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# Failure to Communicate and Effective Assistance of Counsel: State v. Hutchins

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# NOTES

## Failure to Communicate and Effective Assistance of Counsel: *State v. Hutchins*

In *State v. Hutchins*[1] the North Carolina Supreme Court rejected an indigent criminal defendant's claim that a breakdown in communication with his court-appointed counsel rendered that counsel's representation ineffective in violation of the sixth and fourteenth amendments.[2] The court found no error in the trial court's denial of defendant's motion to dismiss his appointed lawyers and counsel's motion to withdraw, holding that the trial court was not constitutionally required, under the facts presented, to appoint substitute counsel.[3] *Hutchins* raises interesting and difficult questions concerning the importance of communication between an attorney and client to the constitutional guarantee of effective assistance of counsel.

Following a shooting spree in which three law enforcement officers were killed, James W. Hutchins was arrested and charged with three counts of first degree murder. The defendant was found to be indigent, and two attorneys, David Fox and Ronald Blanchard, were appointed to represent him. Fox and Blanchard filed numerous pretrial motions and succeeded in obtaining a change of venue and a psychiatric evaluation of the defendant.[4]

After several weeks in jail awaiting trial, the defendant moved, through his appointed counsel, that the two attorneys be discharged for "good and sufficient reasons." After a hearing, the motion was denied.[5] Shortly thereafter attorney Fox received the following letter from his client, Hutchins:

> I am fire you from my case. I'll not to court with you as my lawyer. You have lie to my (illegible) in other words I don't need you any more at all. That is that. Good-bye.[6]

Mr. Fox responded to the letter by filing a motion asking that the

1. 303 N.C. 321, 279 S.E.2d 788 (1981).

2. *Id.* at 335-37, 279 S.E.2d at 797-98. Although this case presents many other issues, the scope of this note is limited to the constitutional question of effective assistance of counsel.

3. *Id.*

4. *Id.* at 325-30, 279 S.E.2d at 792-95.

5. *Id.* at 330, 279 S.E.2d at 795.

6. *Id.* The version of the letter quoted in the dissenting opinion is slightly different. *Id.* at 360, 279 S.E.2d at 811-12.

court dismiss him as attorney of record because "no meaningful communication" was possible between himself and the defendant. In the motion, Mr. Fox stated that since his initial meeting with the defendant, he had met with "stiffening personal resistance" from Hutchins which had developed into a "personal antagonism."[7]

At a hearing two weeks before trial, the defendant was asked what complaints he had of his lawyers. He responded that they did not visit him often enough or keep him informed of developments in the case. Hutchins complained of Mr. Fox: "I know he's a good lawyer here in town, but he ain't come through with nothin'." He said of both lawyers, "[T]hey promised this and promised that, and none of them have come through. . . . If I can't trust them now, I can't trust they any more."[8]

Mr. Fox pressed his request for discharge, saying that his conversations with the defendant had reached an "impasse," and that "things had degenerated." He said:

> *Mr. Hutchins and I have reached a state where we have an absolute lack of communication*. That he has personal—a feeling personal against me as opposed to all other persons in his acquaintance; a lack of trust. He doesn't feel he can place trust of his situation, his case in my hands. As a result, *that has put me in a position where—with the lack of communication am unable to prepare effectively for the defense of this case*.[9]

Mr. Fox specifically noted that an important potential defense would be based on the defendant's mental status, and that he was not able to communicate with his client concerning that issue. Mr. Fox also noted that the antagonism he felt from the defendant would adversely affect his performance at trial and make it "very difficult to approach the case mentally."[10] Mr. Blanchard supported Mr. Fox's assessment, saying he thought the defendant's animosity toward counsel would be apparent to the jury and would work to the defendant's detriment.[11]

At the conclusion of the hearing the trial court found that the defendant had not shown any justification for discharging Mr. Fox and Mr. Blanchard and denied the motion to appoint substitute counsel.[12] Hutchins was convicted on two counts of first degree murder and one count of second degree murder;[13] he received two death sentences plus life imprisonment.[14]

The North Carolina Supreme Court rejected defendant's argument

7. *Id.* at 331, 279 S.E.2d at 795.
8. *Id.* at 331, 332, 279 S.E.2d at 795, 796.
9. *Id.* at 360-61, 279 S.E.2d at 812 (emphasis by the court).
10. *Id.* at 361, 279 S.E.2d at 812.
11. *Id.*
12. *Id.* at 334, 279 S.E.2d at 797.
13. *Id.* at 329, 279 S.E.2d at 794.
14. *Id.* at 365, 279 S.E.2d at 814 (Exum, J., dissenting).

that he had been denied effective assistance of counsel and that substitute counsel should have been appointed. Writing for the majority, Justice Britt cited earlier North Carolina cases holding that the defendant is denied his constitutional right to counsel only where the lawyer's representation is so ineffective that it renders the trial a farce and mockery of justice,[15] that a defendant does not have a right to substitute counsel merely because he is dissatisfied with his appointed counsel, and that in the absence of a substantial reason, substitute counsel need not be appointed.[16]

The supreme court framed the issue of effective assistance of counsel as a question of fault or failure on the attorneys' part in light of the complaints the defendant had made about his lawyers. The court did not evaluate the claim of lack of communication, the majority finding that the defendant's complaints about the number and length of visits were insufficient cause for dismissal. The court evaluated the performance of Mr. Fox and Mr. Blanchard from the record and found that they had spent sufficient time and effort on the case, had conducted "spirited motions practice," and had been "diligent in all respects" in preparation. The majority held that their representation had been competent and that Hutchins had not been denied effective assistance of counsel. Therefore, according to the majority, the trial court did not err in refusing to appoint substitute counsel.[17]

Justice Exum, in a strong dissent, viewed the case in a different light. In his view, ineffective assistance of counsel could result, not solely from the lack of skill or effort on the attorneys' part, but from the failure of communication between the attorneys and their client. The dissent placed great weight on the attorneys' assessment of the breakdown in communication, and argued that the "gross deterioration" of the attorney-client relationship in this case resulted in a denial of the constitutional right to effective assistance of counsel. Justice Exum cited North Carolina case law for the proposition that when the attorney-client relationship deteriorates to the point of prejudicing the presentation of the defendant's case, appointment of substitute counsel is required.[18]

The issue raised in *Hutchins* has been raised in an increasing number of cases since the constitutional right to appointed counsel was extended to all indigent criminal defendants by *Gideon v. Wainwright*[19] and its progeny.[20] In view of the frequent conflicts between defendants

15. *Id.* at 335, 279 S.E.2d at 797 (citing State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974)).
16. 303 N.C. at 335-37, 279 S.E.2d at 797-98.
17. *Id.*
18. *Id.* at 356-67, 279 S.E.2d at 810-15 (Exum, J., dissenting).
19. 327 U.S. 335 (1963).
20. *E.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

and their appointed counsel and the large volume of post-conviction litigation based on claims of ineffective assistance, it is likely that courts will continue to wrestle with the problem.[21]

## I. Duty to Inquire

Nationally, there is a conflict of authority as to whether a trial court, upon a defendant's request for discharge of appointed counsel or for substitute counsel, is under a duty to inquire into the reasons for the defendant's dissatisfaction.[22] North Carolina cases have found no error in rejecting such a request without a hearing or inquiry,[23] but the court has stated that the "better practice" is to allow the defendant to state his reasons,[24] and that "some situations may indeed require an in-depth inquiry."[25] If the defendant's request is made during or shortly before trial, the potential disruption of the court's schedule may provide additional justification for denying the request.[26]

## II. Must Substitute Counsel Be Appointed?

In several decisions, general statements have been made as to when appointment of substitute counsel will be required,[27] but there are no North Carolina cases holding that a failure to appoint substitute counsel was error under the facts of a particular case.

### A. *Substantial Reason*

The North Carolina Supreme Court's earliest statement of a rule in this area is phrased in the negative: "In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to

21. It may be useful to point out that *State v. Hutchins* does not involve the issue of a paying client's request to allow substitution of retained counsel. In that situation a constitutional right to "counsel of choice" is recognized, tempered by considerations of timeliness and delay or obstruction of the courts. State v. McFadden, 292 N.C. 609, 234 S.E.2d 742 (1977). Neither does it present the issue of an accused's request for appointment of counsel of choice. *See, e.g.*, Harris v. Superior Court, 19 Cal. 3d 786, 567 P.2d 750, 140 Cal. Rptr. 318 (1978); Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973).

22. The denial of defendant's motion without allowing him to state the reasons for his request requires reversal. People v. Marsden, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970). *Contra*, Commonwealth v. Arkus Pharmacy, Inc., 5 Mass. App. Ct. 557, 365 N.E.2d 839 (1977).

23. State v. Sweezy, 291 N.C. 366, 371-72, 230 S.E.2d 524, 528-29 (1976).

24. *Id.* at 372, 230 S.E.2d at 529.

25. State v. Thacker, 301 N.C. 348, 353, 271 S.E.2d 252, 256 (1980).

26. United States v. Price, 474 F.2d 1223, 1226 (9th Cir. 1973); Good v. United States, 378 F.2d 934, 935-36 (9th Cir. 1976); Duncan v. State, 412 N.E.2d 770, 773 (Ind. 1980).

27. United States v. Young, 482 F.2d 993, 995 (5th Cir. 1973); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); United States v. Grow, 394 F.2d 182, 209 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968).

present his own defense."[28]

Unfortunately, "substantial reason" is not defined. Subsequent cases have identified several reasons that are not "substantial" such as the failure of a lawyer to make courtroom statements requested by the defendant[29] and the failure of the lawyer to prosecute an appeal upon the defendant's request.[30] A disagreement between client and counsel as to trial tactics is not sufficient to require substitution,[31] and substitute counsel need not be appointed "merely because [the defendant becomes] dissatisfied with his attorney's services."[32] In these cases the appointment of substitute counsel is within the sound discretion of the trial court; while it may be done, it need not be.[33]

In *State v. Sweezy*,[34] the court began to state more fully the reasons that mandate appointment of substitute counsel, adopting this statement from *United States v. Calabro*:[35] "In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict."[36] *Sweezy* introduced a list of causes warranting substitution, none of which were found to exist in that case, and none of which have yet been found in any reported North Carolina case.[37]

### B. *When Present Counsel is Ineffective*

In *State v. Thacker*,[38] the issue of appointing substitute counsel was addressed again and tackled head on this time. Justice Carlton's opinion contains the first direct and positive statement of a standard: "A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his

28. State v. McNeil, 263 N.C. 260, 270, 139 S.E.2d 667, 674 (1965).

29. In *State v. McNeil*, the defendant complained, "I tell him what to say and he says other things." The court stated that lawyers need not follow such instructions, "because to do so would ruin the defendant." *Id.* at 262, 270, 139 S.E.2d at 668, 674.

30. *Id.* at 270, 139 S.E.2d at 674.

31. State v. Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976).

32. State v. Sweezy, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976).

33. *Id.* at 371-72, 230 S.E.2d 529.

34. 291 N.C. 366, 230 S.E.2d 524 (1976).

35. 467 F.2d 973 (2d Cir. 1972).

36. *Id.* at 986 (citations omitted).

37. In evaluating Sweezy's claim, the court noted that the defendant did not point to "any act or omission indicating incompetency or lack of diligence on the part of counsel," 291 N.C. at 373, 230 S.E.2d at 529, apparently including incompetence and lack of diligence as "good causes" in the list of factors.

38. 301 N.C. 348, 271 S.E.2d 252 (1980).

constitutinal right to counsel."[39] This standard placed the emphasis on evaluation of the initial counsel's role and performance. A trial court faced with a motion for substitute counsel should determine if, for any reason, representation by initial counsel would be ineffective, thus denying defendant's constitutional right. If so, substitute counsel must be appointed.

## III. INEFFECTIVENESS STANDARDS

### A. *Performance-Oriented Standard; Farce and Mockery; and Normal Competency*

The inquiry must now shift to an examination of standards used to determine effective assistance of counsel. In a number of cases, the United States Supreme Court has indicated that the right to counsel is a right to *effective* representation,[40] but the Court has never established a standard to be used in judging effectiveness.[41]

In *State v. Hutchins* the court cites its holding in *State v. Sneed*,[42] that a defendant is not denied his constitutional right to effective assistance of counsel unless his lawyer's representation is so ineffective that it renders the trial "a farce and a mockery of justice."[43] The "farce and mockery" standard, once popular, has been abandoned by many courts.[44] The use of that standard was rejected by the Fourth Circuit Court of Appeals in *Marzullo v. Maryland*.[45] Its reassertion in *Hutchins* prompts some discussion of its continued viability and some reflections on the relationship between state and federal courts on constitutional issues.

The *Marzullo* opinion briefly traced the history of the 'farce and mockery" standard in fourth circuit decisions, and noted that the circuit had implicitly departed from it in favor of more specific requirements focused upon whether counsel was reasonably competent. In *Marzullo*, in a holding approved by all the judges of the court, the

39. *Id.* at 352, 271 S.E.2d at 255.

40. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 482 (1978); Reece v. Georgia, 350 U.S. 85, 90 (1955).

41. McMann v. Richardson, 397 U.S. 759 (1970), asserts that a defendant is entitled to "reasonably competent" advice. For a full discussion, see Smithburn & Springman, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497 (1981).

42. 284 N.C. 606, 201 S.E.2d 867 (1974). *Sneed* is the rare case where the ineffectiveness issue arose at trial, on a motion to suppress a defendant's statement as having been given without benefit of counsel. Generally, this issue arises at the appellate level. The *Sneed* court seemed to agree that a denial of effective assistance of counsel would require a substitute, but found that counsel was not ineffective.

43. *Id.* at 612, 201 S.E.2d at 871, *quoted in* State v. Hutchins, 303 N.C. at 335, 279 S.E.2d at 797.

44. *See* Smithburn & Springmann, *supra* note 41, at 505 n.41.

45. 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

court expressly disavowed the farce and mockery test and adopted a "normal competency" standard.[46] The supremacy clause of the United States Constitution[47] requires that the standards of federal courts be applied in deciding federal constitutional questions.[48] However, the North Carolina courts continue to apply the farce and mockery standard. Still, in all cases where the North Carolina courts apply the farce and mockery standard, an imprisoned defendant might seek relief in the federal courts by a petition for a writ of habeas corpus, which would judge the case under the fourth circuit's "normal competency" standard.[49] Thus, the standard of normal competency will eventually be used in evaluating effectiveness of counsel.

### B. *The "No-Fault" Aspect of Ineffectiveness*

Standards which measure counsel's competence, ability, or performance do not meet the objections raised by the defendant in *Hutchins*. The claim of ineffective assistance raised in *Hutchins* is of a "no-fault" nature, based not on any failure on the part of the attorneys, nor on lack of skill or effort. The claim is founded upon the mere breakdown of communication itself, whatever its cause. If we accept the premise that such a "no-fault" standard can support a claim of ineffective assistance, then examination of whether Hutchin's complaints were "justified" is largely beside the point.[50]

### C. *Breakdown of Communication*

That a breakdown or failure of communication between the attorney and client can render counsel's assistance ineffective has been accepted in statements of the North Carolina Supreme Court at least since the adoption of the *Calabro*[51] language in *Sweezy*.[52] The concept was first

46. *Id.* at 542-45. Some of the factors used in evaluating normal competency are set forth in Coles v. Peyton, 389 F.2d 224 (4th Cir.) *cert. denied*, 393 U.S. 849 (1968).

47. U.S. CONST. art. VI, cl. 2.

48. *See, e.g.*, Testa v. Katt, 330 U.S. 386 (1947); Townsend v. Sain, 372 U.S. 293 (1963). Extraordinary remedies, such as mandamus, for forcing state courts to apply the federal standards, are of uncertain application. The "farce and mockery" test has not been specifically rejected by the United States Supreme Court; in fact, it is still applied in modified form by some United States Courts of Appeal. United States v. Easter, 539 F.2d 663 (8th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975).

49. *See* 28 U.S.C. § 2254 (1976). A petitioner under that section might argue that the state courts' stubborn refusal to apply the correct standard makes resort to the state courts an exercise in futility, and thus excuses a failure to exhaust state remedies. *See, e.g.*, Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973); Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971); Patton v. North Carolina, 381 F.2d 636 (4th Cir.), *cert. denied*, 390 U.S. 905 (1967).

50. The court in *State v. Hutchins* applied a fault standard, asking whether Hutchins had any justifiable reason for being dissatisfied with counsel, 303 N.C. at 331, 279 S.E.2d at 797, and failed to address the contention that the dissatisfaction, whether justified or not, led to a breakdown in communiction which rendered counsel ineffective.

51. United States v. Calabro, 467 F.2d 973 (2d Cir. 1972).

stated in *Brown v. Craven*,[53] a federal habeas corpus attack on a California state court conviction. A dispute arose between Brown, the defendant, and the state public defender who had been appointed to represent him. The cause of the dispute is not reported. Brown challenged, among other things, the trial court's denial of his request for substitute counsel. The Ninth Circuit Court of Appeals found that Brown was forced to trial with a lawyer "with whom he was dissatisfied, with whom he could not cooperate, and with whom he would not, in any manner whatsoever, communicate."[54] The court held that in this state of affairs the attorney was "deprived of the power to present any adequate defense," and that to force the defendant to trial with an attorney "with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."[55]

The concept enunciated in *Brown v. Craven* and the language of that decision have been adopted by a large number of courts,[56] though the instances in which the facts of a particular case have been found to fit the rule are limited.[57] As mentioned earlier,[58] the rule was adopted by the North Carolina Supreme Court in *State v. Sweezy*, and repeated in *State v. Thacker*.[59] And although *Brown* was not cited in *State v. Robinson*[60] and *State v. Gray*,[61] the principle that a deterioration of the

52. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976). *See* notes 34-37 and accompanying text *supra*.

53. 424 F.2d 1166 (9th Cir. 1970).

54. *Id.* at 1169.

55. *Id.* at 1170. The terms "irreconcilable conflict" and "breakdown of communication" are not synonymous, but are used without differentiation, as in *Brown*. This failure by the courts to distinguish between the two may not be significant, since the first often leads to the second, and the effect of either is the same.

56. *E.g.*, United States v. Williams, 594 F.2d 1258 (9th Cir. 1979); United States v. Jones, 512 F.2d 347 (9th Cir. 1975); United States v. Calabro, 467 F.2d 973 (2d Cir. 1972); State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980); State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

57. One such rare example is United States v. Williams, 594 F.2d 1258 (9th Cir. 1979). In *Williams*, upon the trial court's denial of the motion for substitute counsel, the defendant elected to proceed *pro se*. In reversing the conviction, the court held that the defendant and the attorney were "totally incompatible" and "at serious odds," that the attorney had confirmed the troubles in the attorney-client relationship, and that the defendant's decision on how to proceed was immaterial. *Id.* at1260-61.

58. *See* notes 34-37 and accompanying text *supra*.

59. 301 N.C. 348, 271 S.E.2d 252 (1980).

60. 290 N.C. 56, 224 S.E.2d 174 (1976). In *Robinson*, the defendant's conviction was reversed as a consequence of an irreconcilable conflict between the defendant and appointed counsel. The attorney was not allowed to withdraw completely, but conducted only parts of the trial, at other times sitting silently while the defendant examined witnesses. Such fractured representation was held to have denied the defendant a fair trial, since the conflict must have been obvious to the jury and worked to the defendant's prejudice. The *Robinson* court suggests, however, that there would be no denial of counsel if the trial court had forced the defendant to either yield to his lawyer's decision or to forgo having an appointed attorney. *Id.* at 58-64, 67-68, 224 S.E.2d at 175-178, 180.

61. 292 N.C. 270, 233 S.E.2d 905 (1977). Though recognized, the principle was not applied in *Gray* due to a finding that "the [trial] court . . . had no reason to suspect the relationship between

lawyer-client relationship could lead to ineffective assistance was recognized in those cases.

### D. *Why Communication is Necessary for Effective Representation*

*Brown v. Craven* concluded, without explication, that a breakdown in communication or an irreconcilable conflict renders counsel's assistance ineffective. Such a statement may have been considered self-evident or obvious. But it can be argued that a lawyer might be able to perform effectively in spite of a conflict or lack of communication with his or her client. It is worthwhile to consider how a breakdown of communication negatively affects counsel's performance. In doing so, statements by the courts, standards of professional conduct, commonsense arguments, and the particular arguments raised in *Hutchins* will be examined.

Many decisions indicate the high value accorded attorney and client communication. The right to communicate with counsel has been held an important aspect of the right to the assistance of counsel.[62] A denial of right to counsel has been found where a defendant was prevented from conferring with his attorney overnight,[63] or during a court recess,[64] or where the defendant was kept at a location too distant from his attorney, making communication difficult.[65] The protection of the attorney-client privilege suggests the importance and value which the law places on communication between attorney and client.

Courts have consistently held that adequate preparation is a necessary ingredient of effective representation.[66] The interview with the client is an important source of information, useful to determine the client's version of the facts, identify witnesses, aid investigation, or discover contradictions in testimony, and it has been held to constitute an essential element of preparation.[67] "Counsel must confer with his client without undue delay and as often as necessary to advise him of his rights and to elicit matters of defense or to ascertain what potential

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the defendant and his counsel to have deteriorated so as to prejudice the presentation of his defense." *Id.* at 282, 233 S.E.2d at 913.

62. Pugh v. North Carolina, 238 F. Supp. 721 (E.D.N.C. 1965); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, *cert. denied*, 409 U.S. 1047 (1972); State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), *rev'd on other grounds*, 277 N.C. 547, 178 S.E.2d 462 (1971).

63. Geders v. United States, 425 U.S. 80 (1976).

64. United States v. Allen, 542 F.2d 630 (4th Cir. 1976).

65. Bitter v. United States, 389 U.S. 15 (1967).

66. Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205, *appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975); State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970). Notable here are the numerous cases dealing with the time which appointed counsel is allowed to prepare the case. *E.g.*, Reece v. Georgia, 350 U.S. 85 (1955); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Calloway v. Powell, 393 F.2d 886 (5th Cir. 1968).

67. Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

defenses are available."[68] When the client does not trust counsel or cannot or will not communicate with counsel, there is a danger that potential defenses or other "matters of defense" will not be discovered. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client about the realities of his case are cornerstones of effective assistance of counsel."[69]

A lawyer also needs a good working relationship with his client in order to evaluate the client as a potential witness. Besides the difficulty of judging a client's possible testimony if he will not discuss it, there is the possibility that a defendant who might otherwise be an excellent witness in his own defense, will, if he has a conflict with his lawyer, destroy his value as a witness by showing his hostility on the stand.[70] It is difficult to conduct direct examination of a defendant who dislikes or distrusts his attorney. The results could be disastrous; hostility between client and lawyer might preclude an important, perhaps the only, viable defense stategy. The attorneys in *Hutchins* argued that development of any potential defense based on mental attitude, either for the guilt-innocence phase, or for the use in sentencing mitigation, was precluded or severely hampered by the lack of communication.[71]

The high value attached to communication is also evident in the American Bar Association *Model Code of Professional Responsibility* and the new *Model Rules of Professional Conduct*.[72] Ethical Consideration 7-8 of the Code of Professional Responsibility states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."[73] Ethical Consideration 9-2 further states that "[a] lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."[74] Rule 1.4 of the Model Rules, entitled "Communication," states, in part, that a lawyer "shall explain the legal and practical aspects of a matter and alternative courses of action to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[75] The importance of this communication is underscored by the Rule 1.2 mandate that a lawyer for a criminal defendant "shall abide by the client's decision . . . whether to waive jury trial and whether the client will

68. 389 F.2d at 226.

69. Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978).

70. Recall the reasoning in State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976), discussed in note 61 *supra*.

71. State v. Hutchins, 303 N.C. 321, 361, 279 S.E.2d 788, 814 (1981) (Exum, J., dissenting).

72. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981).

73. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

74. *Id.* EC 9-2.

75. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(6) (Proposed Final Draft 1981).

testify."[76] Since the ultimate result in a case may hinge on the client's decision in these matters, the flow of information and communication between attorney and client is crucial.

### E. *A Right to Trusted Counsel*

Trust is an essential element in the attorney-client relationship. A client's lack of trust can certainly cause a breakdown in communication. It is difficult to imagine a situation where there is a complete lack of trust on the client's part but a full and free flow of information between attorney and client. Trust is probably a prerequisite for a client's full disclosure to his attorney, but situations might arise where the client's distrust developed later, at the trial stage, after all essential information had been revealed.

The importance of a client's trust in his attorney must be weighed as an element of representation and should be preserved despite the fact that it has no effect on the outcome. A part of the purpose in supplying lawyers to indigent defendants may be to help them understand and be satisfied with the legal process by creating the subjective feeling that someone is on their side. If true, a defendant's subjective feeling that the entire court system, including his own lawyer, is conspiring against him becomes a relevant consideration in evaluating the effectiveness of the attorney-client relationship. Certainly many criminal defendants feel that way. But generally courts have not considered the defendant's "trust" for his attorney to be a factor in judging representation, except as it has an impact upon communication.

### F. *The Effect on Performance*

In *State v. Hutchins*, the lawyers also argued that the defendant's hostility would not allow them to perform as well as they should at trial.[77] The strain of dealing with an angry, distrustful client during a complicated trial can diminish a lawyer's effectiveness. It is difficult to specify exactly how this works, unless it can be stated, for example, that an obvious objection was not made because the lawyer was listening to his client mutter that he was being sold out. Hutchins' attorney expressed the idea by saying that he needed to be in a state where ideas could flow but the defendant's hostilities put him on the mental defensive and made him hesitant and resistant.[78]

Finally, it should be noted that though decisions based on the principle are few, courts have almost universally adopted the proposition that

76. *Id.* Rule 1.2(a).
77. 303 N.C. 321, 331, 279 S.E.2d 788, 795 (1981).
78. *Id.* at 331, 279 S.E.2d at 795.

a breakdown of communication may make counsel ineffective, and have recognized such a breakdown as good cause for substitution of counsel.[79] Differences have only arisen in determining whether a particular set of facts demonstrate such a breakdown. The readiness of courts to accept the principle indicates widespread agreement that attorney-client communication is an essential element of effective representation.

### G. *Assessment of the Relationship*

When a court is deciding whether a lack of communication or an irreconcilable conflict has or will render counsel's assistance ineffective, there may be some objective factors to consider, but the court must always depend to some extent on the assessment of the attorney-client relationship given by each of those persons.[80]

Some expression of distrust or dissatisfaction will usually be voiced by the defendant in bringing the matter before the court. Situations may arise where the issue is raised only by the lawyer, but in fact all of the reported North Carolina cases involve outspoken and clearly dissatisfied defendants.[81] A court must take into account the following to assess this discontent: the defendant's interest or bias; a desire to avoid all punishment and to blame a failure to do so on his lawyer; a general hostility toward the entire court system, including the lawyer; and the cagey defendant's use of his complaint to obstruct or delay the court's business. All of these factors are relevant in evaluating a defendant's opinion. But a court should remember that determining whether these complaints are "unjustified" answers the wrong question. Unjustified complaints may be an even stronger indication of a breakdown of communication.

Generally, a court should assume that an attorney's assessment of the attorney-client relationship will not be influenced by interest or bias. Perhaps an occasional lawyer might want to escape representation in a difficult or distasteful case.[82] But the interest or bias factor is small compared to the value of the lawyer's experience and detached professional judgment. Being in the daily business of relating to clients and knowing the need for a solid attorney-client relationship, a lawyer is more qualified to judge the condition of that relationship. An exper-

79. *E.g.*, United States v. Calabro, 467 F.2d 973 (2d Cir. 1972).

80. United States v. Williams, 594 F.2d 1258 (9th Cir. 1979).

81. *E.g.*, State v. Hutchins, 303 N.C. 321, S.E.2d 788 (1981); State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980); State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976).

82. Justice Exum's dissent in *State v. Hutchins* notes: "Nowhere does the the record indicate that counsel's pleas to be relieved were based on mere unwillingness to handle a difficult and undoubtedly unpopular case." 303 N.C. at 360, 279 S.E.2d at 811.

ienced attorney should be able to qualify as an "expert witness' on the subject. While the defendant may be unfamiliar with the proceedings and not understand what relationship should be expected, the lawyer can measure the relationship against many others. An attorney is also an "officer of the court" with a duty to report truthfully on these matters.[83] The attorney's opinion that a breakdown has occurred should be given great weight by a court in evaluating such a claim, perhaps even to the extent that, in the absence of any contradictory information, it should be considered conclusive. On the other hand, situations may arise where the defendant asserts a breakdown of communication but the attorney fails to recognize it or denies it. To discount the defendant's claim solely on the basis of the attorney's statement that no such breakdown exists would run a serious risk of depriving defendant's rights. In such situations the attorney's assessment must be examined more closely and a more thorough investigation is necessary to safeguard defendant's counsel rights.

### H. *Defendant's Refusal to Communicate*

One additional and important consideration winds its way through many cases involving requests for substitute counsel. It is frequently noted by courts and often cited as a reason for denying substitution of counsel, but is rarely dealt with systematically. That is the court's suspicion, fear, judgment, or conclusion that the defendant is using the request for substitute counsel merely to interfere with or obstruct the orderly proceedings of the court.[84] The *Sweezy* case involves such an unruly, obstructive defendant.[85] In such a case courts have not hesitated to hold that the right to counsel may not be manipulated to obstruct the administration of justice.[86]

The "unruly defendant" cases are somewhat similar to the cases involving a defendant's simple refusal to communicate with counsel, but should be distinguished. The motivation for a simple refusal to communicate might be a distrust of counsel or hostility toward the court system, while there is no specific intent by the defendant to obstruct the court's operation. Whatever the motivation it results in the same breakdown of communication which renders counsel ineffective, but a

83. "An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *In re* Sawyer, 360 U.S. 622, 668 (1959) (Frankfurter, J.).

84. United States v. Fowler, 605 F.2d 181, 183 (5th Cir.), *rehearing denied*, 608 F.2d 1373 (1979), *cert. denied*, 445 U.S. 950 (1980); United States v. Shuey, 541 F.2d 844, 847 (9th Cir. 1976); Lofton v. Procunier, 487 F.2d 434, 435 (9th Cir. 1973); Nunn v. Wilson, 371 F.2d 113, 117-18 (9th Cir. 1967); United States v. Birrell, 286 F. Supp. 868, 895 (D.C.N.Y. 1968).

85. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

86. *E.g.*, Nunn v. Wilson, 371 F.2d 113, 117-18 (9th Cir. 1967).

defendant's refusal to communicate leaves open the question of whether effective counsel can be found. The defendant may refuse to communicate with any lawyer. A court may have difficulty responding to such a situation.

Many courts have held that where the failure of communication is the result of defendant's intransigence or stubborn refusal to cooperate, substitute counsel is not required.[87] Those decisions generally do not require that the trial court make a finding of defendant's refusal. A more cautious and enlightened course would be to appoint substitute counsel upon a showing of a breakdown in communication or an irreconcilable conflict with initial counsel. If a similar problem develops with the substitute counsel, the court should then inquire and find facts as to whether the breakdown is caused by the defendant's refusal to cooperate.[88] A trial court's finding of a refusal to cooperate as the cause could justify forcing the defendant to trial without the assistance of counsel.[89]

## IV. PRACTICE TIPS

What conclusions may the practitioner draw from the *Hutchins* decision? A failure of communication is recognized by the North Carolina courts as a situation which renders ineffective the assistance of appointed counsel. But *Hutchins*, without deleting that category, seems to make it a "null set," since, as Justice Exum remarks in his dissent, if these facts do not fit the bill, it is hard to imagine facts which do.[90] The prudent lawyer must assume that the North Carolina Supreme Court is not likely to find a denial of effective assistance of counsel from breakdown in communication. In this respect, *Hutchins* offers assurance to the prosecuting attorney and little encouragement to the defense attorney.

However, *Hutchins* may offer some guidelines for the lawyer appointed to represent a hostile or uncommunicative client. To stand any

87. *See, e.g.*, United States v. Arellanes, 238 F. Supp. 546 (N.D. Cal. 1964); *affirmed*, 353 F.2d 270, *cert. denied*, 385 U.S. 870 (1966).

88. Some may complain that such a procedure gives a defendant two opportunities at getting the lawyer of his choice. Certainly a trial court should not ignore indications that this issue is being used as a mere maneuver, but in the absence of such indications, subterfuge should not be assumed. Since the defendant must show a breakdown of communication or an irreconcilable conflict, chances for obstruction of justice by court delay because of the refusal to cooperate are small.

89. United States v. Sperling, 506 F.2d 1323, 1337 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); United States v. Arellanes, 238 F. Supp. 546, 550 (D.C. Cal. 1964), *affirmed*, 353 F.2d 270, *cert. denied*, 385 U.S. 870 (1966).

90. "If this principle has any vitality, however, and I believe that it does, this case demands its application. If it is not to be applied here, I cannot imagine a case in which it would be." 303 N.C. at 359, 279 S.E.2d at 811 (Exum, J., dissenting).

chance of prevailing on the substitute counsel issue, an attorney should build an adequate record for the appellate court. First, in the defendant's name, move for a dismissal of present counsel and appointment of substitute counsel; second, in the attorney's own behalf, file a motion to be allowed to withdraw; third, state fully the reasons for these requests showing how the conflict or breakdown will adversely affect counsel's performance (these motions should be made in writing and as early as possible); fourth, if possible, show the availability of acceptable substitute counsel. These actions were taken in *Hutchins* to no avail, but the decision turns on factual judgments and another case may be decided otherwise.[91] Beyond these precautions, a lawyer can only do as effective a job as possible in representing the uncommunicative defendant.

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91. It would be helpful to obtain as full a finding of facts on the motion as the trial court will undertake, particularly if the absence of deliberate obstruction on the defendant's part can be shown. This will encourage a complete factual review on appeal and increase the likelihood of finding the need for substitute counsel.