Protect confidentiality in ineffective assistance claims

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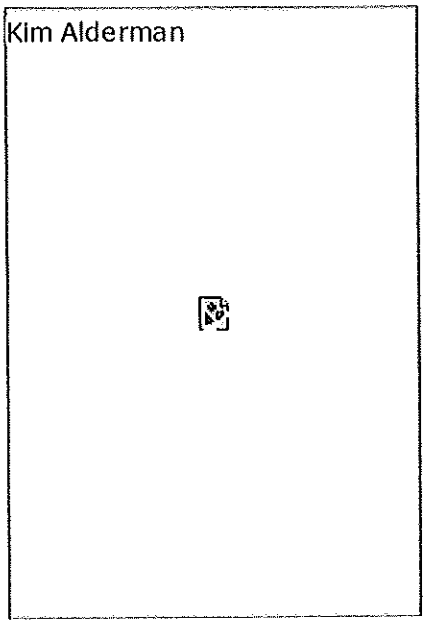


Kim Alderman

Direct appeals in Wisconsin are often premised on Ineffective Assistance of Counsel ("IAC") claims. Such claims can be unpleasant for trial attorneys, who feel they have fought hard for their clients under difficult circumstances and often for very little pay. IAC claims are also unpleasant for post-conviction counsel, who take no pleasure in having to criticize their colleagues.

Most IAC claims stem not from a belief that trial counsel is a low quality lawyer, but rather from the practical reality of post-conviction procedure: IAC is often the only vehicle through which a criminal defendant can raise arguments and evidence on appeal that may otherwise be precluded.

The common misconception of IAC claims as attacks on trial counsel leads some to think that client confidentiality is broken automatically with the filing of an IAC claim. In some IAC cases, the prosecutor will contact trial counsel before a Machner hearing to discuss a joint strategy on how to respond to the IAC claim. In other cases prosecutors and trial counsel communicate in court, before the Machner hearing begins, about trial counsel's perspective on the case. Then, trial counsel will sometimes begin testifying about confidential information before the court has obtained an explicit waiver of confidentiality from the defendant.

A recent ABA opinion makes clear that, prior to the client's express waiver or a court order to break confidentiality, such disclosures of confidential information are not permitted. (ABA Formal Op. 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim.) The ABA Opinion states:

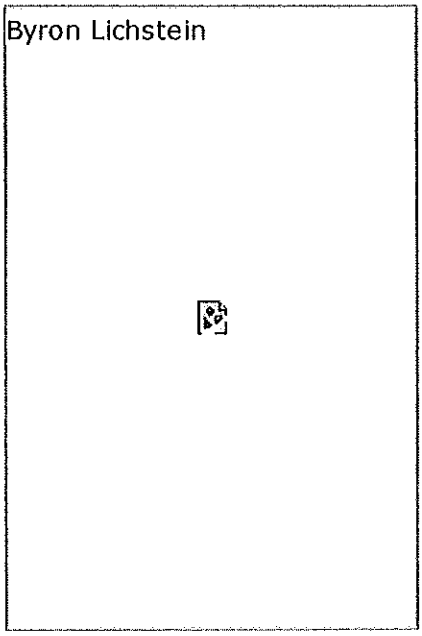
[Trial counsel] may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

The ABA opinion confirms that an IAC claim does not extinguish the trial lawyer's obligation to "not reveal information relating to the representation of a client unless the client gives informed consent[.]" SCR 20 :1.6. The requirement applies to all information relating to the representation – not just to matters communicated to trial counsel in confidence.

Under the ABA opinion, the filing of an IAC claim does not constitute an immediate waiver of client confidentiality. There is an exception in the confidentiality rule, both in Wisconsin's SCR 20:1.6 and under the Model Rules of Professional Conduct, allowing trial counsel to break confidentiality in order to respond to allegations concerning the lawyer's representation of the client. However, the recent ABA opinion explains that confidentiality should be broken only upon a court directive that trial counsel do so, after the court considers any objections or claims of privilege raised by the defendant.

Disclosure to the prosecutor is also impermissible pursuant to SCR 20:1.9, Duties to Former Clients, which explains that trial counsel "shall not use information relating to the

representation to the disadvantage of the former client" until confidentiality is waived or the information has become generally known.



Byron Lichstein

Strategies for post-conviction counsel

There are several things that post-conviction counsel can do to encourage preservation of the confidential relationship between trial counsel and the defendant. The formal remedies to a violation of confidentiality by trial counsel are limited and do not benefit the defendant. The nature of the problem indicates that simply making trial counsel aware of the ongoing obligation of confidentiality is the solution.

Raising awareness of the continuing confidential relationship between defendant and trial counsel can be accomplished by several means. The first is to mention continued confidentiality during the first phone call with trial counsel. The benefit to this approach is that it is casual, and early in the post-conviction process, potentially foreclosing passing conversations with the prosecutor that may disadvantage the defendant. This would entail simply advising trial counsel that the defendant has authorized her to speak only with post-conviction counsel, and otherwise confidentiality persists.

The second is to advise trial counsel in writing that the client wishes to preserve confidentiality, either via a letter or in a client waiver. Post-conviction counsel get waivers from defendants to allow access to the file and conversations with trial counsel. This waiver can be modified to specify its limited nature, and then a copy sent to trial counsel. The disadvantage to this method is that the waiver may be processed by a secretary or paralegal and simply put in the file, never read by the attorney.

A third approach is to explain, in the cover letter accompanying the post-conviction motion (which should be cc'ed to the prosecutor and trial counsel), that the defendant does not waive confidentiality and thus disclosures by trial counsel to the prosecutor are not permitted outside a judicially-supervised hearing.

We note that there is a certain unfairness to the prosecutor in allowing post-conviction counsel exclusive pre-hearing access to trial counsel, who will be the key witness at the Machner hearing. The ABA opinion does not address this complex issue. Although there are several conceivable solutions (which are beyond the scope of this article), at the very least the prosecutor should be allowed some latitude in questioning trial counsel at the Machner hearing.

There is no easy solution to correcting the misconception that an IAC claim serves as an automatic waiver of confidentiality between defendant and trial counsel. The recent ABA Formal Op. 10-456, along with efforts on the part of post-conviction litigators to make trial counsel and the State aware of defendants' right to continued confidentiality despite an IAC claim and until a court orders otherwise, should combat unintentional violations of ethical obligations preceding IAC hearings.

Part 2: ~~Pitfalls of discussing ineffective assistance~~

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Pitfalls of discussing ineffective assistance

by WISCONSIN LAW JOURNAL STAFF

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Alderman

This article is a follow-up to "Continuing Confidentiality in Ineffective Assistance of Counsel Claims," published in the Oct. 19, 2010 edition of the Wisconsin Law Journal.

As discussed in our Oct. 19 article, ineffective assistance of counsel (IAC) is a common claim in Wisconsin criminal appeals because it often serves as the only vehicle to reach issues that would otherwise be waived.

One of the challenges appellate counsel face in litigating IAC claims is knowing when and how to communicate with trial counsel. Most trial attorneys understand that appellate attorneys are seeking only to fulfill their constitutional responsibility to do whatever possible to assist their clients. Nonetheless, such conversations present complex issues. This article makes recommendations for how to approach and memorialize such inquiries.

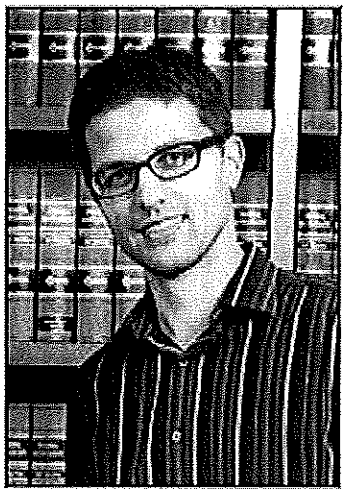
Appellate counsel should first communicate with trial counsel early in the process of identifying potential issues for appeal, before making any decisions about litigation strategy. During this initial conversation, appellate counsel typically seeks to elicit trial counsel's impressions, hoping trial counsel will share ideas about appealable issues. Frank communication by trial counsel at this stage can immensely help appellate counsel spot issues and frame her inquiry into the case record. Appellate counsel should candidly explain that she has not reached any decisions about the appeal, but rather is attempting to identify all possible avenues.

If appellate counsel reviews a case and suspects there is an avenue for post-conviction relief that can best (or only) be brought through an IAC claim, she will need to follow-up with trial counsel and conduct a more detailed pre-filing interview. Before this interview, appellate counsel should analyze the various angles and counterarguments of the IAC claim, so she can politely probe into the validity of trial counsel's decisions. In this interview, appellate counsel should give trial counsel the opportunity to explain his strategy for any decisions that may form the basis of an IAC claim. Typically, this pre-filing interview provides enough information to evaluate the merits of the possible IAC claim. If it does not, appellate counsel may follow-up with additional clarifying questions in a future interview to ensure that any IAC claim is premised on complete facts about trial counsel's decisions.

The goal of both appellate counsel and trial counsel should be consistency between trial counsel's statements in the pre-filing interview and in any Machner hearing testimony. If trial counsel testifies at the Machner hearing to new facts or additional strategic reasons that were not mentioned during the pre-filing interview, this can unfairly harm the client's chances on appeal, and can place trial counsel in the uncomfortable position of being impeached during testimony. To that end, trial counsel should be encouraged to review his case records before or during the pre-filing interview so that he can provide complete and accurate answers. This will help ensure that trial counsel does not later remember or discover additional information relevant to the IAC claim before testifying at a Machner hearing. For the same reason, appellate counsel should probe for as much information as possible during the pre-filing interview, so she can be sure to elicit all possible facts relevant to the IAC claim.

Memorializing this pre-filing interview is critical to ensure consistent testimony at the Machner hearing. The most effective method for doing so is to electronically record the interview, with

trial counsel's permission (recording without permission is inadvisable because of the ethical implications). The equipment necessary for electronic recording is inexpensive, requiring at a minimum nothing more than a handheld digital recorder and speakerphone. Appellate counsel can then send the recording to trial counsel either immediately after the interview or before the Machner hearing. This will aid trial counsel in knowing the likely parameters of questioning as well as what issues he needs to further investigate in his case files and notes. If trial counsel has new revelations or identifies inconsistencies in his story, he is more likely to notify and explain them to appellate counsel before the hearing.



Lichstein

If either appellate or trial counsel is uncomfortable with recording pre-filing interviews, then appellate counsel may instead send a letter or proposed affidavit to trial counsel soon after the conversation, detailing trial counsel's explanations and expected testimony. This allows trial counsel to clear up misunderstandings early in the process, instead of after issues have been fully briefed on misunderstood factual underpinnings.

There is no fool-proof way to ensure complete consistency between the trial attorney's pre-filing statements and his testimony at a Machner hearing. But thorough communication and documentation of the pre-filing interview will benefit both trial and appellate counsel in ineffective assistance of counsel claims.

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