Wisconsin State Public Defender
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Examining Lawyers as Witnesses in Machner Hearings
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A. Basic Principles.

1. **Ineffective Assistance –** *Strickland v. Washington*, 466 U.S. 668 (1984) – To establish ineffective assistance of counsel (IAC), the defendant must show that counsel's performance was deficient and the deficient performance prejudiced his defense. *See also State v. Pitsch*, 124 Wis. 2d 628 (1985).

2. **Deficient Performance** – Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. *State v. Pitsch*, 124 Wis. 2d 628, 636-37 (1985).

3. **Prejudice** - Prejudice is demonstrated where, but for counsel's deficient performance, there is a reasonable probability of a different trial outcome. *State v.* Thiel, 2003 WI 111, ¶19, 264 Wis. 2d 571. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. However, prejudice is deemed "automatic" if: (1) the prosecutor has breached a plea agreement by recommending a harsher sentence and the defendant has failed to object and move to enforce the agreement, *State v. Smith*, 207 Wis. 2d 259, 282 (1997); or (2) the defendant's trial counsel had an actual conflict of interest in the representation, *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

4. **Evidentiary Hearing** – To obtain a hearing, the defendant must allege sufficient facts in postconviction motion that, if true, would entitle the defendant to relief. *State v. Thornton*, 2002 WI App 294, ¶27. Thus, the court may deny postconviction motion claiming IAC without a hearing if: the defendant fails to allege sufficient facts in motion to raise question of fact; the defendant presents only conclusory allegations or subjective opinion; or the

record conclusively demonstrates the defendant is not entitled to relief. *State v. Curtis*, 218 Wis. 2d 550, 555 n.3 (Ct. App. 1998).

5. **IAC Claim Not Attack on Lawyer's General Competency** – Keep in mind that a finding of ineffectiveness does not mean the lawyer did an overall bad job for the client. A single serious error may require a new trial. *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986); *see also Thiel*, ¶5 ("Thiel's Counsel often performed effectively"); *State v. Felton*, 110 Wis. 2d 485, 499 (1983) ("the fact that an attorney is ineffective in a particular case is not a judgment on the general competency of that lawyer," but "merely a determination that a particular defendant was not appropriately protected in a particular case"; *Felton*, 110 Wis. 2d at 499 ("'judges should recognize that all lawyers will be ineffective some of the time'") (citation omitted).

B. Postconviction Counsel Must Call Trial Counsel as Witness.

1. *State v. Machner*, 92 Wis. 2d 797 (Ct. App. 1979) – "This court is of the opinion that where a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged. We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."

2. *State v. Mosley*, 201 Wis. 2d 36 (Ct. App. 1996) – the failure to procure the attendance of defendant's trial attorney waives IAC claim.

3. *Machner* hearing is required even if trial counsel's errors are claimed to be so obvious that they could not possibly have been trial tactics. *State v. Curtis*, 218 Wis. 2d 550 (Ct. App. 1998).

C. Communicating with Trial Counsel.

1. Contact trial counsel early in postconviction review process.

   a. Obtain all file materials (file belongs to client).

   b. Find out trial counsel's thoughts about case.

   c. Solicit ideas regarding potential postconviction issues.

d. Establish rapport/partnership with trial counsel (you may fail miserably).

2. Contact trial counsel to discuss concerns about deficient performance before filing motion. Recognize that it is natural for an attorney to be sensitive about prospect of his or her performance being challenged.

a. Ask counsel directly why he or she did or did not take particular actions, preferably in writing. Solicit written response. You want to pin the witness down before the hearing and preferably before filing the motion regarding the reasons for his or her actions.

b. If oral communication with trial counsel about actions, use a prover and/or follow up with a letter summarizing your discussion with counsel.

c. Don't raise frivolous issues merely to satisfy client.

d. Be courteous and professional and solicit counsel's cooperation.

D. Investigating IAC Claims.

1. Investigation is necessary where potential disputes between client and trial counsel or concerns about trial counsel's credibility.

2. To corroborate client's claims, talk to other witnesses, such as the client's family or friends, who were present during discussions about the case; determine whether there are prior consistent statements of client regarding counsel's actions.

3. Talk to/subpoena associates or investigators who assisted trial counsel in trying the case.

4. Billing records – may reflect whether counsel conducted particular research or investigation or spent sufficient time preparing case.

5. Jail/prison records – may confirm that counsel failed to spent sufficient time with client or failed to meet with client sufficiently in advance of trial.

6. Investigate counsel - CCAP; prior discipline; Google search; Westlaw.

7. Subpoena *duces tecum* to obtain information in counsel's possession (e-mails, calendars, personal notes).

8. Materials from seminars trial counsel attended may provide impeachment material.

E. Attorney/Client Privilege.

1. Obtain limited waiver from client so trial counsel can freely discuss case with you, but no one else.

2. Attorney-client privilege under Wis. Stat. §905.03(4)(c) provides exception to the privilege when the communications are "relevant to an issue of breach of duty by the lawyer to the lawyer's client." *See State v. Flores*, 170 Wis. 2d 272, 277-78 (Ct. App. 1992).

3. Merely raising IAC in postconviction motion should not in itself waive the attorney/client privilege. It may be prudent to advise trial counsel that the waiver is not effective until such time as testimony is taken and that he should not discuss privileged communications with the prosecutor prior to the postconviction motion hearing.

4. At the *Machner* hearing, client should execute limited waiver of attorney/client privilege extending only to matters relevant to the specific claims of ineffectiveness raised. *See* Wis. Stat. §905.03(4)(c).

F. Hearing Preparation.

1. Provide the postconviction motion to trial counsel before hearing.

2. Discuss with trial counsel the issues raised in the postconviction motion.

3. Provide trial counsel with any materials trial counsel may need to fairly respond to questioning at hearing and inquire whether trial counsel would like to review any other materials prior to the hearing.

4. Subpoena trial counsel (see whether trial counsel will accept subpoena by fax).

5. Know the record better than anyone else.

6. Have exhibits and impeachment material copied and organized so that flow of cross and control of witness will not be interrupted.

7. Clearly have in mind your objectives in examining trial counsel.

G. Examining Trial Counsel.

1. Typically follow the same principles of cross-examination as you follow with other witnesses.

2. Hostile or friendly witness may affect approach.

3. Be professional and courteous; witness is colleague of the judge.

4. Establish control early with leading questions on issues not reasonably in dispute, including foundational issues.

5. Be prepared to explain why you should be permitted to ask leading questions.

   i. Trial counsel is an "adverse witness" because the claim of ineffectiveness constitutes an allegation of a breach of duty by counsel. *Cf*. Wis. Stat. §905.03(4)(c). Circuit court has discretion to permit leading questions.

   ii. Rules of evidence do not apply to postconviction motion hearings. *See* Wis. Stat. §911.01(3); *State v. Burgess*, 181 Wis. 2d 365 n.1 (Ct. App. 1993) (unpublished).

6. Cross-examination is not a deposition – know going into the hearing the points you need to make and address those points only.

7. Avoid debating the facts or the law – the debate itself suggests point may be reasonably in dispute.

8. Keep the witness's answers brief by asking declarative questions – one fact per question.

9. As with most witnesses, generally better to demonstrate that counsel was mistaken or negligent, rather than lying or engaging in intentional misconduct. Theory of minimal contradiction.

10. Address each issue raised as IAC in the postconviction motion to avoid waiver.

11. To establish deficient performance, trial counsel does not have to admit error. Establish the foundation from which you can argue that counsel's performance was deficient.

12. In appropriate case, use trial counsel to bolster prejudice showing by explaining the significance of particular issues or evidence in the case to demonstrate that the deficient performance was prejudicial.

13. Even if counsel admits error, you may want to develop more extensive record on how counsel made the error. Trial counsel's testimony that he had no tactical or strategic reason for not taking particular action is not necessarily dispositive. *E.g., State v. Kimbrough*, 2001 WI App 138, ¶35, 246 Wis. 2d 648.

H. Establishing that Counsel's Decisions Were Not Strategic or Tactical.

1. Often the key issue at *Machner* hearing is whether counsel's actions were deliberate and reasonable trial strategy.

2. Establish importance of issue or fact in context of trial as whole.

3. Establish what counsel did or did not do.

4. Establish benefits of alternative course not pursued if counsel will acknowledge.

5. Ideally from pretrial investigation, you already have documented a reason for counsel's decision that is not strategic such as oversight, failure to investigate, ignorance of law or facts.

6. Cross the witness regarding the law or facts that counsel did not know to establish foundation for arguing that his or her decisions were not reasonable. *See Felton*, 110 Wis. 2d at 502 (the prudent-lawyer standard "is substantially the equivalent of the exercise of discretion; and, accordingly, it must be based upon a knowledge of all facts and all law that may be available").

7. If counsel claims particular action as trial strategy (such as failing to object), be prepared to identify instances in record where counsel acted in contrary manner).