

# When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims

*Ellen Henak*<sup>†</sup>

## Abstract

*Ms. Henak brings her experience as a public defender to this overview of the ethical issues facing postconviction attorneys who contemplate ineffective assistance of counsel claims. This Article is a useful resource to approach the ethical rules and case law bearing on these claims.*

## Introduction

Ineffective assistance of counsel claims<sup>1</sup> are the most frequently raised issues in postconviction motions in criminal cases.<sup>2</sup> When defendants raise ineffective assistance of counsel claims, they must allege and prove both that (1) their lawyer made a serious mistake that no reasonable lawyer would make, and (2) the mistake prejudiced the defendant.<sup>3</sup> Depending upon the jurisdiction, the timing of these claims may differ. Some jurisdictions prefer or require that an ineffective assistance of

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<sup>†</sup> B.A. (1978), Michigan State University; J.D. (1983) *cum laude*, New York University School of Law. Ellen Henak has been a part-time assistant state public defender in the Appellate Division of the Wisconsin State Public Defender's Office since 1991. She also is of counsel at the Milwaukee, Wisconsin law firm of Henak Law Office, S.C., which concentrates on criminal appellate and postconviction work. The views expressed in this Article are her own and are not necessarily those of the Wisconsin State Public Defender's Office or of anyone at Henak Law Office, S.C.

<sup>1</sup> An ineffective assistance of counsel claim is a claim that a defendant has been deprived of his constitutional right under the Sixth Amendment to the United States Constitution to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984).

<sup>2</sup> See Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999).

<sup>3</sup> *Strickland*, 466 U.S. at 687. The details of what a defendant must prove can be complex and are beyond the scope of this Article.

counsel claim be raised on direct appeal,<sup>4</sup> while other jurisdictions generally limit such claims to collateral review.<sup>5</sup> Regardless of timing, these claims arise within all jurisdictions.

Most criminal defense attorneys, at some time in their careers, will find themselves questioning the work of a colleague or having their own work in a case questioned. Not surprisingly, ineffective assistance of counsel claims can create conflicts and tensions between an attorney's feelings for, and duties to, self, to current and former clients, and to legal colleagues.

It is the postconviction attorney<sup>6</sup> who must choose whether to bring a claim of ineffective assistance of counsel. The investigation and evaluation of that claim, and any concomitant decision about the necessity of a related ethics complaint against the lawyer, may pit the postconviction attorney's loyalty to, and feelings about, the client against any loyalty to others in the profession with whom the postconviction attorney may associate. For the lawyer against whom the claim is being brought, the possibility of having to handle requests for the file, dealing with inquiries from the prosecutor or the postconviction attorney, testifying at any

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<sup>4</sup> Jurisdictions preferring that ineffective assistance of counsel claims be raised on direct appeal include Indiana, Iowa, Oklahoma, and Wisconsin. *See Riner v. State*, 394 N.E.2d 140, 143-44 (Ind. 1979); *Collins v. State*, 477 N.W.2d 374, 376-77 (Iowa 1991); *McCracken v. State*, 946 P.2d 672, 676 (Okla. Crim. App. 1997); *State v. Escalona-Naranjo*, 517 N.W.2d 157, 162 (Wis. 1994); *see generally State v. Lo*, 665 N.W.2d 756, 777 (Wis. 2003) (Abrahamson, J., dissenting) (noting that *Escalona-Naranjo* appears to have the effect of requiring that all issues, including ineffectiveness claims, be raised on direct appeal or be deemed waived).

<sup>5</sup> Jurisdictions taking this position include Alaska, Delaware, Florida, Missouri, Rhode Island, and Virginia. *See Champion v. State*, 908 P.2d 454, 470 (Alaska Ct. App. 1995); *Jackson v. State*, No. 157,1995, 1995 WL 439270, at \*2 (Del. July 19, 1995); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997); *State v. Hurt*, 931 S.W.2d 213, 214 (Mo. Ct. App. 1996); *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 n.4 (Va. 1996). Although ineffectiveness claims in the federal courts can be raised on direct appeal, review on direct appeal is limited to the existing record. *See United States v. Walls*, 80 F.3d 238, 243 (7th Cir. 1996). The preferred way to raise such claims therefore is on collateral review under the United States Code, and ineffectiveness claims in federal court therefore generally occur on collateral review. *Id.* at 243; 28 U.S.C. § 2255 (2000).

<sup>6</sup> To aid in clarity, this Article uses the words "postconviction attorney" to refer to counsel potentially making the claim of ineffective assistance of counsel and "lawyer" to refer to counsel against whom the claim potentially is made. The term "postconviction attorney" is intended to include any appellate attorney considering bringing an ineffectiveness claim.

evidentiary hearings, and interacting with former clients who are now *pro se*, invokes an understandable desire to protect one's self, and one's professional image, within the legal community.

Given the habit of many people, including counsel, to feel out what is right and proper with their gut as much as with their head, the strong feelings evoked by ineffectiveness of counsel claims tend to act as a magnet on one's moral compass. This Article is intended to step back and treat the conflicting loyalties and feelings within a logical framework focusing on the duty to the client as the primary consideration. Because nearly all states have adopted some version of the Model Rules of Professional Conduct,<sup>7</sup> the rules provide a good touchstone for the analysis of the various ethical considerations that arise.

## I. Ethical Issues Surrounding the Determination of Whether to Bring a Claim

When deciding whether to bring an ineffective assistance of counsel claim, the postconviction attorney must evaluate the client's claim that their previous lawyer made a mistake. An ineffectiveness claim, no matter how it feels to those involved, is technically *not* a claim against the previous lawyer and, unlike in claims for legal malpractice,<sup>8</sup> making such a claim does not make the previous lawyer a party, nor does it necessarily create an adversarial relationship.<sup>9</sup> Nor is such a claim a moral judgment about the general competence of the prior lawyer; even a single serious mistake, and all human beings make mistakes, in an otherwise well

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<sup>7</sup> See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2087 (2009).

<sup>8</sup> By contrast, in a legal malpractice claim the parties are the former client and the previous lawyer. In most states, clients bringing legal malpractice claims in criminal cases are required to prove actual innocence. See, e.g., *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987); *Glenn v. Aiken*, 569 N.E.2d 783, 785-88 (Mass. 1991); *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993); *Wile v. County of San Diego*, 966 P.2d 983, 985 (Cal. 1998); *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.*, 727 A.2d 996, 998-99 (N.H. 1999); *Rodriguez v. Nielsen*, 609 N.W.2d 368, 374-75 (Neb. 2000); *Griffin v. Goldenhersh*, 752 N.E.2d 1232, 1238 (Ill. App. Ct. 2001); *Schreiber v. Rowe*, 814 So. 2d 396, 399 (Fla. 2002); *Ang v. Martin*, 114 P.3d 637, 640-41 (Wash. 2005); *Hicks v. Nunnery*, 643 N.W.2d 809, 823 (Wis. Ct. App. 2002).

<sup>9</sup> See MICHAEL MEARS, *THE DEFENSE ATTORNEY'S ETHICAL RESPONSE TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS* 10 (2005).

defended case can undermine the defense and support an ineffective assistance of counsel claim.<sup>10</sup> Instead, an ineffectiveness claim is a claim that the previous lawyer has not been effective as required by the Sixth Amendment to the United States Constitution.<sup>11</sup> Generally, to prevail on such a claim the client must establish both that his previous lawyer made a serious mistake that no reasonable lawyer would make, and that the mistake prejudiced the client.<sup>12</sup> Reasonable strategic decisions, even if ultimately unsuccessful, cannot form the basis for an ineffective assistance of counsel claim.<sup>13</sup>

The decision whether to raise a particular challenge to a conviction usually belongs to the postconviction attorney.<sup>14</sup> Because of one's natural reluctance to criticize colleagues, the postconviction attorney may be tempted to impose a higher threshold in evaluating whether claims of ineffective assistance of counsel have merit than in evaluating other types

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<sup>10</sup> See *Murray v. Carrier*, 477 U.S. 478, 496 (1986); see also *State v. Thiel*, 665 N.W.2d 305, 322 (Wis. 2003) (stating "a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding").

<sup>11</sup> Every state constitution, except that of Virginia, contains some provision granting a defendant a lawyer. See ALASKA CONST. art. I, § 6; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I § 16; GA. CONST. art. I, § 1, para. XIV; HAW. CONST. art. I § 14; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. bill of rights § 10; KY. CONST. § 11; LA. CONST. art. I § 16; MD. CONST. declaration of rights art. 21; ME. CONST. art. I, § 6; MICH. CONST. art. I § 20; MISS. CONST. art. 3, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 26; N.C. CONST. art. I, § 23; N.D. CONST. art. I, § 12; NEB. CONST. art. I, CI-10; NEV. CONST. art. I, § 8(1); N.H. CONST. part first, art. 15; N.J. CONST. art. I, § 10; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 23; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 10; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10; WASH. CONST. art. I, § 12; WIS. CONST. art. I, § 7; WYO. CONST. art. I, § 10.

Only six state constitutions use the phrase "assistance of counsel." See ALA. CONST. art. I, § 11; CAL. CONST. art. I, § 15; IOWA CONST. art. I, § 10; MINN. CONST. art. I, § 6; R.I. CONST. art. I, § 10; W.V. CONST. art. III, § 14. Virginia has read a right to counsel into its state constitution despite the lack of a specific provision. See *Stonebreaker v. Smyth*, 46 S.E.2d 406 (Va. 1948).

<sup>12</sup> *Strickland*, 466 U.S. at 687.

<sup>13</sup> See, e.g., *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001); *Trice v. Ward*, 196 F.3d 1151, 1162 (10th Cir. 1999); *State v. Marty*, 404 N.W.2d 120, 123-24 (Wis. Ct. App. 1987).

<sup>14</sup> *Jones v. Barnes*, 463 U.S. 745 (1983).

of claims. Attorneys, however, have a duty to help assure the effective assistance of counsel and to seek justice. Attorneys therefore “must be especially careful to avoid permitting their personal regard for a fellow lawyer to blind them to that lawyer’s failure.”<sup>15</sup> As with other claims, a claim of ineffective assistance of counsel does not lack merit merely because not all of the facts are substantiated,<sup>16</sup> nor is such a claim without merit because the postconviction attorney believes a client ultimately will not prevail.<sup>17</sup>

Nevertheless, many of these claims present issues of credibility. A client, for example, may claim that her previous lawyer told her that she could not testify at trial,<sup>18</sup> a claim the previous lawyer denies. If no documentation exists to support the credibility of either the client or the previous lawyer, the postconviction attorney is presented with the dilemma of whom to believe.

The question of whether and when the postconviction attorney should believe a client implicates the constitutional rights of a criminal defendant, as well as the ethical obligations of counsel.<sup>19</sup> Although the United States Supreme Court has explained that a defendant’s rights do not extend to the right to present perjury,<sup>20</sup> whether it be the defendant’s or someone else’s right, counsel remains obligated to “take all reasonable lawful means to attain the objectives of the client.”<sup>21</sup> Unfortunately, the United States Supreme Court has provided no guidance in determining when counsel has sufficient basis to conclude that the defendant (or

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<sup>15</sup> STANDARDS OF CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARDS § 4-8.6(a) cmt. at 247 (3d ed. 2007).

<sup>16</sup> A claim is not frivolous “merely because the facts have not first been fully substantiated.” MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. (2002).

<sup>17</sup> A claim is not frivolous “even though the lawyer believes that the client’s position ultimately will not prevail.” MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. (2002).

<sup>18</sup> See, e.g., *People v. Whiting*, 849 N.E.2d 125, 131 (Ill. App. Ct. 2006). In *Whiting*, the defendant won a new trial based upon a claim that her trial attorney told her she could not testify at trial. *Id.* at 127. Unlike the scenario this Article is positing, the *Whiting* defendant’s factual claims were uncontroverted. *Id.* at 128.

<sup>19</sup> See *State v. McDowell*, 681 N.W.2d 500 (Wis.), *cert. denied*, 543 U.S. 938 (2004).

<sup>20</sup> *Nix v. Whiteside*, 475 U.S. 157, 173 (1986).

<sup>21</sup> *Id.* at 166.

another witness) intends to commit perjury.<sup>22</sup> As a result, courts have used different standards when determining whether counsel has a sufficient basis to conclude that a defendant intends to commit perjury, ranging from whether counsel has “actual knowledge”;<sup>23</sup> “a firm factual basis”;<sup>24</sup> “a good faith determination”;<sup>25</sup> or “good cause to believe”<sup>26</sup> that the testimony is false.

These standards generally set a high bar for counsel to use in evaluating potential perjury of the defendant.<sup>27</sup> Counsel’s constitutional and ethical obligations to the client suggest that the postconviction attorney draw all inferences favorable to the client’s credibility and that of witnesses supporting the client’s claims.<sup>28</sup> Allowing mere suspicion, conjecture, or inconsistencies in statements—even in the defendant’s own statements—to undercut this obligation, substitutes the postconviction attorney’s private and unilateral factfinding for that of the judge. As Justice Blackmun has noted, “[e]xcept in the rarest of cases, attorneys who adopt ‘the role of the judge or jury to determine the facts,’ pose a

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<sup>22</sup> *Id.*

<sup>23</sup> *United States v. Del Carpio-Cotrino*, 733 F. Supp. 95, 99 (S.D. Fla. 1990); *McDowell*, 681 N.W.2d at 500. When the testimony in question is that of the defendant, the Wisconsin Supreme Court further holds that “[a]bsent the most extraordinary circumstances, such knowledge must be based on the client’s expressed admission of intent to testify untruthfully.” *McDowell*, 681 N.W.2d at 504. A similar standard is whether there is “knowledge beyond a reasonable doubt.” *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989).

<sup>24</sup> *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). A similar standard is whether there is “compelling support” for the notion that the testimony will be perjured. *Sanborn v. State*, 474 So. 2d 309, 313 n.2 (Fla. Dist. Ct. App. 1985).

<sup>25</sup> *People v. Barte*, 566 N.E.2d 855 (Ill. App. Ct.), *cert. denied*, 502 U.S. 1014 (1991).

<sup>26</sup> *State v. Hischke*, 639 N.W.2d 6, 10 (Iowa 2002).

<sup>27</sup> Monroe H. Freedman, *But Only if You “Know”*, *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 138 (Rodney J. Uphoff ed., 1995).

<sup>28</sup> A claim of ineffective assistance of counsel is, at heart, a claim that the client’s right to the effective assistance of counsel under the Sixth Amendment has been violated. *See* U.S. CONST. amend. VI. Moreover, a claim is not frivolous even if not fully substantiated and even if the position may not ultimately prevail. MODEL RULES OF PROF. CONDUCT R. 3.1 cmt. (2002). Thus, in pursuing an ineffective assistance of counsel claim, the postconviction attorney, who has the ethical obligation as the advocate to assert the client’s position zealously, *see* MODEL RULES OF PROF. CONDUCT Preamble (2002), should be erring on the side of the client’s claim.

danger of depriving their clients of the zealous advocacy and loyal advocacy required by the Sixth Amendment.”<sup>29</sup>

Postconviction attorneys can contribute more by assisting triers of fact in making any such determination, rather than resolving it themselves.<sup>30</sup> Perhaps for this reason, the American Bar Association’s (ABA) Criminal Justice Section Standards, Defense Function, urge the bringing of ineffective assistance of counsel claims when a postconviction attorney “is satisfied” that another lawyer did not provide effective assistance of counsel,<sup>31</sup> noting that “[n]othing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose the inadequacy.”<sup>32</sup>

In addition, an attorney’s primary duty is to the client, not to other lawyers. The postconviction attorney who has solid reason to believe that a client’s previous lawyer has made a serious mistake that would support a claim of ineffective assistance of counsel has a duty to the client to make that claim, regardless of the postconviction attorney’s personal feelings about the lawyer involved. Comment 1 to Rule 1.3 of the Model Rules of Professional Conduct, which concerns diligence, notes that a “lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.”<sup>33</sup> Similarly, the comments to Rule 1.4, which deals with communication, stress that a “lawyer may not withhold information to serve the lawyer’s own interest or convenience.”<sup>34</sup>

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<sup>29</sup> *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (quoting *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

<sup>30</sup> *Cf.* W.H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703 (1993) (discussing similar ethical problems in assessing credibility between the client and others in the context of claims to be presented at trial).

<sup>31</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, DEF. FUNCTION § 4-8.6(a) (3d ed. 2007).

<sup>32</sup> *Id.* § 4-8.6 cmt. at 247.

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (2002). Although at least two states note this provision “does not require the use of offense tactics,” ineffective assistance of counsel is a constitutional claim and therefore cannot be considered an “offensive tactic[.]” ARIZ. RULES PROF’L CONDUCT R. 1.3 cmt.; *see also* CONN. RULES PROF’L CONDUCT R. 1.3 cmt. (urging lawyers to take any lawful means necessary to pursue a client’s cause).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. (2002). Note that Louisiana only requires a lawyer to give enough information to allow the client “to participate

A postconviction attorney reviewing a potential claim of ineffective assistance of counsel must bear in mind this primary duty to the client when evaluating the claim. The attorney is not free to fail to bring a legitimate claim because the postconviction attorney feels it is distasteful to do so. In fact, merely bringing the claim is not an endorsement of the client's general view of his previous lawyer.<sup>35</sup> While the client may believe that his previous lawyer was ineffective, or suspect that the lawyer was working with the state, all the postconviction attorney bringing the claim need believe is that the lawyer made a single, serious mistake that prejudiced the client.<sup>36</sup>

Under Rule 1.2(a), the postconviction attorney must "abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are to be pursued."<sup>37</sup> While some state rules differ as to whether consultation is required,<sup>38</sup> all of the states that have adopted any version of the Model Rules of Professional Conduct place decisions concerning the objectives of representation on the client.<sup>39</sup>

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intelligently in decisions concerning the objectives of the representation." LA. RULES PROF'L CONDUCT 1.4(b).

<sup>35</sup> "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).

<sup>36</sup> A generally competent attorney can be ineffective because of a single mistake if that mistake is serious enough. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986); *see also* State v. Thiel, 665 N.W.2d 305, 322 (Wis. 2003) ("Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding . . .").

<sup>37</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

<sup>38</sup> Maryland, for example, requires consultation with the client as to means only "when appropriate." MD. RULES PROF'L CONDUCT R. 1.2(a). But Michigan and Texas do not appear to require any consultation as to means, with Michigan requiring a lawyer to pursue the client's objectives through "reasonably available means." MICH. RULES PROF'L CONDUCT R. 1.2(a); *see also* TEX. RULES PROF'L CONDUCT R. 1.02(a) (establishing scope and objectives of representation).

<sup>39</sup> *See* ALA. RULES OF PROF'L CONDUCT R. 1.2(a); ALASKA RULES OF PROF'L CONDUCT R. 1.2(a); ARIZ. ETHICS RULES ER 1.2(a); ARK. RULES OF PROF'L CONDUCT R. 1.2(a); COLO. RULES OF PROF'L CONDUCT R. 1.2(a); CONN. RULES OF PROF'L CONDUCT R. 1.2(a); DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 1.2(a); FLA. RULES OF PROF'L CONDUCT R. 4-1.2(a); GA. RULES OF PROF'L CONDUCT R. 1.2(a); HAW. RULES OF PROF'L CONDUCT R. 1.2(a); IDAHO RULES OF PROF'L CONDUCT R.

But placing responsibility on the postconviction attorney for the means by which a client's goal is to be achieved does not permit the attorney to refuse to bring the claim if the claim has merit and is the best route to achieving the client's objectives. When a basis for the claim of ineffective assistance of counsel exists, that claim will often be the best strategic route to obtain the client's objectives, both because it can be used to avoid waiver or forfeiture<sup>40</sup> and, if the claim loses in state court, it can provide the federal constitutional basis to seek habeas relief.<sup>41</sup> Nor may the postconviction attorney fail to bring to the attention of his client the potential error of the prior lawyer. Proper consultation with a client requires communicating enough information to allow the client to appreciate the significance of the matter.<sup>42</sup>

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1.2(a); 2010 ILL. RULES OF PROF'L CONDUCT R. 1.2(a); IND. RULES OF PROF'L CONDUCT R. 1.2(a); IOWA RULES OF PROF'L CONDUCT R. 32:1.2(a); KAN. RULES OF PROF'L CONDUCT R. 226; KY. SUP. CT. R. R 3.130 (1.2)(a); LA. RULES OF PROF'L CONDUCT R. 1.2(a); ME. RULES OF PROF'L CONDUCT R. 1.2(a); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.2(a); MASS. JUD. CT. R. 3:07 (1.2(a)); MISS. RULES OF PROF'L CONDUCT R. 1.2(a); MO. SUP. CT. RULES R.4-1.2(a); MONT. RULES OF PROF'L CONDUCT R. 1.2(a); NEB. CT. RULES OF PROF'L CONDUCT § 1.2(a); NEV. RULES OF PROF'L CONDUCT R. 1.2(a); N.H. RULES OF PROF'L CONDUCT R. 1.2(a); N.J. RULES OF PROF'L CONDUCT R. 1.2(a); N.M. RULES OF PROF'L CONDUCT R. 16-102(a); N.Y. RULES OF PROF'L CONDUCT R. 1.2(a); N.C. RULES OF PROF'L CONDUCT R. 1.2(a); N.D. RULES OF PROF'L CONDUCT R. 1.2(a); OHIO RULES OF PROF'L CONDUCT R. 1.2(a); OKLA. RULES OF PROF'L CONDUCT R. 1.2(a); OR. RULES OF PROF'L CONDUCT R. 1.2(a); PA. RULES OF PROF'L CONDUCT R. 1.2(a); R.I. RULES OF PROF'L CONDUCT R. 1.2(a); S.C. APP. CT. RULES R. 407 (1.2(a)); S.D. RULES OF PROF'L CONDUCT R. 1.2(a); TENN. RULES OF PROF'L CONDUCT R. 1.2(a); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(a); UTAH SUP. CT. RULES OF PROF'L PRACTICE ch. 13, R 1.2(a); VT. RULES OF PROF'L CONDUCT R. 1.2(a); RULES OF SUP. CT. VA. part 6, § II, R. 1.2(a); WASH. RULES OF PROF'L CONDUCT R. 1.2(a); W. VA. RULES OF PROF'L CONDUCT R. 1.2(a); WIS. SUP. CT. RULES R. 20:1.2(a).

<sup>40</sup> For judicial recognition of the use of this tactic, see for example, *United States v. Boyd*, 86 F.3d 719, 722 (7th Cir. 1996) ("Ineffective assistance of counsel would avoid the [defendant's] waiver, because a deficient lawyer's acts are attributed not to the accused but to the government.").

<sup>41</sup> See, e.g., *Washington v. Smith*, 219 F.3d 620, 635 (7th Cir. 2000) (granting habeas relief on ineffective assistance of counsel grounds after state courts had denied relief). Although the United States Constitution guarantees the right to the effective assistance of counsel, state remedies must be exhausted before federal habeas relief is available. U.S. CONST. amend. VI; 28 U.S.C. § 2254 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999).

<sup>42</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007).

## II. Ethical Issues in the Reporting of Possible Unethical Behavior by the Previous Lawyer

The possibility of either needing to report a lawyer for disciplinary action or being reported creates emotional dilemmas that can lead to poor decision-making in the context of ineffective assistance of counsel claims. As a general rule, lawyers normally are not at risk for sanctions merely because they have made a mistake.<sup>43</sup> In fact, ethical violations and ineffective assistance of counsel are not usually seen as one and the same. The Arizona Supreme Court “decline[d] to adopt a *per se* rule that successful post-conviction relief based on ineffective assistance of counsel automatically results in an ethical violation, or, conversely, that a denial of post-conviction relief will always insulate an attorney from professional discipline.”<sup>44</sup> Thus, a lawyer can violate ethical rules and, at the same time, not be found ineffective.<sup>45</sup> Conversely, a lawyer can behave in accord with prevailing norms of legal practice and still not meet constitutional standards.<sup>46</sup> In other words, an otherwise competent lawyer can perform in a generally competent manner and still be found to be ineffective because of a single, serious mistake.<sup>47</sup>

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<sup>43</sup> See John Freeman, *Department: Ethics Watch: Ineffective Assistance and Ethics*, S.C. LAW., Mar.-Apr. 2002, at 9.

<sup>44</sup> *In re Wolfram*, 847 P.2d 94, 98 (Ariz. 1993) (in banc); *accord In re Lewis*, 445 N.E.2d 987, 989 (Ind. 1983) (per curiam); see also *Office of Disciplinary Counsel v. McKinney*, 668 S.W.2d 293, 296-97 (Tenn. 1984) (holding that a finding of ineffective assistance of counsel was inadmissible in a later disciplinary proceeding against the lawyer).

<sup>45</sup> See *McClure v. Thompson*, 323 F.3d 1233 (9th Cir.), *cert. denied*, 540 U.S. 1051 (2003).

<sup>46</sup> For example, a study in Phoenix found that 30% of defense attorneys allowed clients to enter guilty pleas without having interviewed any defense witnesses. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1735 (1993). An earlier, similar study in New York City found that only 25% of defense attorneys interviewed their own clients prior to the entry of a guilty plea. See Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986-87); see also *Goodman v. Bertrand*, 467 F.3d 1022, 1027 (7th Cir. 2006) (involving deficient performance where the lawyer, consistent with local practice, failed to subpoena a witness and instead relied on the prosecution to subpoena the witness).

<sup>47</sup> See, e.g., *Murray v. Carrier*, 477 U.S. 478, 484-85 (1986); *State v. Thiel*, 665 N.W.2d 305, 322 (Wis. 2003).

In any event, not every violation of the rules of professional conduct need be reported.<sup>48</sup> An earlier version of Rule 8.3 of the Rules of Professional Conduct required that an attorney who “ha[d] knowledge” that “another lawyer ha[d] committed a violation of the Rules . . . that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” report that lawyer.<sup>49</sup> The current version of the rules imposes the same duty on an attorney who “knows” that another lawyer has committed such a violation.<sup>50</sup> “The term ‘substantial’ refers to the seriousness of the possible offense” and not to the magnitude of evidence of the violation.<sup>51</sup>

The starting point in determining whether the postconviction attorney has an obligation to report the mistake of the previous lawyer to the regulating body of the applicable jurisdiction turns not on whether the previous lawyer has made a mistake, but on whether that mistake gives rise to larger concerns. The postconviction attorney has no obligation to report the previous lawyer if the conduct giving rise to the claim of ineffective assistance of counsel does not give rise to a “substantial question” about the previous lawyer’s general fitness as a lawyer.<sup>52</sup>

Even if the mistake of the previous lawyer raises a substantial question about the lawyer’s fitness, the inquiry is not over. If the mistake raises a substantial question, the postconviction attorney must report it unless the information is “otherwise protected by Rule 1.6,” which concerns confidentiality.<sup>53</sup> Once again, the duty to the client is primary. In this

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<sup>48</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. (2002). This comment is unchanged from the earlier version. “Not every instance in which ineffective assistance is alleged will necessarily amount to a disciplinary violation, and concomitantly, a duty to report will not necessarily arise every time” an attorney acknowledges having provided ineffective assistance of counsel. State Bar of Ariz. Ethics Op. 98-02 (1998).

<sup>49</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3 (2002).

<sup>50</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3 (2000). Under either version of the rules “knowing” requires “actual knowledge of the fact in question.” See *id.* R. 1.0(f); accord MODEL RULES OF PROF’L CONDUCT pmb. (2002). However, the rules of Kentucky and Ohio require only that the violation raises a question as to the lawyer’s fitness. See KY. RULES PROF’L CONDUCT R. 8.3(a); OHIO RULES PROF’L CONDUCT R. 8.3(a). The reporting obligation in Ohio exists only if the attorney possesses “unprivileged knowledge.” OHIO RULES PROF’L CONDUCT R. 8.3(a).

<sup>51</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. (2002).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* R. 8.3(c). This rule is unchanged from the earlier version. Comment to this rule expounds on this notion and states that a “report about misconduct is not required where it would involve violation of Rule 1.6.” *Id.* R. 8.3 cmt.

situation, it trumps any duty to the profession at large. The comment to this rule, however, urges the attorney to “encourage [the] client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.”<sup>54</sup>

At least one state, while maintaining the client’s interest as a primary concern, considered, but ultimately rejected, a rule that would have made consultation with the client mandatory when the information involved is confidential.<sup>55</sup> Wisconsin’s proposed version of Rule 8.3 would have imposed an affirmative requirement to consult with the client in such circumstances.<sup>56</sup> Even under this proposal, the client retained the option of barring his postconviction attorney from reporting the ethical violation.<sup>57</sup> The proposal would have required the attorney to “abide by the client’s wishes to the extent required by Rule 1.6.”<sup>58</sup> The advantage of this rule lay in requiring the postconviction attorney to consult with the client, as this would have made it harder for the attorney to unilaterally avoid incurring a duty to report the previous lawyer to regulatory authorities. As a result, criminal defendants may have been afforded greater protections. Then again, clients in criminal cases—angry with their errant, previous lawyers—are often angry enough that the urge to retaliate overcomes self-interest in evaluating their case, a glaring difficulty with this proposal. This difficulty may have been of little practical import, however, as nothing in the rules would have barred these clients from personally contacting a regulatory authority.

### III. Ethical Issues Involving the Previous Lawyer’s File

At some point, a competent postconviction attorney considering an ineffective assistance of counsel claim will need access to the previous lawyer’s file. Most human beings are uncomfortable with someone

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<sup>54</sup> *Id.* R. 8.3 cmt.

<sup>55</sup> See *In re* Petition for Amendment to Supreme Court Chapter 20, RULES OF PROF’L CONDUCT FOR ATTORNEYS, No. 04-07, R. 20:8.3 (Proposed July 29, 2004).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Consultation with the client would have required communicating enough information to be reasonably sufficient to allow the client to appreciate the significance of the matter. *Id.* R. 20:1.0(b).

peering over their shoulder, especially if they suspect that they may have made mistakes. Lawyers are no different. Moreover, the accused lawyer will undoubtedly be uncomfortable with losing control over the physical evidence necessary to their potential defense against ineffective assistance of counsel or malpractice claims. As such, issues involving the previous lawyer's file may pit the lawyer's perceived self-interest against the interests of the former client.

Ethical considerations concerning the client file arise long before any postconviction attorney contemplates bringing an ineffective assistance of counsel claim. Properly maintaining a file helps assure competent counsel and protects the client if a need for successor counsel arises. Not only is this important for the clients interests, it is arguably a component of the requirement that a lawyer provide competent representation.<sup>59</sup> It is unlikely that any lawyer can carry an entire case in her head, so naturally the failure to adequately maintain a file can lead to mistakes in that case. In addition, clients can switch or relieve lawyers, lawyers may become incapacitated, die or need to withdraw, or clients may need the file long after the lawyer terminates representation.<sup>60</sup> In each of these circumstances, transfer of a well-kept file is crucial to the client's case. Thus, properly maintaining the file will protect both the lawyer and the client while the case is pending in the trial court.

The probability of appellate and postconviction actions<sup>61</sup> creates an additional incentive to properly maintain the case file. With ineffective assistance of counsel claims, the reasoning behind a lawyer's decisions in the case are crucial, and the file is often the best evidence of what actions were taken or withheld, and why. Reasonable strategy decisions, even if ultimately unsuccessful, cannot form the basis for an ineffective assistance of counsel claim.<sup>62</sup> Notes taken in the file, or charts and

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<sup>59</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002); *see generally* Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1189 (2003). Although the stakes in capital cases are higher than in other criminal cases, the need for a well-kept file is no less in these other criminal cases.

<sup>60</sup> *See* Fox, *supra* note 59, at 1189.

<sup>61</sup> An indigent defendant is entitled to representation in a direct appeal as of right. *Douglas v. California*, 372 U.S. 353, 364 (1963).

<sup>62</sup> *See, e.g.*, *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001); *Trice v. Ward*, 196 F.3d 1151, 1162 (10th Cir. 1999); *State v. Marty*, 404 N.W.2d 120 (Wis. Ct. App. 1987).

diagrams drawn for a client, may provide evidence of what steps the lawyer considered, what information was available at the time of action, the extent of any investigation or research into this information, and what steps or actions were rejected, and for what reason. Sloppy files, incomplete files, or both, can put the client, as well as the lawyer, at a disadvantage after conviction. Inadequate files also can give rise to ineffectiveness claims that might not otherwise occur. For example, if the postconviction attorney reviewing the file after conviction believes that grounds may exist to pursue a claim under *Maryland v. Brady*<sup>63</sup> based upon the state's alleged failure to share exculpatory information, an incomplete or messy file may cause a cautious attorney to consider the possibility that the state did turn over the information but the previous lawyer mishandled it. In such a case, a cautious postconviction attorney will file a motion making the *Brady* claim and, in the alternative, a claim that the previous lawyer was ineffective for failing to handle the information correctly.

A prudent lawyer will advise his or her client, upon termination of representation, how long the lawyer intends to maintain the file before it will be destroyed, and should give the client the option of retaining the file. Additionally, clients should be advised that copies of documents will be provided, but it is the client's responsibility to maintain a file with those documents. Whether this tendering of these documents is sufficient may turn in part on "whether the client is capable of appropriately securing or disposing of the file."<sup>64</sup> In any event, if a previously represented client can be readily found, that client should be given the option of retaining files himself before the files are destroyed.

For obvious reasons, no lawyer can afford to retain every file indefinitely, and lawyers "should not have the burden of maintaining client files forever."<sup>65</sup> But how long must the lawyer maintain the file? At least one state, Missouri, requires lawyers to "securely store" a client's

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<sup>63</sup> 373 U.S. 83 (1963).

<sup>64</sup> Utah State Bar Ethics Advisory Op. Comm., Formal Op. 96-02 (1996).

<sup>65</sup> Wis. State Bar Prof'l Ethics Comm., Formal Op. E-98-1 (1998). For some attorneys, scanning and retaining a file in electronic form may be a cheaper option than storing a physical file. If a lawyer chooses to keep a digitized copy of a file, however, the lawyer still may not destroy *original* paper documents belonging to the client. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 07-20 (2007).

file for ten years.<sup>66</sup> More commonly, states do not have specific rules regarding the length of time a lawyer is required to retain a closed file,<sup>67</sup> although some state bar ethics committees have suggested that files be retained for at least six years.<sup>68</sup> Proper considerations in determining how long to keep a file or portions of it may include: whether it contains items which clearly or probably belong to the client;<sup>69</sup> whether the items may be available elsewhere (such as in a court file); whether the information has previously been given to the client;<sup>70</sup> whether the lawyer knows or should know that it “may still be necessary or useful in the assertion or defense of the client’s position;”<sup>71</sup> the nature of the services rendered to the client; and other factors that may determine whether destruction would cause prejudice to the client.<sup>72</sup> Because ineffective assistance of counsel claims are frequently raised on collateral review,<sup>73</sup> the need for the lawyer’s notes, memoranda, and other documents may likely extend for several years.

When a postconviction attorney investigates a potential ineffective assistance of counsel claim, the prudent attorney will request a copy of the client’s file. Although the previous lawyer maintains the file, most states hold that the file belongs to the client.<sup>74</sup> Lawyers are, of course,

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<sup>66</sup> MO. SUP. CT. R. 4-1.15 (2005).

<sup>67</sup> See, e.g., Ala. State Bar Office of the General Counsel, Formal Op. 1993-10 (1993); Fla. State Bar Prof. Ethics Comm., Formal Op. 63-3 (1963); NYCLA Comm. on Prof’l Ethics, Formal Op. 725 (1998); Nerino Petro, *Practice Tips: Retaining Client Files*, 79 WIS. LAW. 25, 26-27 (2006).

<sup>68</sup> See Ala. State Bar Office of the General Counsel, Formal Op. 1993-10 (1993); Wis. State Bar Prof’l Ethics Comm., Formal Op. E-98-1 (1998). A federal bankruptcy court has suggested the minimum time is five years. *Ramirez v. Fuseier*, 183 B.R. 583, 587 n.3 (B.A.P. 9th Cir. 1995).

<sup>69</sup> See ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1384 (1977).

<sup>70</sup> Both the Mississippi Bar and the Utah State Bar have suggested the lawyer has no obligation to retain the file once she gives the client all originals and copies of the records. See Miss. Bar Ethics Comm., Formal Opinion No. 234 (1996); Utah State Bar Ethics Advisory Op. Comm., Formal Op. 96-02 (1996).

<sup>71</sup> Utah State Bar Ethics Advisory Op. Comm., Formal Op. 96-02 (1996).

<sup>72</sup> See Bar Ass’n of San Francisco Legal Ethics Comm., Formal Op. 1996-1 (1996).

<sup>73</sup> See *supra* notes 5-6 and accompanying text.

<sup>74</sup> See, e.g., *Weiss v. Marcus*, 51 Cal. App. 3d 590, 599 (1975); State Bar of Cal. Standing Comm. on Prof. Responsibility & Conduct, Formal Op. 1992-127 (1992); State Bar of Texas Prof’l Ethics Comm., Formal Opinion 570 (2006); Wis. State Bar Prof’l Ethics Comm., Formal Op. E-00-03 (2000). In some instances, lawyers have

free to make and keep their own copies of any documents turned over to a postconviction attorney.<sup>75</sup> Rule 1.16(d), concerning the termination of representation, requires the lawyer to “take steps to the extent reasonably practicable to protect a client’s interest,” even after the representation ends, which specifically includes “surrendering papers and property to which the client is entitled.”<sup>76</sup> The rule further states, however, that “[t]he lawyer may retain papers relating to the client to the extent permitted by other law.”<sup>77</sup>

The next, logical question is to what extent other law permits a lawyer to withhold papers from the client and the attorney investigating the claim of ineffective assistance of counsel. Some jurisdictions that have considered the question distinguish between litigation materials—which include materials filed or served in the criminal case—and “work product.”<sup>78</sup> The State Bar of Wisconsin, for example, considered this question and suggested two categories of documents that may constitute documents to which the client is not entitled.<sup>79</sup> The first category includes “documents used by the attorney to prepare initial documents for the client, in which a third party . . . has a right to nondisclosure.”<sup>80</sup> These documents could include medical records,<sup>81</sup> documents barred from release by statute,<sup>82</sup> and documents belonging to other clients that were

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been disciplined for failing to turn over files. *See, e.g., In re Urban*, 645 N.W.2d 612 (Wis. 2002) (reprimand for failure to forward files to a client despite numerous requests); *In re Whitnall*, 482 N.W.2d 648 (Wis. 1992) (suspension for such failure). *But see* State Bar of Mich. Standing Comm. on Prof’l Ethics, Formal Op. R-019 (2000) (file presumptively belongs to the lawyer). Even in Michigan, however, the client has the right to access to the file. *Id.*

<sup>75</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2002).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See* Alaska Bar Ass’n, Op. 2003-3 (2003); Ill. State Bar Ass’n Ethics, Adv. Op. 94-13 (1995); *see generally* Wis. State Bar, Formal Op. E-00-03 (2000).

<sup>79</sup> Wis. State Bar, Formal Op. E-00-03.

<sup>80</sup> *Id.*

<sup>81</sup> *See generally* Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 564-65 (2004) (surveying state statutes on physician-patient privilege).

<sup>82</sup> Such documents may include presentence investigation reports in some jurisdictions. *See, e.g.,* N.Y. CRIM. PROC. LAW. § 390.50 (McKinney 2005) (although a prose defendant may have a copy); WIS. STAT. § 972.15(4)-(4m) (2000) (allowing a prose defendant access but no copy).

used as a template during the drafting of any documents for the client at issue.

Refusing to disclose information barred from disclosure by statute or by the interests of third parties is rarely controversial. However, problems may arise when a lawyer refuses to disclose documents used as templates. Clearly, any document actually drafted for a client based upon a template cannot be withheld.<sup>83</sup> On the other hand, the strength of the grounds for withholding the template itself may vary depending upon circumstance. Although the Wisconsin State Bar did not provide rationale behind its conclusion that the template may be withheld, one possible basis could be the lawyer's duty of confidentiality to the client whose documents were used as a template. Even if the evidence of what occurred during the drafting process of a particular document might be relevant to an ineffective assistance of counsel claim that relates to that document, the duty of confidentiality to the client whose documents were used as a template may bar release. Just as the lawyer retains a duty of confidentiality to the former client whose postconviction attorney is seeking the file, the lawyer retains a duty of confidentiality to the client whose documents were used as a template even if the lawyer no longer represents that client.<sup>84</sup> That rationale, however, is considerably weakened if the document used as a template has been filed in court making it freely accessible to the public.

The second category of documents that may not need to be turned over under the Wisconsin State Bar's analysis are those "documents that would be considered personal attorney work product," including "internal memoranda concerning the client file, conflict checks, . . . and lawyers' notes reflecting personal impression and comments relating to the business of representing the client."<sup>85</sup> Whether a document comes within this category depends on whether the lawyer's "duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information" requires such production, although "[g]enerally, such duty favors production."<sup>86</sup>

In the context of ineffective assistance of counsel claims, items such as conflict checks, internal memoranda, and notes of the lawyer's

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<sup>83</sup> Wis. State Bar, Formal Op. E-00-03 (2000).

<sup>84</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.9 & 1.6 cmts. (2009).

<sup>85</sup> Wis. State Bar, Formal Op. E-00-03.

<sup>86</sup> *Id.*

personal impression and comments, are generally the best evidence of why the lawyer took, or abstained from, certain actions. Such documents are the most relevant items in the file and their production will help protect the client's interests. Even if the information in these memoranda or notes will indicate to the postconviction attorney that a claim of ineffective assistance of counsel likely has no merit, knowing that information at the outset aids the client by allowing the postconviction attorney to make an informed, strategic decision whether to abandon the claim before such weaknesses taint other potential claims. In some instances, having that information at the outset aids the client because it allows the current attorney to properly frame a related issue.

In any event, the rationale for allowing a lawyer to withhold such documents is not clear. Just like attorney-client privilege, the work product privilege is owned by the client, not the lawyer.<sup>87</sup> It exists to: (1) allow lawyers to better develop legal and factual theories without interference from opposing counsel; (2) to avoid rewarding any indolence of opposing counsel; (3) to motivate lawyers to do more adequate preparation; and (4) to avoid placing an attorney, "except in exceptional cases . . . in the position where he is required to be a witness for or against his client."<sup>88</sup> None of these purposes are served by allowing a lawyer to withhold these documents from his former client.

Not surprisingly, other jurisdictions have concluded that the work product of a lawyer belongs to the client after termination of the attorney-client relationship.<sup>89</sup> As suggested above, this result follows from the idea that the privilege is intended to prevent access by an adversary—not

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<sup>87</sup> *State v. Meeks*, 666 N.W.2d 859, 867 (Wis. 2003).

<sup>88</sup> *See State ex rel. Dudek v. Cir. Ct. for Milwaukee Co.*, 150 N.W.2d 387, 404-05 (1967).

<sup>89</sup> *See, e.g., Weiss v. Marcus*, 124 Cal. Rptr. 297, 304 (Ct. App. 1975); CAL. CIV. PROC. CODE § 2018.080 (West 2007); Prof'l Ethics Comm. for the State Bar of Tex., Op. 570 (2006); *accord* Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1992-127 (1992) (dealing specifically with criminal defense attorneys turning files over to successor appellate counsel but is based upon Cal. Rule of Prof'l Conduct 3-700(D)(1)(1992), which specifically required release of "all the client papers and property"). *But see*, State Bar of Mich. Standing Comm. on Prof'l & Judicial Ethics, Op. R-019 (2000), *available at* [http://www.michbar.org/opinions/ethics/numbered\\_opinions/r-019.htm](http://www.michbar.org/opinions/ethics/numbered_opinions/r-019.htm) (last visited Mar. 8, 2010) (stating that "[t]here is no legal support in Michigan for the proposition that the files are the property of the client").

by the client—and therefore does not bar a client from access to her own file.<sup>90</sup> Requiring the disclosure of the lawyer's work product prevents the lawyer from being tempted to put his own interests ahead of the client's in deciding whether to withhold his notes.<sup>91</sup> Except in limited circumstances, such as those involving information that could cause serious harm to a mentally ill client, allowing the lawyer to unilaterally make the decision on what to release may undermine the lawyer's duty to the client and deny the client the full benefit of the lawyer's services.<sup>92</sup>

The most difficult question arises when the lawyer wishes not to disclose to the client information in order to protect other individuals and, perhaps, the client. When this problematic information is likely to be turned over to the postconviction attorney, there is no reason to withhold it as the postconviction attorney is no more likely to misuse the information than the original lawyer, and the postconviction attorney's professional judgment is no more suspect than that of the lawyer. However, when the client is requesting the file directly, the problem can be thorny.

Such information may include, for example, the new address of a former spouse who accused the client of harassment. The Model Rules of Professional Responsibility suggest that a lawyer may have an obligation to prevent serious harm to others, although the Rules do not specifically discuss withholding information for such a purpose.<sup>93</sup> The Rules allow a lawyer to disclose confidential information "to prevent reasonably certain death or substantial bodily harm."<sup>94</sup> Given the support in the Rules for disclosing information in order to physically protect third parties, it follows that refusing to disclose information in order to similarly protect third parties be deemed ethical.

But determining what the lawyer must turn over does not answer the question of who must pay to make copies of the documents. The lawyer,

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<sup>90</sup> *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982).

<sup>91</sup> Prof'l Ethics Comm. for the State Bar of Tex., Op. 570 (2006).

<sup>92</sup> *Id.*

<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007).

<sup>94</sup> *Id.*; see also ARK. RULES OF PROF'L CONDUCT 1.6(b)(1) (2005) (allowing disclosure to prevent a crime); COLO. RULES OF PROF'L CONDUCT R 1.6(b)(1) (2008). Some states go further and require the lawyer to disclose confidential information to prevent serious injury to a third party. See, e.g., CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b) (2009); TEX. DISCIPLINARY RULES OF R. PROF'L CONDUCT R. 1.05(e) (2005); Wis. Sup. Ct. Rule 1.6(b).

of course, is always free to retain a copy of any material turned over to the client. Alternatively, the postconviction counsel may be willing to incur copying costs and need not charge copying costs in any circumstance. The answer is not clear, however, on whether the lawyer can make the client bear the copying costs. Some states have taken the position that the client bears the costs of copying and delivering file records, but this position occurs in states in which the files are not considered as belonging to the client.<sup>95</sup> The superior position is one where the file does belong to the client, and it makes more sense that the client should receive at least one original (or copy) of her own belongings without incurring costs. Thus, some jurisdictions require a lawyer to supply the requested materials at the lawyer's expense if they have not been previously provided, or when the lawyer and client did not agree to an alternate arrangement.<sup>96</sup> If the materials have been previously provided, the lawyer is not required to bear the cost of providing duplicates.<sup>97</sup> If the lawyer does require the client to pay for duplicates, or, in those jurisdictions where it is permissible, for original copies, "[c]osts must be reasonable and must not impair the client's practical access to [the] file."<sup>98</sup>

Releasing the file to the former client never raises issues of confidentiality vis-à-vis communications with that client.<sup>99</sup> When the person requesting the file is the postconviction attorney, however, the previous lawyer must consider the obligations of confidentiality carefully. Those obligations, however, do not raise insurmountable hurdles. Rule 1.9(c)(2) of the Model Rules of Professional Conduct prohibits the previous lawyer from revealing information relating to the representation except as allowed under Rule 1.6.<sup>100</sup> Rule 1.6 bars the disclosure of information relating to the representation unless either "the client gives informed

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<sup>95</sup> See, e.g., State Bar of Mich. Standing Comm. on Prof'l & Judicial Ethics, Op. R-019 (2000).

<sup>96</sup> See Wis. State Bar Ethics Op. E-00-03(3) (2003); Ariz. State Bar Ethics, Op. 98-07 (1998).

<sup>97</sup> See Wis. State Bar Ethics, Op. E-82-7 (1982), which was reaffirmed in Wis. State Bar Ethics, Op. E-00-03 (2000).

<sup>98</sup> See Wis. State Bar Ethics, Op. E-00-03 (2000).

<sup>99</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.9 (2007).

<sup>100</sup> *Id.* R. 1.9(c)(2).

consent, [or] the disclosure is impliedly authorized in order to carry out the representation,” or “the client gives informed consent.”<sup>101</sup>

In most circumstances, revelation of the information in the file to the postconviction attorney will be impliedly authorized<sup>102</sup> as required by Rule 1.6. When the lawyer knows that the client has directed his appellate or postconviction attorney to appeal, the lawyer knows that the client’s objective is to succeed on appeal. If the lawyer is aware that the postconviction attorney established an attorney-client relationship with that previous client, and that client truly intends to appeal, disclosure of the file to the attorney is necessary to carry out the representation and is therefore impliedly authorized.<sup>103</sup> What the lawyer must verify, whether by release, order appointing counsel, or retainer agreement, is whether that attorney truly represents the client for postconviction or appellate purposes.

If the lawyer has the explicit consent of the client to release the file, confidentiality is waived to the limited extent necessary for the postconviction attorney to provide representation and for that limited purpose.<sup>104</sup> The provisions of Rule 1.9 are intended to protect the client, not the lawyer, and can be waived by the client.<sup>105</sup> Informed consent requires that the client agree to the proposed course of conduct after communication of “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>106</sup> These Rules do not state that the lawyer must provide this information.<sup>107</sup> The postconviction attorney’s provision of

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<sup>101</sup> *Id.* R. 1.6(a).

<sup>102</sup> In unusual circumstances, however, the former client may expressly direct the prior lawyer not to disclose either specific information or information in general to the postconviction attorney. For instance, the client may have made certain embarrassing or inculpatory disclosures that the client fears would taint the postconviction attorney’s representations. Under these circumstances, the client’s express refusal to waive the privilege would control. If the file or information is absolutely necessary to the postconviction attorney, the attorney will need to explain to the client why waiver is essential.

<sup>103</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2007).

<sup>104</sup> *See id.* R. 1.9(c)(2).

<sup>105</sup> *Id.* R. 1.9 cmt.

<sup>106</sup> *Id.* R. 1.0(e).

<sup>107</sup> *See id.* R. 1.0 cmt. (“[A] lawyer need not inform a client or other person of facts or implications already known to the client or other person . . .”).

that information is sufficient as long as the lawyer knows that the information has been provided.<sup>108</sup>

#### **IV. Ethical Issues Arising in Discussions Between the Previous Lawyer and the Current Attorney**

The lawyer cannot satisfy her obligation to the former client by simply turning over the file to the client's postconviction attorney. Competent representation arguably includes "representation which does not impair a client's ability to ensure, after the fact, that the counsel he has received was effective."<sup>109</sup> Cooperation of the trial-level lawyer is essential because the underlying basis for decisions the lawyer made are often uniquely within her knowledge.<sup>110</sup> Understanding strategic thinking is crucial to a proper appraisal of ineffective assistance of counsel claims,<sup>111</sup> thus a client retains a significant interest in the relationship with, and the reasoning of, the lawyer.<sup>112</sup>

An ineffectiveness claim is a proceeding intended to enforce the constitutional rights of the former client.<sup>113</sup> The ineffectiveness challenge relates "explicitly to the integrity of the [legal] process."<sup>114</sup> While the conduct of the former lawyer is being challenged, in a greater sense the

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<sup>108</sup> *Id.* ("[A] lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.").

<sup>109</sup> David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 102 (1998).

<sup>110</sup> *See id.* at 95-96.

<sup>111</sup> *See, e.g., State v. Marty*, 404 N.W.2d 120 (Wis. Ct. App. 1987) (upholding a lower court's finding that defense counsel was ineffective because he did not adequately attack the credibility of the victim which was, as the lower court found, "the whole case;" because the state's entire case was based on the testimony of victim, the lower court rejected, as an unreasonable strategy, defense counsel's explanation that he wanted to focus on his alibi defense).

<sup>112</sup> *See Siegel, supra* note 109, at 96.

<sup>113</sup> *See id.* at 101 (quoting *United States v. DeCoster*, 487 F.2d 1197, 1202 n.21 (D.C. Cir. 1973)); U.S. CONST. amend. XIV.

<sup>114</sup> Siegel, *supra* note 109, at 100.

process itself is the real subject of the challenge. As members of the Bar and as a part of the judicial system, lawyers have an interest in the integrity of the judicial process, apart from personal concerns.

Thus, when the postconviction attorney approaches the prior lawyer for information about the case, circumstances impose a duty on the prior lawyer “to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel.”<sup>115</sup> A California ethics opinion notes:

In the criminal context, appellate counsel has a duty to identify arguable issues and to raise them on direct appeal or in related writ proceedings. Full and prompt disclosure by trial counsel of matters which may not be in the record provides for expeditious processing of the client’s case. Where trial counsel refuses to cooperate with the investigation of a claim of ineffective assistance of counsel, the end result may be that formal habeas proceedings may be instituted prematurely by appellate counsel, and this may work to the detriment of the client. In such situations, trial counsel’s refusal to cooperate may harm the client, and by harming the client, counsel is violating the ethical duty she owes her client.<sup>116</sup>

This duty also arises out of the lawyer’s obligation to advise a client of all information bearing on the quality of his or her representation.<sup>117</sup> This obligation gives rise to a duty to inform a client of any omission that may constitute malpractice against the lawyer.<sup>118</sup> Similar reasoning suggests that a lawyer has the obligation to advise the client (as well as a successor attorney who is operating on behalf of the client) of any act or omission implying that the attorney failed to provide effective assistance of counsel.

The reality of the situation, however, is that the prior lawyer has several reasons to not cooperate. But none of these reasons trump the lawyer’s ethical obligations. Lawyers often do not want to cooperate for self-preservation, or to defend their conduct. Being second-guessed is

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<sup>115</sup> Cal. State Bar Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 1992-127 (1992).

<sup>116</sup> *Id.*

<sup>117</sup> Wis. State Bar Ethics, Op. E-82-12 (1982).

<sup>118</sup> *Id.*

not pleasant, and the impulse to defend one's self is all too human.<sup>119</sup> Economic pressures may also affect cooperation. For example, public defender cases may not pay the lawyer particularly well. On top of this, the lawyer, irrespective of whether he or she was appointed or privately retained on the original charges, rarely receives extra compensation for the time spent cooperating with an ineffectiveness claim.<sup>120</sup> The prior lawyer may blame the client for this hassle, particularly if the client failed to cooperate in some way during the representation, or if there was a personality clash.<sup>121</sup>

But a lawyer has an obligation to a client regardless of personal concerns. A lawyer must "take whatever steps are necessary to protect the defendant's right of appeal."<sup>122</sup> These obligations to the client exist independently of any ill will the lawyer harbors toward the client, or any blame the lawyer may reasonably attach to the client for the outcome of their case.<sup>123</sup>

Any confidentiality concerns attached to communications between the former lawyer and the current attorney are analogous to confidentiality concerns involving the file.<sup>124</sup> In other words, absent any contrary directive from the former client, the prior lawyer can, and should, speak freely with the postconviction attorney. In doing so, the lawyer should be honest. The lawyer has an ethical duty barring her from knowingly "mak[ing] a false statement of material fact"<sup>125</sup> including falling on the sword, so to speak, or engaging in a cover-up. "The rules against engaging in professional conduct involving fraud, deceit and misrepresentation do not 'go out the window' just because an attorney's conduct has been called into question by the attorney's former client . . . ."<sup>126</sup>

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<sup>119</sup> See Fox, *supra* note 59, at 1185.

<sup>120</sup> See *id.* at 1186.

<sup>121</sup> See *id.* at 1185-86.

<sup>122</sup> ABA STANDARDS OF CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION STANDARDS § 4-8.2(b) (3d ed. 1993).

<sup>123</sup> See MODEL RULES OF PROF'L CONDUCT 1.16 cmt. (2002). ("Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.")

<sup>124</sup> See *supra* notes 61-112 and accompanying text.

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 (2006).

<sup>126</sup> See MEARS, *supra* note 9, at 14.

## V. Ethical Issues Arising With Prosecutorial Inquiries

In the real world of criminal law, many lawyers see their interests aligning with those of the prosecution once a former client brings, or threatens, an ineffective assistance of counsel claim. But even after bringing such a claim, the former client does not become an adversary, and the prosecutor does not become the former lawyer's attorney. The prosecutor's role does not include protecting the lawyer; instead, the prosecutor's job is to protect the conviction consistent with the overriding requirement to do justice.<sup>127</sup> The former lawyer is only a witness, and witnesses do not really "belong" to any one particular party or side of a case.<sup>128</sup> The filing of an ineffectiveness claim therefore does not empower the former lawyer "to become another arm of the prosecutor's office."<sup>129</sup>

The prudent lawyer will wait until the evidentiary hearing on the claim before disclosing any information to the prosecutor. First, and before any hearing on the claim, the possibility exists that the client will withdraw the claim, especially when pursuing such a claim risks the client's other goals. Second, and more importantly, waiting until after the hearing allows the lawyer to gain the protection of a judicial ruling verifying the waiver of confidentiality and setting forth the scope of that waiver.

While Rule 1.6 allows a lawyer to reveal information "to respond to allegations . . . concerning the lawyer's representation," the Model Rules of Professional Conduct are not the lone rules governing the lawyer's behavior in this situation. The same information is also covered by attorney-client privilege and the work product rule.<sup>130</sup> Note Uniform Rule of Evidence Rule 502, which states that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."<sup>131</sup> The work product

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<sup>127</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor's duty "is not that it shall win a case, but that justice be done.").

<sup>128</sup> Siegel, *supra* note 109, at 95.

<sup>129</sup> MEARS, *supra* note 9, at 19.

<sup>130</sup> See, e.g., WIS. STAT. § 905.03(2) (2000).

<sup>131</sup> UNIF. R. EVID. 502(b) (1999).

privilege protects “mental processes of the attorney.”<sup>132</sup> As the Wisconsin Supreme Court has explained,

a lawyer’s work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means.

This broad definition of lawyer’s work product requires that most materials, information, mental impressions and strategies collected and adopted by a lawyer after retainer in preparation of litigation and relevant to the possible issues be initially classified as work product of the lawyer and not subject to inspection or discovery unless good cause for discovery is shown.<sup>133</sup>

“[T]he mere fact that an attorney offers him or herself as a witness does not automatically waive the attorney-client privilege or work product doctrine” because the client owns the privileges.<sup>134</sup> Moreover, the filing of an ineffectiveness claim, unlike a malpractice action, should not automatically lift the privilege in such a way that the prosecutor is entitled to the entire client file or, necessarily, to all knowledge of the former client or the case obtained by the former lawyer.

Assuming waiver of privilege and confidentiality exists at this stage, difficulties arise in determining the full scope of the waiver. Disclosure of client confidences “should be no greater than the lawyer reasonably believes is necessary to vindicate [the lawyer’s] innocence . . . and appropriate protective orders or other arrangement should be sought by the lawyer to the fullest extent practicable.”<sup>135</sup> The exact nature of the claim and the facts surrounding determine what is “necessary.” Without reviewing the motion itself, the lawyer cannot make an intelligent determination of necessity with any degree of legal sophistication or

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<sup>132</sup> *United States v. Nobles*, 422 U.S. 225, 238 (1975).

<sup>133</sup> *State ex rel. Dudek v. Circuit Court*, 150 N.W.2d 387, 404 (Wis. 1967) (interpreting *Hickman v. Taylor*, 329 U.S. 495 (1947)); *Crull v. Preferred Risk Mut. Ins. Co.*, 153 N.W.2d 591, 593 (Wis. 1967) (quoting *Dudek*, 150 N.W.2d at 404).

<sup>134</sup> *State v. Meeks*, 666 N.W.2d 859, 867 (Wis. 2003) (citing *Swan Sales Corp. v. Joseph Schlitz Brewing Co.*, 376 N.W.2d 640, 648 (Wis. Ct. App. 1985)).

<sup>135</sup> *Siegel*, *supra* note 109, at 110; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. (2007); ABA STANDARDS OF CRIMINAL JUSTICE PROSECUTION AND DEFENSE FUNCTION § 4-8.6 cmt. at 248 (3d ed. 1993); *accord* N.H. BAR ASS’N ETHICS COMM. advisory op. 1984-85/14 (1984).

accuracy. Thus, the lawyer should always request a copy of the motion, reviewing it prior to any disclosure to a party other than the client or the postconviction attorney. Indeed, as a matter of courtesy, the postconviction attorney should provide the prior lawyer with a copy of the motion when filing it with the court.

Problems encountered when determining what is “necessary” to vindicate the lawyer’s innocence are best demonstrated by the following example. A claim of ineffective assistance of counsel for failure to prosecute a suppression motion clearly waives confidentiality and privilege with respect to the decision not to file the motion.<sup>136</sup> Thus, pursuit of such a claim allows disclosure of otherwise privileged communications and information regarding the circumstances of the search, possible witnesses to the search, the client’s standing, and strategic considerations in evaluating the possibility of bringing the motion. This claim, however, should not waive confidentiality or privilege to the extent of allowing the former lawyer to testify about the client’s inculpatory admissions about the crime or the possible testimony of witnesses who, while not called at trial, have no knowledge of the search or seizure. That information is not relevant to whether the failure to file the suppression motion was deficient performance. Moreover, the test for prejudice for a claim of failure to prosecute a suppression motion is whether “there exists a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,”<sup>137</sup> so the strength of trial evidence is irrelevant to the claim.

Other types of claims raise thornier problems concerning the scope of the waiver. When the ineffectiveness claim is based upon an alleged failure to present certain evidence at trial, for example, the test for prejudice is whether there exists a reasonable probability that the lawyer’s error affected the outcome of the trial.<sup>138</sup> In such a situation, is information concerning the possible testimony of other potential witnesses not mentioned in the motion and not specifically a part of the claim “necessary” to reveal? It may be, but only if the information about those potential witnesses was a factor in the decision not to present exculpatory evidence. Determining relevancy is problematic because courts can find

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<sup>136</sup> See Siegel, *supra* note 109, at 110.

<sup>137</sup> See *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

<sup>138</sup> *Strickland v. Washington*, 466 U.S. 688, 694 (1984).

a lack of prejudice and reject an ineffectiveness claim without ever reaching the issue of the lawyer's performance.<sup>139</sup>

Nevertheless, once an ineffectiveness claim is filed, the prosecutor often begins calling the lawyer or accosting her in courthouse hallways seeking information. The confidentiality concerns raised in this situation differ markedly from those raised when the postconviction attorney makes such inquiries. Under the Model Rules of Professional Conduct as they existed prior to 2002, the lawyer was barred from using "information relating to the representation to the disadvantage of the former client" except as the rules on confidentiality permitted.<sup>140</sup> This bar continued after termination of the client-lawyer relationship.<sup>141</sup> The current Model Rules of Professional Conduct are more explicit; Rule 1.9(c)(2) prohibits a lawyer who has formerly represented a client from revealing information relating to the representation "except as these Rules would permit or require with respect to a client."<sup>142</sup> The provisions of both of these rules are intended to protect the client and not the lawyer. The lawyer lacks the power to waive the protections unilaterally without the client's consent. Although the lawyer must assert the privilege, he does so on behalf of the client only.<sup>143</sup>

In the context of an ineffective assistance of counsel claim, no disclosure of information to the prosecutor logically comes within any rule allowing a lawyer to reveal confidences which are "impliedly authorized in order to carry out the representation."<sup>144</sup> The prosecutor's interests are in conflict with those of the former client. While the former client's interest is in overturning, at least in some part, the conviction and judgment, the prosecutor's interest is in upholding the conviction. Because of the inherent conflict of interest between the client and the prosecutor, the client's postconviction attorney (or the client himself in a *pro se* situation) is in a better position than the former lawyer to determine what information helps the client, what information hurts the client, and what information should be ultimately revealed. Therefore,

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<sup>139</sup> *Id.*; see generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.10 (2d ed. 1992).

<sup>140</sup> MODEL RULES OF PROF'L CONDUCT R. 1.9 (2007).

<sup>141</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2000).

<sup>142</sup> MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2) (2007).

<sup>143</sup> *E.g.*, WIS. STAT. § 905.03(3) (2000).

<sup>144</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

the lawyer's best course of action is to avoid conversations with the prosecutor, with the limited exception of procedural discussion involving such matters as scheduling.

## **VI. Ethical Issues Arising When the Previous Lawyer is Called to Testify**

Once an ineffective assistance of counsel claim proceeds to a hearing, the client is fully committed to the claim. At this point, attorney-client privilege has, without question, been waived as to those matters which bear directly on the claim. Because of the possibility of dispute over the extent of the waiver,<sup>145</sup> a prudent lawyer is well-advised to get a clear ruling concerning the scope of the waiver from the court.

Once the scope of waiver has been determined and the prior lawyer is testifying, the lawyer must testify truthfully; neither deliberately testifying in order to make her conduct appear better to protect herself, nor knowingly making her conduct seem worse to help the client is appropriate.<sup>146</sup> Rule 3.3(a)(1), which deals with candor toward the tribunal, provides "a lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal."<sup>147</sup> Rule 3.3(a)(3) also prohibits a lawyer from knowingly and deliberately offering "evidence that the lawyer knows to be false."<sup>148</sup> This duty to be truthful exists under Rule 3.3(c) "even if compliance requires disclosure of information otherwise protected by Rule 1.6 [confidentiality]."<sup>149</sup>

## **VII. Ethical Issues Arising When the Former Client Contacts the Prior Lawyer Directly**

When the prior lawyer knows a former client retained another attorney, the lawyer is prohibited from communicating with the former client.<sup>150</sup>

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<sup>145</sup> See discussion *supra*, at notes 136-41.

<sup>146</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* R. 3.3(a)(3).

<sup>149</sup> *Id.* R. 3.3(c).

<sup>150</sup> *Id.* R. 4.2.

The new Model Rules of Professional Conduct strengthen this rule by clearly prohibiting contact even if the former client “initiates or consents to the communication,” unless the lawyer has the consent of the current attorney or the communication is otherwise authorized by law.<sup>151</sup> The pull of courtesy, the desire not to further provoke an unhappy client, and the desire to justify one’s actions make it very difficult to simply ignore such letters and inquiries. There are options, however, other than simply ignoring the communication. The Rules do not bar the lawyer from communicating with the former client’s attorney; the lawyer can seek the consent of the current attorney or the lawyer can write to that attorney and ask the attorney to explain the situation.

The above problem arises less often than the difficulties inherent in communicating with former clients who are not currently represented by counsel. Clients bringing ineffective assistance of counsel claims commonly lack representation.<sup>152</sup> If an unrepresented, former client brings an ineffectiveness claim against a lawyer, the rules guiding communication between them are less clear. Rule 4.3, which concerns dealing with unrepresented persons, appears to assume that the unrepresented person is not the client.<sup>153</sup> Although it is not clear that Rule 4.3 applies in the situation at hand, it may provide some useful guidance.

Rule 4.3 requires a lawyer dealing with an unrepresented person to inform the unrepresented person of the lawyer’s role in the matter.<sup>154</sup> In this context, and if the requirement applies, the lawyer has an affirmative duty to explain that her role is one of a witness, that the lawyer cannot represent or otherwise aid the former client with legal advice, and that witnesses are not advocates for any particular point of view.<sup>155</sup> The ABA Comment to this rule suggests that, where necessary, counsel should explain that there are interests opposed to the interest of the unrepresented person.<sup>156</sup> When the unrepresented person is a former client who has filed

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<sup>151</sup> *Id.* R. 4.2 cmt. 3.

<sup>152</sup> For a brief discussion of the problem, see Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 35 n.22 (2003).

<sup>153</sup> See MODEL RULES OF PROF’L CONDUCT R. 4.3 (2007).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* R. 4.3 cmt.

a claim of ineffective assistance of counsel, the lawyer has a clear interest in being found to be effective and should disclose this interest to the former client.

Given the inherent conflict between the lawyer and the client, the lawyer should refrain from giving any legal advice other than the advice to obtain counsel. Such restraint is obligatory if the lawyer “knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”<sup>157</sup> Under the Comment to Rule 4.3, whether a lawyer is giving impermissible advice “may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.”<sup>158</sup> Because the lawyer was considered a trusted person to whom the client looked for advice and counsel, communication of any legal advice, other than the advice to seek another lawyer, is unethical and unwise. In addition, many criminal defendants lack any substantial education, which requires an abundance of caution from the prior lawyer due to the increased potential for taking advantage of the former client.

## Conclusion

The competing emotional tugs inherent in ineffective assistance of counsel claims make the accused lawyer’s gut a poor guide to ethics in cases involving these claims. The Model Rules of Professional Responsibility and the new Model Rules of Professional Conduct are a more effective lodestar, and both the attorneys considering potential ineffective assistance of counsel claims and the lawyers facing potential claims should keep them close for reference.

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<sup>157</sup> *Id.* R. 4.3.

<sup>158</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 4.3 cmt. (2002).

