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

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

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

A. *The Factual Scenario*

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

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

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

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

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

*129 B. *The Ethical Response*

1. Defense Counsel's Competing Ethical Obligations

The above dilemma requires that defense counsel strike a delicate balance between competing ethics rules. [115] First, a lawyer has a duty of candor to the tribunal as defined in Model Rule 3.3. [116] Subsection (a)(1) of this rule provides in relevant part that "[a] lawyer shall not knowingly ... make a false statement of fact or law to a tribunal." [117]

Second, defense counsel must be mindful of her duty to maintain confidential client information reflected in Model Rule 1.6. [118] The relevant portions of Rule 1.6 provide that, "[a] lawyer shall not reveal ***130** information relating to the representation of a client unless the client gives informed consent" [119] or "the disclosure is impliedly authorized in order to carry out the

representation."[120] What constitutes information for the purposes of Rule 1.6 is indeed quite broad. As commentators have noted, Rule 1.6 makes clear that lawyers have an obligation to refrain from revealing *all* information relating to representation of a client that their clients have not consented to have disclosed,[121] whatever its source.[122]

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

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

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

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

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

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

Of course, if the lawyer believed the information provided by the probation department were correct, the lawyer would confirm such. Therefore, it is fairly obvious that the only reason defense counsel has ***132** refused to answer the judge's question regarding the existence of the defendant's prior criminal record is because counsel is aware of the fact that the defendant does in fact have a criminal conviction.

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

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

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

To that end, the San Diego County Bar Association was asked by an attorney whether the attorney could "answer a court's question asking if she has any idea why her client is not in court, when Attorney is aware of incriminating information that she suspects may explain her client's absence?" [132] In that particular case the attorney, who was representing the client on a drug charge, received a call from the client's mother the night before court in which the client's mother stated, "[D]on't expect to ***133** see Client in court tomorrow morning; he just left the house high as a kite." [133] Sure enough, not only does the client not appear in court, but the judge asks the attorney on the record, "Do you have any idea why your client is not here?" [134]

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

Of course, the drafters of the opinion were aware of the fact that in refusing to answer the question, the court might be put on notice that the attorney was in possession of information that was detrimental to the client, noting that the attorney would of course divulge to the court an exculpatory or unexceptional reason explaining the client's absence, as such disclosure would not violate the duty of confidentiality. [137] Further, because the attorney's refusal to answer, or to provide some exculpatory response to the court's question regarding the defendant's whereabouts, ***134** will prove detrimental to the client (the court will likely issue a bench warrant for the client's arrest), concerns related to zealous advocacy are once again brought to the fore.

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

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

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

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

a. The Technically True Response

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

To illustrate how such a response might work, let us return to the previous example taken from the context of a sentencing hearing. To that end, when the judge asks, "*Counsel, are you aware of any criminal convictions that are not before the court?*" the defense attorney would say something to the effect, "*I do not have any official documentation reflecting prior criminal convictions*." Or, if the defense counsel was simply told by the client about the prior criminal conviction but never reduced such to writing, the attorney could ***135** pick up her file, look through it and say, "*I have nothing in my file reflecting prior criminal convictions*." Defense counsel may also say, "*Your Honor, my client has no prior criminal convictions based on what is reflected in the probation report.*"

Those who might advocate for one of these technically true responses would likely suggest that this type of response represents an effective balance between these three competing ethical obligations. First, saying, "*I do not have any official documentation reflecting prior criminal convictions*." (or something to that effect) complies with Rule 1.6 in that it does not represent a breach of attorney-client confidentiality. [140] The lawyer's not having a particular court document does not seem to itself constitute

information learned in the course of representing the client, and even if it did, it can be assumed that the client impliedly consented to this revelation because such a statement is far more advantageous to the client than the lawyer's refusing to answer. [141]

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

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

b. The Ethical Boundaries of a Technically True Response

However, while innovative, these technically true statements are arguably unethical. Such responses may be viewed this way because Model Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation." [142] Importantly, Rule 8.4(c), while overlapping ***136** somewhat with Rule 3.3's duty of candor to the tribunal, is equally applicable to an attorney's conduct and statements made before a trial court. [143]

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

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

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

During these interviews, Shorter informed the agents that he had no personal assets. [148] At Shorter's criminal trial, an IRS Agent testified that when interviewed, Shorter was asked "if he had any bank account or any interest in any bank account ... he replied no." [149] Similarly, when Shorter met with an IRS agent to make a financial statement, the agent asked Shorter if "he had cash in a bank account or a savings account or ***137** any other financial institution," and he answered that "[h]e had no accounts whatsoever." [150]

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

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

The *Shorter* court held that fraud, deceit or misrepresentation, while somewhat different from each other, all require "kinds of active deception or positive falsehood." [155] However, dishonesty, while also encompassing fraud, deceit and misrepresentation also "encompasses conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness[.]'" [156] Thus, in the words of the *Shorter* court, "what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." [157] Indeed, legal ***138** commentators have noted "the threshold for what constitutes 'dishonesty' under Rule 8.4(c) is lower than lawyers might expect." [158]

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

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

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

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

***139 c. Defining Dishonest Conduct Based on the Factual Context**

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

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

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

In this sense, perhaps as a policy matter, it may be wise to construe dishonest conduct differently based on the factual setting in which the attorney was behaving. The argument follows that society should attach less culpability to the acts of an attorney who finds herself in the thick of a court created ethical dilemma and attempts to best represent her client than it should to an

attorney who misleads the IRS to avoid paying back taxes. The attorney who utters a technically true statement as a means of resolving this particular ethical trilemma should by definition not be viewed as having engaged in dishonest conduct. [167]

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

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

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

Accordingly, because defense counsel's statements can prejudicially influence the administration of justice, there seems to be little reason why an attorney navigating competing ethics rules in a courtroom setting should otherwise be subject to a more watered-down standard of what constitutes honest conduct than any other attorney. In this regard, a compelling reason certainly exists for applying exacting standards of honest conduct to those statements by defense counsel that can influence the court's decision and correspondingly have a negative impact on the fair ***141** administration of justice. To that end, Rule 8.4 seems to embrace such an approach by drawing no distinction based on the factual setting in which counsel behaves. [171]

C. *The Final Answer*

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

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

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

Perhaps defense counsel can refuse to answer the question, citing more generic reasons. For example, defense counsel could say, "*Your Honor, it is not my burden to produce any evidence for sentencing purposes that the government wants to use for the purposes of a sentencing increase.*" [174] Or, defense counsel could ***142** say, "*As a general principal, I do not answer questions that if put directly to my client would constitute a violation of his Fifth Amendment right against self-incrimination.*" [175] Obviously if defense counsel believed the client had no prior record, she would readily volunteer such information. Therefore, whether these particular responses are better than refusing to answer is a matter of debate.

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