness, that witness may never appear on behalf of the defense. Moreover, the accused will not be present to furnish the defense counsel with investigative leads.

Not only may the defense have less evidence, but the prosecution may have more, or even superior evidence. Admittedly, if the facts indicate only the accused's unexplained absence, the trial judge may forbid conclusions of guilt to be drawn from the absence.<sup>109</sup> Suppose, though, that the prosecution has evidence to support an inference that the accused fled the jurisdiction. Given those facts, ample authority indicates that the prosecution is entitled to characterize the accused's conduct as evidence of consciousness of guilt,<sup>110</sup> and the judge may instruct the jury accordingly.<sup>111</sup>

103. Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL. ADV. 183, 196–201 (1985); see also Cohen, *supra* note 3, at 181 (“The jury ought to base its decision on the testimony and the exhibits, not on the accused’s physical characteristics.”).

104. 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1102, at 348 (3d ed. 1998).

105. *Id.* § 1104, at 349–51.

106. See *id.* § 1312, at 456. Compare FED. R. EVID. 804 (listing hearsay exceptions requiring a foundational showing of unavailability) with FED. R. EVID. 801(d)(2)(A) (codifying the hearsay exemption for personal admissions).

107. Conceivably, a creative defense attorney could argue that the accused's absence constitutes unavailability, triggering the application of a hearsay exception to an otherwise inadmissible pretrial statement by the accused. The chance that a court would accept such an argument is remote. On occasion, defense counsel have successfully contended that an accused's invocation of the Fifth Amendment privilege to refuse to testify rendered the accused unavailable. *Bryan v. State*, 837 S.W.2d 637, 643–44 (Tex. Crim. App. 1992). But, the prevailing view is to the contrary. *United States v. Peterson*, 100 F.3d 7, 13–14 (2d Cir. 1996); *United States v. Kimball*, 15 F.3d 54, 55–56 (5th Cir. 1994). Most courts follow the prevailing view even though, in this variation of the facts, the accused is lawfully asserting a privilege. When the accused absconds from trial, his conduct could amount to a crime. Even if the conduct fell short of constituting a separate offense, it is difficult to see how the defense could satisfy any provision of Federal Rule 804(a) specifying the recognized forms of unavailability. FED. R. EVID. 804(a).

108. Cohen, *supra* note 4, at 283, 285.

109. 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 430, at 813 (13th ed. 1991). Moreover, if the facts indicate that the accused's absence is unexplained, it is debatable whether a trial *in absentia* is even permissible. See authorities cited *supra* notes 2–3.

110. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:04 (rev. ed. 1999); MOORE ET AL., *supra* note 3, ¶ 643.08[2]; Starkey, *supra* note 4, at 737; Cohen, *supra* note 3, at 118.

111. MOORE ET AL., *supra* note 3, ¶ 643.08[2] n.25 (citing *United States v. Touchstone*, 726 F.2d 1116, 1117 (6th Cir. 1984)); Starkey, *supra* note 4, at 736–39.

The accused's absence may improve the quality of some prosecutorial evidence, and increase the quantity of evidence the prosecution can present. Lay jurors appear to attach a good deal of weight to witnesses' nonverbal demeanor.<sup>112</sup> In many jurisdictions, the trial judge expressly instructs the jury that in evaluating a witness's credibility, they may consider the witness's demeanor while testifying.<sup>113</sup> In some cases, however, the accused's presence can make a prosecution witness so uncomfortable that the discomfort will manifest itself as unfavorable demeanor thereby leading the jury to the wrong conclusion. Suppose, for example, that the witness is the child victim of sexual abuse committed by the accused. If the witness is forced to testify in the accused's presence, the witness may testify less effectively;<sup>114</sup> even if a truthful witness retains enough composure to fully answer the prosecutor's questions, the witness's nonverbal demeanor may cause the jurors to disbelieve the witness. The United States Supreme Court has announced that, in some instances, the Confrontation Clause must yield when the prosecutor can show that face-to-face confrontation with the accused will probably have a severe impact on the witness.<sup>115</sup> When the prosecution has made a satisfactory showing, the courts have sanctioned such procedures as closed-circuit television and screens.<sup>116</sup> The demeanor of such vulnerable witnesses is likely to be more confident at trial when the accused is absent or not visible. As a result, jurors will more likely find the witness's demeanor more convincing than it would otherwise be in a face-to-face confrontation.

Hence, rather than reducing the prosecution's ability to establish the accused's guilt beyond a reasonable doubt, in most instances the accused's absence will make it easier for the prosecution to achieve a guilty verdict. The defense counsel may have less exculpatory evidence at his or her disposal, and the accused's conduct in absconding may furnish the prosecution with "consciousness of guilt" evidence and improve the demeanor of some prosecution witnesses. In light of Professor Westen's analysis, the accused's absence should therefore not work a forfeiture of most of the accused's trial rights. The accused has necessarily lost the right to testify personally, but his or her absence should not forfeit either the accused's

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112. See, e.g., Arthur D. Austin, *Why Jurors Don't Heed the Trial*, NAT'L L.J., Aug. 12, 1985, at 15, 18 (discussing research findings of the Cleveland Jury Project and the need for reform); see generally Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993) (discussing the popular confidence in demeanor evidence and why it is problematic); Imwinkelried, *supra* note 103 (analyzing the impeachment value of a witness's unfavorable demeanor); The Honorable James P. Timothy, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000) (examining the jury's use of demeanor to assess witness credibility); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (summarizing experimental findings that indicate demeanor evidence is insufficient to assist the trier of fact, and the implications of these findings on rules and practices).

113. Imwinkelried, *supra* note 103, at 229.

114. See, e.g., *State v. Foster*, 915 P.2d 520, 522-23 (Wash. Ct. App. 1996) (finding that to require "the child to testify in the presence of the defendant . . . will prevent the child from communicating at trial" even though she is able to differentiate between telling the truth and telling a lie).

115. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853 (1990) ("We likewise conclude today that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.").

116. IMWINKELRIED ET AL., *supra* note 104, § 109; see also *Craig*, 497 U.S. at 853 n.2 (listing thirty-seven states and corresponding statutory authority that permit videotaped testimony of sexually abused children); *id.* at 853-54 n.3 (listing twenty-four states and corresponding statutory authority that permit closed circuit television in child abuse cases); *id.* at 854 n.4 (listing eight states and corresponding statutory authority that permit the use of a two-way video system for both the witness and the defendant in the courtroom).

Confrontation Clause right to cross-examine, or the accused's Compulsory Process right to introduce favorable evidence. A new question then arises: In the accused's absence, who will decide whether and how to exercise those right?

*E. The Defense Attorney as a Suitable Surrogate to Exercise the Constitutional Rights Retained by the Accused Being Tried In Absentia*

Assume the court concludes that by absenting himself or herself, the accused has not forfeited the valuable constitutional rights to cross-examine prosecution witnesses and to present defense evidence.<sup>117</sup> Who will serve as the accused's surrogate to decide whether to exercise those rights?

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117. Even the conclusion by the court that forfeiture has not occurred does not resolve the question of the extent of those retained rights. There are two possible models: constitutional law and evidence law. Under the constitutional law model, whoever is authorized to act as the accused's surrogate may exercise the rights only to the extent constitutionally mandated. For example, although the accused has a basic constitutional right to cross-examine a prosecution witness to expose the witness's bias, that right does not require the trial judge to permit any cross-examination relevant to the witness's bias. *IMWINKELRIED & GARLAND, supra* note 53, § 8-7c, at 282–84 (the trial judge enjoys “a great deal of leeway” in determining the proper scope of cross-examination). In particular, the judge may restrict cross-examination about a particular source of bias when the record contains other evidence allowing the jurors to adequately gauge the witness's credibility. *Id.* § 8-7c, at 287–92. Likewise, while the accused has an implied Sixth Amendment right to introduce exculpatory testimony, the testimony must be both demonstrably reliable, *id.* § 2-4a(2), and critical, *id.* § 2-4a(1). The determination whether the specific item of evidence is critical turns in part on the defense's access to other, alternative evidence. *Id.*

Assume arguendo that the judge conducting an *in absentia* trial strictly followed a constitutional-law paradigm for the hearing. On that assumption, the judge might have to constantly interrupt the trial to conduct sidebar conferences. The conferences would be necessary to determine whether there was so little other impeaching evidence that the Confrontation Clause mandated cross-examination about the specific impeaching fact, or whether there was so little other favorable evidence that the Compulsory Process guarantee required the admission of the particular exculpatory fact proffered. As the preceding paragraph indicates, in deciding whether the facts trigger the Confrontation Clause or Compulsory Process Clause, the judge must consider both the proffered defense evidence and the other evidence available to the defense. That procedure would be awkward and time-consuming.

Precisely because the constitutional law procedure seems so unwieldy, the second, evidence-law model is attractive. Under that model, defense counsel may cross-examine even when the Confrontation Clause does not require cross-examination to that extent; counsel may introduce favorable evidence even though the Compulsory Process guarantee does not compel its admission. In other words, at trial the accused's surrogate may question witnesses to the extent the governing statutory and common-law rules of evidence permit.

In practice, the courts that hear *in absentia* cases seem to have adopted the evidence-law model. None of the published opinions dealing with *in absentia* cases indicates that the presiding trial judges have paused to determine whether a cross-examination subject was so vital that the Confrontation Clause required allowing questioning on that topic, or whether the proffered defense evidence was so critical that its exclusion would run afoul of the Compulsory Process guarantee. Instead, the cases suggest that a court would permit defense counsel to conduct the trial in the same manner as he or she would have if the accused had been present. In the words of *Diaz v. United States*, 223 U.S. 442, 455 (1912), the trial proceeds “in like manner . . . as if [the accused] were present.” Hence, the authorities indicate that in the normal fashion, defense counsel representing accused being tried *in absentia* have been afforded the opportunity to: (1) conduct voir dire examination, *see* Willis, *supra* note 2, at 115; (2) present an opening statement, *see* *People v. Smith*, 721 N.E.2d 553, 556 (Ill. 1999); (3) cross-examine prosecution witnesses, *see* *Diaz*, 223 U.S. at 445; Willis, *supra* note 2, at 115; (4) introduce evidence, *see* *Diaz*, 223 U.S. at 464; (5) participate in jury views, *see* *People v. Edwards*, 73 P. 416, 417 (Cal. 1903); and (6) present a closing argument, *see* *Diaz*, 223 U.S. at 460.

### 1. *The Defense Counsel's General Suitability as a Surrogate*

The possibility exists that the law would designate a third party other than the defense attorney as the surrogate for the accused. This Article asserts that the defense attorney is the most appropriate surrogate for several reasons.

Regardless of who serves as the surrogate, in order to make intelligent decisions about the presentation of evidence at trial, the surrogate should be familiar with the overall trial strategy and the role that particular exculpatory and impeaching facts can play in that strategy. The defense attorney is in the best position to develop that familiarity.

Moreover, even if the accused were present, the defense attorney would have some authority to make decisions about the cross-examination conducted and the evidence presented at trial. Several American Bar Association documents acknowledge that authority. One example is Model Rule of Professional Conduct 1.2(a):

A lawyer shall abide by a client's decisions concerning the objectives of representation and, . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.<sup>118</sup>

Although the Rule expressly states that the client has the final authority to decide whether to personally testify, the Rule implies that the attorney has final authority to decide other evidentiary matters. The notes to Rule 1.2 following the 1981 Proposed Final Draft cite cases that support this inference. Thus, the notes state that the attorney is empowered to decide "whether to cross-examine a [prosecution] witness,"<sup>119</sup> whether to "present or refuse to present certain witnesses,"<sup>120</sup> and whether to "stipulate to certain facts,"<sup>121</sup> including a stipulation as "to the use of testimony from a prior trial."<sup>122</sup>

The American Bar Association Standards for Criminal Justice also reflect an attorney's decision-making authority.<sup>123</sup> Like Model Rule 1.2, the 1993 Defense Function Standard 4-5.2(a)(iv) asserts that the accused has final authority to decide "whether to testify in his or her own behalf."<sup>124</sup> Defense Function Standard 4-5.2(b) adds the following:

Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and

118. MODEL RULES OF PROF'L CONDUCT R.1.2(a) (2004).

119. MODEL RULES OF PROF'L CONDUCT R.1.2 note (Proposed Final Draft 1981) ("decline cross-examination") (citing *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974)).

120. *Id.* (citing *Nahhas v. Pacific Greyhound Lines*, 13 Cal. Rptr. 299 (Cal. Dist. Ct. App. 1961), *Newman v. L.A. Transit Lines*, 262 P.2d 95 (Ca. Dist. Ct. App. 1953), and *In re King*, 336 A.2d 195 (Vt. 1975)).

121. *Id.* (citing *Laird v. Air Carrier Engine Serv. Inc.*, 263 F.2d 948 (5th Cir. 1959)).

122. *Id.* (citing *Smith v. Whittier*, 30 P. 529 (Cal. 1892)).

123. ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35.

124. *Id.*

appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.<sup>125</sup>

Like the American Bar Association's ethical and practice standards, several Supreme Court opinions acknowledge that, as a general proposition, the defense counsel has decision-making authority with respect to many trial-related matters, including evidence. As Part II.D of this Article discussed, the Court has declared that only the accused can effectively waive a particular constitutional right. The Court has simultaneously noted that other trial-related decisions fall within the defense counsel's province.<sup>126</sup> *New York v. Hill*<sup>127</sup> is illustrative. Part II.D quoted the passage in *Hill* in which the Court stressed that only the accused has the power to waive certain constitutional rights.<sup>128</sup> Yet, in its next breath, the Court hastened to make the following observation:

For other rights, however, waiver may be effected by action of counsel . . . . [D]ecisions by counsel are generally given effect as to what arguments to pursue, . . . what evidentiary objections to raise, . . . and what agreements to conclude regarding the admission of evidence . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.<sup>129</sup>

At trial, it is usually more effective for any litigant, including a criminal accused, to make a consistent, coherent presentation to the trier of fact.<sup>130</sup> If, at various points in the trial, a litigant takes inconsistent positions, the inconsistency can lead the trier to question the general credibility of the litigant's position. As we have seen, with the exception of the evidentiary question of whether to present the accused's own testimony, even when the accused is present, the accused's attorney has authority to resolve most evidentiary questions related to the defense trial strategy. Hence, selecting a surrogate other than the accused's attorney would create the risk of introducing an inconsistency into the defense trial strategy.

## 2. *The Defense Counsel's Suitability as a Surrogate for the Specific Purpose of Deciding Whether to Waive an Evidentiary Privilege*

Of course, the specific question presented is whether the defense counsel should be empowered to waive the accused's evidentiary privileges. As discussed

125. *Id.*

126. *Cf. Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (discussing *Strickland v. Washington*, 466 U.S. 668 (1984), in which the Court held that "[t]o counteract the natural tendency to fault an unsuccessful defense, a court receiving a claim of ineffective assistance must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"). Even Justice Brennan, an ardent civil libertarian, conceded that the trial defense attorney must be granted "decisive authority . . . with regard to the hundreds of decisions that must be made quickly in the course of a trial." *Jones v. Barnes*, 463 U.S. 745, 757–60 (1983) (Brennan, J., dissenting).

127. 528 U.S. 110 (2000).

128. *Id.* at 114.

129. *Id.* at 114–15 (internal citations omitted).

130. See generally RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS 28–49 (3d ed. 2002) (suggesting how to plan a case "strategically and tactically" through the choice of a trial theory and trial theme so as to "achieve a simple, coherent trial presentation").

above, the defense attorney possesses extensive authority over the general run of evidentiary questions arising at trial. Yet, the decision whether to waive an evidentiary privilege differs from the general evidentiary issue. Most evidentiary doctrines relate to the reliability of the testimony submitted to the trier of fact.<sup>131</sup> From the litigant's perspective, the only question may be whether the item of evidence will appear so trustworthy to the trier of fact that the trier is motivated to return a favorable verdict based on the evidence.<sup>132</sup> In the vast majority of instances, the defense attorney is at least as competent as the accused to resolve that question.

Whether to waive an evidentiary privilege or not involves a very difficult calculation. Unlike doctrines such as authentication and hearsay, privileges rest in large part on considerations of extrinsic social policy.<sup>133</sup> The introduction of privileged information can affect not only the probability that the holder will prevail in the litigation, but the use of the information also implicates the holder's right to personal autonomy.<sup>134</sup> In a given case, the holder might prize personal autonomy so strongly that he or she decides to assert the privilege even though doing so reduces the probability that the holder will prevail in the litigation. Counsel, though, may know little or nothing about how the holder values privacy interests. Thus, no one can say with certainty that the defense attorney is as competent as the accused to resolve this question.

Nevertheless, on balance, the defense counsel representing an accused tried *in absentia* should be authorized to waive the privilege. Several factors cut in favor of that conclusion. Initially, the defense attorney already possesses some authority with respect to the accused's personal privileges. If the attorney was the original recipient of the privileged communication, the law confers on the attorney the power to assert the privilege on the accused's behalf. In 1998, in *Swidler & Berlin v. United States*,<sup>135</sup> the United States Supreme Court allowed an attorney to invoke the privilege on behalf of his client. Further, the original draft of the Federal Rule of Evidence 503(c) stated, "The person who was the lawyer at the time of the communication may claim the privilege . . . on behalf of the client."<sup>136</sup> California Evidence Code Section 954(c) grants the attorney the same authority.<sup>137</sup>

Although the view that the attorney has authority to assert the privilege on the client holder's behalf is virtually universal, the existence of the authority does not dictate the conclusion that the attorney should also have the authority to waive the privilege. Privilege law empowers several classes of persons to claim a privilege on the holder's behalf,<sup>138</sup> but as a general proposition, only the holder is capable of waiving the privilege.<sup>139</sup> An exception to this general proposition is that the attorney has some implied power to waive the privilege in connection with the management of the litigation. As Part II demonstrated, the rules of both legal ethics and agency permit the attorney to make necessary waivers during settlement

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131. 1 IMWINKELRIED, *supra* note 1, § 1.1, at 3.

132. CARLSON & IMWINKELRIED, *supra* note 130, § 7.2(c), at 167–70.

133. 8 WIGMORE, *supra* note 46, at v; 1 IMWINKELRIED, *supra* note 1, § 1.1, at 3.

134. 1 IMWINKELRIED, *supra* note 1, § 5.3.3.

135. 524 U.S. 399 (1998).

136. FED. R. EVID. 503(c) (deleted), *reprinted in* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE Rejected Rule 503*, at 38 (1986).

137. CAL. EVID. CODE § 954(c) (West 1991).

138. 1 IMWINKELRIED, *supra* note 1, § 6.5.3.

139. 2 IMWINKELRIED, *supra* note 1, § 6.12.3.

negotiations.<sup>140</sup> As we noted, though, those rules have only a limited impact because in many, if not most, cases another exclusionary rule of evidence<sup>141</sup> comes into play to preclude the later use of the disclosed information against the client. More importantly, however, it is well settled that at trial, counsel's failure to interpose a proper privilege objection can waive the client's privilege.<sup>142</sup> At trial, counsel's omission binds the client even if counsel lacks the client's express consent.<sup>143</sup> The omission is binding even if counsel acted negligently without making a thoughtful, deliberate decision to waive.

To some extent, conceding that limited authority to the attorney is necessitated by trial administration policies. Privileges often must be asserted at trial, and neither the holder nor the holder's counsel may have been able to anticipate the proffer of the privileged testimony. In that event, the defense may have to decide whether to assert or waive in the brief interim—a matter of seconds—between the conclusion of the question calling for the privileged information and the beginning of the answer disclosing the information.<sup>144</sup> As a practical matter, before objecting, there may not be enough time for the counsel both to recognize the potential privilege objection and to consult with the client as to whether to waive the privilege. If the client's consent were necessary in such cases, the admission of privileged information would be error in a large number of cases, and privilege issues would multiply on appeal. Thus, there would be a sort of logic to binding the client by the counsel's inadvertent omissions while denying the counsel the power to intentionally waive the holder's privilege. In the final analysis, however, counsel representing an accused being tried *in absentia*, at least, should be granted that latter, further power to waive privilege.

### 3. *A Third Party's General Suitability as a Surrogate*

The counsel in this situation is more qualified than some third parties who already wield that power. Probate is a context in which a third party might possess this power. In a number of jurisdictions, after the death of a natural person holding privilege, the holder's privilege passes by operation of law to the personal representative of the decedent's estate.<sup>145</sup> California Evidence Code section 953 is illustrative.<sup>146</sup> Subdivision (c) of that statute designates "[t]he personal representative of the client [as the holder] if the client is dead."<sup>147</sup> The decedent can nominate a person as the executor or executrix of the decedent's will.<sup>148</sup> When the decedent fails to nominate someone, the court appoints a representative as administrator or administratrix.<sup>149</sup> Some state statutes governing appointment give

140. 1 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 1.46, at 1–122 (2d ed. 1995).

141. FED. R. EVID. 408–10.

142. 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:2, at 11, § 9:10, at 26–28 (2d ed. 1999); PAUL F. ROTHSTEIN & SUSAN W. CRUMP, FEDERAL TESTIMONIAL PRIVILEGES § 2:27, at 151–52 (2d ed. 2003).

143. 2 RICE, *supra* note 142, § 9.10, at 26–28.

144. FED. R. EVID. 103(a)(1).

145. 1 IMWINKELRIED, *supra* note 1, § 6.5.2, at 566–67; Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1183–84 (1998–99).

146. CAL. EVID. CODE § 953 (West 1991).

147. *Id.* § 953(c).

148. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 12.4, at 479–80 (2d ed. 2001).

149. *Id.* at 479.

priority to close family relatives.<sup>150</sup> In those states and under the Uniform Probate Code, however, the court has authority to appoint “any suitable person.”<sup>151</sup> For example, after listing preferred categories of relatives, California Probate Code section 8461(r) authorizes the court to appoint “[a]ny other person.”<sup>152</sup> No invariable requirement that the appointee be an attorney or that the appointee even have known the decedent appears to exist.<sup>153</sup> Thus, in some circumstances the current state of the law allows lay, appointed personal representatives, who were strangers to the decedent, to decide whether to assert or waive the decedent’s privilege. To be sure, necessity is an element in this situation, since the natural person holder is deceased. Similarly, an element of necessity exists when the accused is tried *in absentia*. Just as the administrator representing a decedent cannot consult the former holder about his or her preference, the attorney representing a defendant *in absentia* cannot confer with the absent holder. If the law empowers the administrator to waive the decedent’s privilege even when the administrator has neither legal training nor personal acquaintance with the decedent, it certainly seems defensible to enable the attorney to waive the absent accused’s privilege.<sup>154</sup>

#### IV. CONCLUSION

Fact situations such as *Marcum* are rare. *In absentia* trials are infrequent phenomena, but in the exceptional *in absentia* trial, defense counsel may believe introducing privileged material is in the client’s best interest. The still rarer case is one in which the privilege issue is not moot. Ordinarily, when the defense counsel attempts to introduce a prior statement made by his or her client, the trial judge will never have to reach the issue of whether the counsel has the authority to waive the applicable evidentiary privilege. In part, *Marcum* was so extraordinary because the issue was not moot since it arose during sentencing when the defense counsel did not have to comply with the normal evidentiary strictures. When offered by the defense, the accused’s pretrial statement will ordinarily be inadmissible hearsay.<sup>155</sup>

As rare as the *Marcum* situation is, however, an analysis of the situation sheds light on more important issues such as the standard for forfeiture of constitutional rights and the extent of an attorney’s implied authority to waive a client’s evidentiary privilege. The analysis demonstrates once again both the soundness and

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150. See *id.*; see, e.g., CAL. PROB. CODE § 8461 (West 1991) (listing relations in order of priority, beginning with the surviving spouse, then children, then grandchildren, and so on).

151. MCGOVERN, JR. & KURTZ, *supra* note 148, § 12.4, at 479.

152. CAL. PROB. CODE § 8461(r) (West 1991).

153. See MCGOVERN, JR. & KURTZ, *supra* note 148, § 12.4, at 479–80.

154. In rare cases, jurisdictions have restricted the ability of successor holders to waive the original holder’s privilege. For instance, under New York law, the “personal representative of a deceased person may waive the [physician-patient] privilege, provided that his doing so does not ‘tend to disgrace the memory of the decedent.’” CHARLES KRAMER & DANIEL KRAMER, EVIDENCE IN NEGLIGENCE CASES 7 (7th ed. 1981) (internal footnotes omitted). For the most part, however, successor holders have discretion as to whether to assert or waive the privilege. *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595, 597 (Ct. App. 1991).

Yet, the attorney is a fiduciary, bound to protect and pursue the client’s best interests. 1 IMWINKELRIED, *supra* note 1, § 5.3.3c(8), at 348–49. If the attorney neglected to take any steps to learn anything about the client’s background, and any investigation would have led the attorney to realize that in the circumstances the client would have asserted the privilege, the client could conceivably have a cause of action against the attorney for breach of fiduciary obligation at a later point in time.

155. FED. R. EVID. 801–02.



utility of Professor Westen's forfeiture test.<sup>156</sup> Finally, the analysis also shows that, like so many other propositions in the law, the generalization that only a holder can waive a privilege must sometimes yield to necessity. *Marcum* addresses an admittedly narrow problem, but there are larger lessons to be learned.

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156. Westen, *supra* note 90, at 1260–61.