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## THE CONTINUING DUTY THEN AND NOW

*David M. Siegel\**

### I. INTRODUCTION

The recognition in the American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”)<sup>1</sup> of a continuing duty on the part of defense counsel to safeguard the interests of former clients by facilitating the work of successor counsel was, and is, essential to implementing post-conviction review of the effectiveness of their representation.<sup>2</sup> It is very difficult to meaningfully assess a defense lawyer’s representation if one cannot access her files (or if they are incomplete) and her strategic thinking and research ideas, let alone her testimony. The continuing duty’s inclusion in 2003 was “new” insofar as prior practice guidelines and public recognition were concerned (with the exception of one state ethics opinion<sup>3</sup> and one undistinguished scholarly article);<sup>4</sup> but over a century before, there had been isolated instances of lawyers discharging a continuing duty to former clients by facilitating their post-conviction efforts. The continuing duty’s inclusion in the ABA Guidelines was remarkable, not as a break from existing doctrine, but because it had almost never been articulated as extending, in scope and duration, to affirmative practices during the post-conviction phase.

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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], available at <http://www.ambar.org/2003Guidelines>.

2. *Id.* Guideline 10.13, at 1074.

3. State Bar of Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 1992-127 (1992), available at <http://ethics.calbar.ca.gov/linkclick.aspx?fileticket=FxYHJ4sE3Ws%3d&tabid=839>.

4. 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, 107-08 & nn.80-82 (1999).

Part II of this Article reviews these historical antecedents (many of which involved capital cases) in which lawyers acted upon a continuing duty to enable their former clients to advance post-conviction claims, sometimes before any existing jurisprudence supported these claims.<sup>5</sup>

Operationalizing the continuing duty, however, required more than simply stating its existence. It required that practitioners take the four steps set forth in Guideline 10.13,<sup>6</sup> even when doing so could present an apparent ethical dilemma for former counsel: facilitating post-conviction claims alleging their own ineffective assistance.<sup>7</sup> The Guideline offered an unqualified assertion concerning actions former counsel should take in detailing her strategic thinking to successor counsel, even when detailing this thinking would be used for the purpose of the former client's claim of ineffective assistance of counsel ("IAC"): "To do otherwise is professionally unethical."<sup>8</sup> At least one jurisdiction-specific performance guideline promulgated since issuance of the ABA Guidelines reflects this position as well.<sup>9</sup> This latent ethical conflict, creating a fundamental practical hurdle for many post-conviction claimants, became patent in 2010 with the Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility ("ABA

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5. See *infra* Part II.

6. ABA GUIDELINES, *supra* note 1, Guideline 10.13, at 1074 (setting forth that previous counsel must maintain files that will adequately "inform successor counsel of all significant developments," provide the files and all information about the representation to successor counsel, "shar[e] potential . . . areas of legal and factual research with successor counsel," and cooperate in successor counsel's "professionally appropriate legal strategies").

7. *Id.* Guideline 10.13 cmt., at 1075 ("Specifically, [prior counsel] must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.").

8. *Id.*

9. The Texas State Bar's Guidelines and Standards for Texas Capital Counsel specifically delineate how counsel should discharge the continuing duty—both as successor counsel and prior counsel. See *generally* STATE BAR OF TEX., GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, in 69 TEX. BAR J. 966, 966-982 (2006), available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/State/TX\\_Bar\\_Association\\_adopated\\_version\\_of\\_ABA\\_Guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Association_adopated_version_of_ABA_Guidelines.authcheckdam.pdf). With respect to successor counsel, Guideline 11.1(B) provides: "Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel." *Id.* Guideline 11.1(B), at 972. With respect to prior counsel, Guideline 12.1(F) provides:

Trial counsel should cooperate with successor direct appeal, habeas and clemency counsel in providing relevant information to successor counsel, including trial counsel's prior representation files upon the client's consent, in order to maintain continuity of representation, and to assist future counsel in presentation of issues relevant to subsequent litigation efforts.

*Id.* Guideline 12.1(F), at 975.

Committee” or “Committee”),<sup>10</sup> addressing how counsel’s continuing duty to her former client should affect her interaction with the prosecutor. The Formal Opinion’s reinforcement of the continuing duty should increase awareness of this duty beyond the more specialized practice of capital post-conviction litigation.<sup>11</sup> The relatively few reported cases to date concerning implementation of this duty and the carrying out of the steps recommended by the ABA Committee suggest it is being formalized in the capital and non-capital contexts. Thus, it is particularly odd that several state ethics bodies have disagreed with the Committee’s recommended steps. Part III of this Article reviews the developing jurisprudence and the treatment of the Formal Opinion in the four ethics bodies that have addressed the matter to date.<sup>12</sup> It is hoped that greater familiarity with the process will lead to a different conclusion concerning the viability of the Formal Opinion.

## II. HISTORICAL ANTECEDENTS TO THE CONTINUING DUTY OF COUNSEL

The continuing duty has three principal sources: the duty of loyalty, the duty of competence, and the constitutional guarantee of effective assistance.<sup>13</sup> The duty of loyalty, principally a duty to safeguard client confidences and defend privileged communications against compelled disclosure, is hundreds of years old. The duty of competence is much newer, though perhaps not as new as is typically assumed. It is usually understood as dating, for federal constitutional purposes, back to *Powell v. Alabama*,<sup>14</sup> but court decisions had found representation inadequate under state constitutions and state statutes for decades before *Powell*, and had also occasionally cited the Federal Constitution.<sup>15</sup>

That there is a conflict between a lawyer for one party in a criminal case, having represented the other side, even if there is no obvious use of the knowledge gained by the prior representation, was firmly established

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10. ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010) [hereinafter ABA Opinion].

11. Kim Alderman & Byron Lichstein, *Protect Confidentiality in Ineffective Assistance Claims*, WIS. L.J. (Oct. 19, 2010, 11:19 AM), <http://www.wislawjournal.com/2010/10/19/protect-confidentiality-in-ineffective-assistance-claims>. 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 Opinion 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.

12. See *infra* Part III.

13. See *State v. Lynch*, 796 P.2d 1150, 1155 (Okl. 1990).

14. 287 U.S. 45, 71-72 (1932).

15. See, e.g., *Batchelor v. State*, 125 N.E. 773, 776 (Ind. 1920).

long before formal ethics rules existed. Similarly, decisions were rendered invalidating convictions for incompetent representation before the U.S. Supreme Court found a constitutional basis for the right to effective assistance of counsel. A brief review of this history suggests these instances were often capital cases.

### *A. Duty of Loyalty*

The duty of loyalty, which generally forbids a lawyer who has taken confidences from a client from subsequently representing one of adverse interest in the same matter, is quite old.<sup>16</sup> Its earliest American application in a criminal case appears to have been in an 1852 Georgia decision in which a former solicitor general of the state, who had “prefer[red] a bill of indictment,” was thereafter barred from representing the indicted defendant as a matter of public policy, notwithstanding his departure from government service, because he would be seen as having knowledge of the case that would thereby unavoidably be used by the defense.<sup>17</sup> An 1861 Indiana Supreme Court decision overturning a rape conviction addressed the converse side-switching situation of a lawyer who was briefly retained and paid by a defendant and had some communication with him, who thereafter returned his retainer and instead represented the complaining witness and prosecuted the case.<sup>18</sup>

Explicitly noting that it was not addressing any contract issues, the Indiana Supreme Court cited some practice treatises and based its decision on what might be termed fundamental fairness—although the court cited no specific legal principle.<sup>19</sup> In a per curiam opinion, the court explained the consequences of permitting such conduct:

With what confidence could one, arraigned upon a charge of crime, confer with his attorney, or reveal to him his evidence, and thereby prepare for his defense, if that officer is permitted, after thus acquiring such knowledge, to change their relative positions, and instead of standing up as his defender, to stand forth as his accuser. Would he not consider it better to stand mute, dumb, as the sheep before the shearer, rather than disclose the evidence which might thus be turned against

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16. Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 677 n.4 (1997) (citing PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* 123-24 (1992)). Professor Charles Wolfram notes an apparent instance of lawyer loyalty at issue from counsel switching sides in a 1282 English pleading. *Id.*; see also *Cholmondeley v. Clinton*, 19 Ves. 261, 261-63, 266-68 (1815).

17. *Gaulden v. State*, 11 Ga. 47, 47, 49-51 (1851).

18. *Wilson v. State*, 16 Ind. 392, 394-96 (1861).

19. See *id.*

him? He might perhaps, truthfully, believe it more to his interest to return to the practice of a semi-barbarous age, when the prisoner was not heard in his defense by counsel, or witnesses in his behalf, than thus to have the weapons of his defense turned against him, by those in whom, by the acknowledged law and the statute, he had a right to confide.<sup>20</sup>

The court recognized, in language long predating modern concepts of cognitive bias and behavioral economics,<sup>21</sup> that although the defendant averred that his former lawyer had been told the “facts and evidence in his defense,” it was more than a little curious that the lawyer had carefully sworn in response that there was no conflict because he had not thereby learned the “grounds or means of defense.”<sup>22</sup> This, the court concluded, was not possible.<sup>23</sup>

Professor Charles Wolfram, in a seminal modern account of the Former-Client conflicts problem, concludes that, with two important exceptions, the duty of confidentiality essentially demarcates the duty of loyalty to the former client.<sup>24</sup> One of those exceptions, the “attack on [one’s] own work,” is the specific instance of the obligation of the continuing duty of counsel.<sup>25</sup>

### *B. Duty of Competent Representation*

Before the ABA acknowledged that there might be a tension between counsel’s duty to provide competent representation and its continuation after the representation—as an obligation to assist the former client’s successor counsel, even if it meant showing counsel’s own shortcomings—there had to be a duty to provide competent representation in the first place. A 1912 *Yale Law Journal* comment

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20. *Id.* at 395.

21. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 489 & nn.127-28 (2009) (citing authorities for the effect of psychological phenomena of confirmation and hindsight biases affecting prosecutors’ ability to re-examine convictions with claims of innocence).

22. *Wilson*, 16 *Id.* at 395 (internal quotation marks omitted).

23. *Id.* The court noted:

We cannot see how he could know, in advance of the trial, that the facts and evidence in favor of the defense, if disclosed to him, could not be made available by him, in some one of the phases the defense might assume, either in shaping questions or producing witnesses. If the defendant had not disclosed the facts and evidence in the case, why did not Mr. *Flagg* so state? He was certainly attempting to place himself in a position that should have called forth the utmost precision, in showing that he had not acquired from the defendant any information which he might use to his detriment.

*Id.* at 395-96.

24. Wolfram, *supra* note 16, at 680.

25. *Id.*

succinctly summarized the state of the law, which will be familiar to anyone who has read *Strickland v. Washington*,<sup>26</sup> thusly: “The mere incompetency of an attorney does not ordinarily constitute a ground for a new trial nor justify a reversal. There must be a strong showing both of incompetency and prejudice.”<sup>27</sup> Although intoxication,<sup>28</sup> insanity, and general incompetency of counsel would not qualify, capital cases appeared to call, at least in some instances, for relaxation of this rule. “In criminal cases, and especially in cases involving the life of the defendant, the court would probably be justified in adhering to the rule somewhat less strictly.”<sup>29</sup>

The acknowledged law, from civil cases and generally applied equally in criminal ones, was that a *client* was held responsible for an attorney’s negligence or incompetence.<sup>30</sup> These early (often capital) cases recognized, as a basis for invalidating a conviction, the deprivation of a fair trial or the protection of a defendant from “oppression.”<sup>31</sup> While the reported cases are few, there were early instances of attorneys, outmatched or outgunned by the government, who subsequently averred their own shortcomings.

In an 1893 capital murder case from the New Mexico Territory, for example, a defendant convicted in a highly charged atmosphere, manacled and surrounded by armed men throughout his trial (less than a week after the death), sought a new trial on the basis that he was denied a change of venue and a continuance, even though his trial counsel had sought neither.<sup>32</sup> Instead, on appeal, his (new) lawyer offered an affidavit from trial counsel explaining that he had feared violence against his client if he had made either motion.<sup>33</sup> The court noted trial counsel’s intimidation was shown both by his affidavit and “even more clearly” by the record, revealing he made no objections nor offered any argument.<sup>34</sup> After the prosecution rested, the defendant “thr[ew] himself upon the

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26. 466 U.S. 668 (1984).

27. Comment, *Technicalities in Criminal Procedure—Reversal for Inadequacy and Inefficiency of Counsel*, 21 YALE L.J. 505, 505 (1912).

28. *O’Brien v. Commonwealth*, 74 S.W. 666, 669 (Ky. 1903) (ruling that the appellate court is powerless to review a decision of the trial court rejecting a claim that counsel was too intoxicated to perform adequately as defendant made no complaint at trial).

29. *State v. Bengé*, 17 N.W. 100, 102 (Iowa 1883).

30. *State v. Lewis*, 9 Mo. App. 321, 324 (1880), *aff’d*, 74 Mo. 222 (1881) (“As a general rule, parties are held to a strict responsibility for the acts or omissions of their attorneys.”).

31. *Id.* at 324-25.

32. *Roper v. Territory*, 33 P. 1014, 1015 (N.M. 1893). His lawyer had been warned at a citizens’ committee meeting prior to trial that his client would receive a “fair trial,” but that there would be no changes of venue or continuances. *Id.* at 1016 (internal quotation marks omitted).

33. *Id.* at 1016.

34. *Id.*

mercy of the court” and requested an additional lawyer, who was promptly appointed to represent him.<sup>35</sup> The New Mexico Supreme Court found he had been denied a fair trial because, though he would have been entitled to a change of venue as an absolute right under the circumstances, he was deprived of it through intimidation of his counsel.<sup>36</sup>

A similar South Carolina lynch mob trial of an African-American defendant convicted and sentenced to death was challenged on the basis of his trial lawyer’s acknowledged mental instability during his case.<sup>37</sup> The lawyer had been “mentally unbalanced” and hospitalized at some point before the trial, and admitted that he had been “unbalanced” during the trial and during the defendant’s subsequent sanity hearing (to determine if the defendant had become insane and so could thereby not be executed).<sup>38</sup> Nevertheless, the lawyer’s admitted mental instability did not appear to have affected the quality of his representation. It did “not appear that he did or left undone anything which would probably have affected the result.”<sup>39</sup> Indeed, he appeared to have done better than the average lawyer.

Long before the Federal Constitution was held to impose a right to effective assistance of counsel, one state court decision, applying a state constitution’s guarantee of assistance of counsel, had so held. The earliest reported American decision invalidating a conviction for ineffectiveness of counsel appears to be an 1882 opinion by the St. Louis Court of Appeals<sup>40</sup> overturning a capital murder conviction and death sentence.<sup>41</sup> The decision is strikingly modern: it examines the

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35. *Id.*

36. *Id.*

37. *State v. Bethune*, 75 S.E. 281, 282 (S.C. 1912). This is the appellate court’s description of the trial:

Unusual interest on the part of the public was taken in the trial, and there was considerable feeling of resentment and indignation against the defendant, which was manifested by threats on the part of the friends and relatives of the deceased that, if he were convicted of anything less than murder, he would be lynched. These threats were brought to the attention of the presiding judge, who caused 10 or 12 extra deputies to be sworn in to preserve order and protect the prisoner. During the trial, the courthouse was crowded to standing room. The space within the bar was filled, and some of the audience were allowed to sit on the steps leading to the judge’s bench.

*Id.*

38. *Id.*

39. *Id.*

40. Edward Lewis and Robert Bakewell were two of the original justices of this court, which was established in 1875. Joy I. Hannel, *Celebrating 125 Years of Justice: A History of the Missouri Court of Appeals, Eastern District 1876-2001*, YOUR MO. CTS., <http://www.courts.mo.gov/file.jsp?id=3500> (last visited Feb. 16, 2014).

41. *State v. Jones*, 12 Mo. App. 93, 95-98 (1882). The opinion, by the three-judge panel, reads that one justice concurred in the opinion and a third “concur[red] in the result, but has not seen this



quality of counsel's representation despite the absence of any legal error in the trial.<sup>42</sup>

The court acknowledged the "rigid rule" that in civil cases there is no relief available from a judgment based upon attorney negligence,<sup>43</sup> though it noted a New York civil case in which relief had been granted upon a showing of "gross ignorance, incompetence, or misconduct" of an attorney.<sup>44</sup> The absurdity of applying a rule that forces a defendant to suffer his lawyer's shortcomings will sound familiar. The court stated:

But must there be absolutely no limit to the operation of this rule, even where a human life is at stake? If an attorney should become insane during the progress of a trial, and should thereupon take such steps as should insure the conviction of an innocent client, would no relief be possible? To say so, would be a libel on the law. In looking over this record, we find, in the performance of the counsel for the defendant, an exhibition of ignorance, stupidity, and silliness that could not be more absurd or fantastical, if it came from an idiot or a lunatic.<sup>45</sup>

Basing its decision on the Missouri Constitution's grant of a right to counsel in criminal cases, the court held "that the prisoner here, in effect, went to his trial and his doom without counsel, such as the law would secure to every person accused of crime."<sup>46</sup> Not only did the court base its decision on an understanding of the right to counsel as a right to effective assistance of counsel, but it also acknowledged (at least in dicta) a continuing ethical obligation of counsel to one's former client—even in a post-conviction allegation of deficient performance—by questioning the appropriateness of trial counsel's post-conviction submissions. More than 120 years *before* the publication of the ABA Guidelines, a court in a capital case questioned the propriety of a lawyer voluntarily providing a contrary view of the facts from that of his former client.<sup>47</sup>

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completed opinion." *Id.* at 98.

42. *Id.* at 93-94. The court in *State v. Jones* held:

It is not satisfactorily shown to us that any error was committed by the court in the conduct of the trial, but our attention is strongly called to its refusal to sustain a motion for a new trial, based upon the alleged ignorance, imbecility, and incompetency of the defendant's attorney, and his gross mismanagement of the cause.

*Id.*

43. *Id.* at 97; *Bowman v. Field*, 9 Mo. App. 576, 576 (1881).

44. *Jones*, 12 Mo. App. at 97 (citing *Sharp v. Mayor*, 31 Barb. 578 (N.Y. Gen. Term 1860)).

45. *Id.* at 94-95. *But see State v. Dreher*, 38 S.W. 567, 570-71 (Mo. 1897).

46. *Jones*, 12 Mo. App. at 98.

47. *Id.* at 93-95.

The defendant was alleged to have confronted the victim lying in a hammock, without any witnesses, who jumped up and swore he would kill the defendant.<sup>48</sup> The defendant claimed self-defense, and apparently gave this account to the authorities.<sup>49</sup> Defendant did not testify at trial, and later claimed that he told his lawyer he wanted to testify in his own defense, but was advised that he was not competent to do so as he was charged with murder.<sup>50</sup> Defendant averred this in an affidavit, and trial counsel responded with his own affidavit to the effect that he had advised the defendant that, while he had a right to testify in his own defense, his statement to the authorities would be sufficient for the purposes of the defense.<sup>51</sup>

So far, this would be a familiar dispute between former client and counsel concerning what was said or not said. What is significant is the court's description of the lawyer's affidavit in response. The court found defendant's affidavit persuasive, and specifically questioned the ethical position of counsel in offering an affidavit:

Considering the existing exigencies, it may be doubted whether the reason given by the attorney for keeping his client off the stand was any more creditable to his professional discrimination than the one stated by the prisoner. But waiving that, and also *the seeming impropriety of an attorney's volunteering an affidavit to prevent his convicted client from getting a new trial*, we think that the general aspect of the record so far corroborates the affidavit of the prisoner as to entitle him to the benefit of the doubt.<sup>52</sup>

This was apparently an astonishing result. Seven years later, considering another death-sentenced defendant's claim that his attorney too had been so incompetent as to deny him a fair trial, the Missouri Supreme Court declared:

After a most laborious search we have found but one case in which an appellate court has reversed a sentence or judgment on the ground of the negligence or incompetency of an attorney. That case is *State v. Jones*. In that case no authority was found upon which to base the ruling, and we cannot find that it has ever been followed in this or any other state. We readily agree with the learned court that decided that case that the record presented a most lamentable example of ignorance and incompetency, and that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent

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48. *Id.* at 95-96.

49. *Id.* at 96.

50. *Id.*

51. *Id.*

52. *Id.* (emphasis added). *But see* *State v. Dreher*, 38 S.W. 567, 570 (Mo. 1897).

attorney for the prisoner; but we think that the court of appeals in that case suffered a hard case to make bad law, and ignored the fact that it was a court for the review of errors only, and that it was confined to such errors as appeared on the record proper, and to such exceptions as had been ruled on by the trial court. For the distinguished jurist who wrote that opinion and his associates we have the profoundest respect. We doubt not that, in that individual instance, their judgment wrought justice; but we cannot give it our sanction as a rule of practice or procedure, and it is accordingly disapproved.<sup>53</sup>

Not only did the Missouri Supreme Court reject the concept that ineffectiveness of counsel that was not due to some conduct of the state could be a basis for relief,<sup>54</sup> but it explicitly acknowledged the reputational interests of counsel in a post-conviction attack:

We are bound to presume that the court which appointed the counsel to defend the prisoner in this case knew him to be a reputable member of the bar, and that it discovered nothing in this conduct calling for his displacement and the appointment of another in his stead. To sustain this contention would be to condemn the counsel, who gave defendant his services without reward, without according him a hearing in a matter vitally affecting his professional standing, and would be an indirect censure of the court, who was a witness to his conduct throughout the trial. We will not do either.<sup>55</sup>

Despite the absence of constitutional recognition that representation could be so deficient as to invalidate a conviction, a handful of early—often death penalty—cases held just that. The Illinois Supreme Court held in 1911 that an unemployed coal miner convicted of murdering a railroad construction worker outside Marion, Illinois had received representation so deficient from his two appointed lawyers that he faced “oppression,” in that one lawyer had fewer than two years of experience and the other had practiced only civil law.<sup>56</sup>

Similarly, in *People v. Nitti*,<sup>57</sup> death sentences for an Italian immigrant convicted of murdering the farmer for whom he worked in (then) rural Cook County and for the farmer’s wife (who allegedly had

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53. *Dreher*, 38 S.W. at 570-71 (citation omitted).

54. The court explained:

The neglect of an attorney is the neglect of his client, in respect to the court and his adversary. The decisions are too numerous to cite, but their uniform tenor is to the effect that neither ignorance, blunders, not misapprehension of counsel, not occasioned by his adversary, is ground for setting aside a judgment or awarding a new trial.

*Id.* at 570.

55. *Id.* at 571.

56. *People v. Blevins*, 96 N.E. 214, 215, 217-18 (Ill. 1911).

57. 143 N.E. 448 (Ill. 1924).

an improper relationship with the immigrant), were set aside because the Illinois Supreme Court found insufficient evidence.<sup>58</sup> The insufficiency of the evidence, however, was determined in light of the spectacularly poor performance of counsel. “The attorney who represented defendants in the trial court seemed to be unfamiliar with the simplest rules of evidence and incapable of comprehending the rules when suggested to him by the trial court. A few quotations from the record will demonstrate his ignorance and stupidity.”<sup>59</sup>

The deprivation of counsel solely through deficient performance, then still not technically a federal constitutional violation, was implicitly found to be one, as it was also found to be a violation of state statutes providing for provision or appointment of counsel to indigent defendants. The court noted:

A layman of ordinary intelligence would have conducted a much better direct examination of this witness. Both federal and state Constitutions provide that an accused person shall have the right to be represented by counsel when called to answer a criminal charge, and the Legislature has further provided that, if the accused is unable to procure counsel, “the court shall assign him competent counsel, who shall conduct his defense.” These provisions are not mere empty formalities.<sup>60</sup>

These early, often capital, cases found that a state constitution or statute providing for counsel could be violated, by depriving a lawyer of a continuance or time to adequately prepare, which could effectively undermine the functioning of counsel. So, for example, a lawyer appointed as substitute counsel in a capital murder case could not be ordered to begin the trial the day of his appointment, lest the right to counsel be a “barren right.”<sup>61</sup> While there was no federal constitutional

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58. *Id.* at 449, 452, 457.

59. *Id.* at 452.

60. *Id.* at 453.

61. *See, e.g.,* *State v. Ferris*, 16 La. Ann. 424, 425 (1862). In *Ferris*, the court explained: The law in securing to them the assistance of counsel did not intend to extend a barren right; for of what avail would be the privilege of counsel to have free access to the prisoner at all reasonable hours, if on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into the investigation of the cause?

The counsel appointed by the court is entitled to a reasonable time for preparation; and this necessitates a postponement of the trial.

*Id.*; *see also* *State v. Lewis*, 9 Mo. App. 321, 322, 325 (1880), *aff’d*, 74 Mo. 222 (1881) (setting aside the capital murder conviction of an African American defendant, whose trial counsel had “three working-days” to prepare and who did not subpoena his numerous alibi witnesses). The *Lewis* court found:

When a human life is at stake, every instinct of humanity, every sentiment of justice,

right to the appointment of counsel, let alone a federal constitutional right to effective assistance of counsel, these cases (many with affidavits of trial counsel themselves) demonstrated that lawyers could be sufficiently inadequate to afford—and later were sometimes themselves willing to show—at least a few condemned defendants a new trial.

### III. IMPLEMENTING THE CONTINUING DUTY

While the ABA Guidelines have been cited by the U.S. Supreme Court even before the 2003 revisions,<sup>62</sup> remarkably few cases have cited Guideline 10.13,<sup>63</sup> which sets forth the continuing duty. Eight states or

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demands that the particular facts of the case be more narrowly looked into, so that mere weakness, ignorance, or helplessness may not be visited with the inflictions designed by a general rule to punish negligence, trifling, or scheming for a delay of justice. Men must not be murdered by technicalities. It is possible, in the present case, that the acts and omissions of the defendant's attorney resulted from nothing more than a mere negligence or inattention, such as the client should be bound to, with all its consequences, in an attorney of his own selection. But there is at the same time in the facts detailed such a flavor of deliberate and persistent refusal to make any preparation whatever for defense at the trial, with such a strange desertion of the defendant,—leaving him to his fate in the face of impending disaster,—that it is by no means difficult to imagine rather the presence of willful and deliberate treachery. An attorney is an officer of the court, selected and appointed as such for qualifications which imply at least a certain guaranty that he will be honest and faithful to those who may entrust him with their causes. To this guaranty, whatever may be its real limits or extent, the law and the courts are necessary parties.

*Lewis*, 9 Mo. App. at 324.

62. See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The Court in *Wiggins* noted:

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."

*Id.* (citation omitted). Prior to the ABA Guidelines, the Court had referenced the ABA Standards for Criminal Justice in *Strickland v. Washington*. See 466 U.S. 668, 709 & n.3 (1984) (Marshall, J., dissenting) (citing ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980)). In 2005, the Court explicitly relied upon the ABA Guidelines in *Rompilla v. Beard*. 545 U.S. 374, 387 & n.7 (2005).

63. One reported case has cited the Guideline 10.13 in recounting a defendant's argument. *Bane v. State*, No. W2009-01653-CCA-R3-PD, 2011 WL 2937350, at \*30 (Tenn. Crim. App. Mar. 7, 2012). The ABA's National Capital Standards Database, which tracks implementation of the ABA Guidelines, notes only this one citation to 10.13. See *The Database*, AM. B. ASS'N NAT'L CAP. STANDARDS DATABASE, <https://www.capstandards.org/about/database> (last visited Feb. 16, 2014). The Guideline has also been explicitly added to the commentary to Rule 6.3(d) of the Arizona Rules of Criminal Procedure, which states:

Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with the complete, original file and records consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.13 (2003). The purpose of these rules is to ensure that files are maintained in accordance with the *ABA Guidelines* and to reduce the delay that

sub-state level jurisdictions have, at least, officially implemented some portion of the Guidelines;<sup>64</sup> and some courts<sup>65</sup> and several defender organizations have added Guideline 10.13 or its substance to their performance standards.<sup>66</sup>

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sometimes occurs in preparing the file for transfer. A file should be properly maintained during the representation and properly stored so it can be expeditiously provided to successor counsel.

ARIZ. R. CRIM. PROC. R. 6.3(d) cmt., in 16A ARIZ. REV. STAT. ANN. (West Supp. 2013). Several commentators have discussed Guideline 10.13. See Robert S. Burke, *The Illinois Death Penalty Defense System and the ABA Capital Defense Guidelines*, 29 JUST. SYS. J. 348, 354 (2008) (“Several Guidelines (10.13, 10.14, 10.15.1, and 10.15.2) concern the duties of counsel after conviction, including the duty to assist successor counsel if there is one.”); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1189 (2003) (“This is an institutional and inevitable conflict, and therefore it is one that gives particular meaning, in my view, to the obligation contained in Rule 1.16 for the lawyer to take steps to protect the client’s interest to the extent reasonably practicable.”); David J. Kessler, *Spoliation in Capital Post-Conviction Proceedings: Theory of Spoliation in Habeas Corpus – Part I*, CHAMPION, Nov. 2005, at 14, 15-16; David M. Siegel, *What (Can) (Should) (Must) Defense Counsel Withhold from the Prosecution in Ineffective Assistance of Counsel Proceedings?*, CHAMPION, Dec. 2011, at 18, 22, 27 n.70 [hereinafter Siegel, *Withhold from the Prosecution*].

64. See IMPLEMENTATION OF THE 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 1 (2012), available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/implementation\\_fact\\_sheet\\_01\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet_01_2012.authcheckdam.pdf).

65. Certification for appointment as capital defense counsel in Maricopa County, Arizona now provides, by the court-adopted legal representation plan as referenced in Guideline 2.1, that “The Capital Defense Review Committee shall apply, in addition to the foregoing performance and practice standards, the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.” *In re Adopting a Plan for Review of Appointed Defense Counsel*, No. 2012-118, slip op. at 10 (Ariz. Super. Ct. Aug. 10, 2012).

66. The Georgia Public Defender Council has adopted Guideline 10.13 verbatim as Standard 13.1 of the Georgia Death Penalty Standards. GA. DEATH PENALTY STANDARDS, standard 13.1, at 17-18, available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/State/GA\\_death\\_penalty\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/GA_death_penalty_standards.authcheckdam.pdf).

District Public Defenders in Louisiana are, as of 2010, charged as part of their duties in establishing a capital representation plan with “ensuring the continuing cooperation of trial counsel and defense team members with appellate and post conviction counsel.” See LA. ADMIN. CODE tit. 22, pt. XV, §§ 905A.1.b. (2011).

Nevada adopted Guideline 10.13 verbatim as Standard 17 of the Nevada Indigent Defense Standards of Performance. NEV. INDIGENT DEF. STANDARDS OF PERFORMANCE, standard 17, at 17, available at <http://www.washoecounty.us/repository/files/36/ADKT411.CapPerfStds.pdf>.

Amendments to the Rules of Superintendence for the Courts of Ohio were adopted by the Supreme Court of Ohio on January 12, 2010, and became effective on March 1, 2010, which provide that only attorneys who have been qualified by the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases may be appointed to handle capital cases, and that “[t]he appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the American Bar Association’s ‘Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases’ and referred to herein as ‘high quality representation.’” OHIO R. CT., SUP. R. 20.03(A) (2011).

Oregon’s Office of Public Defense Services’s Report to the Public Defense Services Commission (adopted June 14, 2007) includes a “Legal Representation Plan for Death Penalty

The implementation of the continuing duty, however, through specific steps that counsel should follow when they are subject to a post-conviction action claiming IAC, has raised more pointedly the ethical issues surrounding when, how, and to what degree former counsel could or should disclose confidential information concerning the representation. Most importantly, the 2010 Formal Opinion by the ABA Committee distilled the duty into specific “do’s” and “don’t’s.”<sup>67</sup> This mechanism, and the ABA Opinion’s treatment by several state ethics opinions, has expanded awareness of the continuing duty beyond the capital context. This is important because recent anecdotal reports suggest that compliance with the continuing duty, at least insofar as it implies limiting informal contacts with the prosecution, may not be the norm.<sup>68</sup> Obvious pressures from the potential loss of future appointments could challenge discharge of the continuing duty.<sup>69</sup> The first Subpart of

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Cases,” which “establishes as the standards for performance for all counsel in death penalty cases the standards set forth in Guidelines 10.2 to 10.15.2 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” OR. OFFICE OF PUB. DEF. SERVS., REPORT TO THE PUBLIC DEFENSE SERVICES COMMISSION 23 (2007); *see also* STATE BAR OF TEX., GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL 4-10 (2006), *supra* note 9.

67. *See generally* ABA Opinion, *supra* note 10, at 1.

68. *See* Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473, 486-92 (2013); Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156 (2013) (“While ABA Formal Op. 10-456 stated ‘... it is highly unusual’ for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying in a judicial proceeding, anecdotally, it does not appear unusual in Tennessee.” (quoting ABA Opinion, *supra* note 10, at 1)); *see also* D.C. Bar Legal Ethics Comm., Op. 364 (2013). D.C. Bar Opinion 364 states:

Anecdotal evidence suggests that different defense lawyers react differently to prosecutors’ requests for information. At one end of the spectrum are lawyers who are angered by the claim and eager to beat it back. Attorneys have a reputational interest in having IAC claims defeated. They may also fear future civil claims by the former client.

At the other end of the spectrum are attorneys who police themselves for potential IAC issues. When such lawyers or their supervisors spot such an issue, they withdraw, refer the client to other counsel, and cooperate with the new counsel. If new counsel tells them that the client objects to any voluntary disclosure to prosecutors, they do not disclose until a court requires them to do so.

Between those extremes are understandably concerned lawyers who do not want to jeopardize their licenses, their reputations, or their ability to continue doing defense work but who may not want to assist the prosecution against a former client. Court-appointed lawyers under the Criminal Justice Act may be especially uncomfortable because their livelihoods depend on continued appointments by the court that will be considering the IAC claim.

D.C. Bar Legal Ethics Comm., Op. 364 (footnote omitted) (citation omitted).

69. Beyond anecdotal reports, new legislation in Florida to expedite executions embodies such an incentive structure by disqualifying counsel for five years from appointment in capital representation if they have been twice found to have provided ineffective assistance and relief was granted as a result. Section Capital Punishment—Timely Justice Act, 2013 Fla. Sess. Law Serv., ch.

this Part addresses the ABA Opinion, the second addresses opinions by state ethics authorities in response to the ABA Opinion, and the final Subpart addresses developing case law.<sup>70</sup>

### *A. American Bar Association Ethics Opinion*

In 2012, the ABA Committee formally addressed the conflict between the continuing duty and the waiver of privilege that is universally held to accompany an allegation of ineffective assistance.<sup>71</sup> The ABA Opinion noted that the attorney-client privilege and the obligation of confidentiality both continue beyond the representation, and, while an IAC claim impliedly waives the privilege with respect to allegations concerning lawyer-client communications, it does not end the obligation to maintain confidentiality.<sup>72</sup> While the Committee recognized there could be a limited need for a lawyer to reveal information concerning a former client to defend herself when the former client has alleged ineffective assistance, it set a high bar for such revelations; it requires that the lawyer reasonably believe the disclosures are necessary, that the lawyer take steps to minimize the disclosures, and that the disclosures be made in a court-supervised proceeding.<sup>73</sup>

Both the requirements that disclosures be reasonably necessary and that they be minimized were inherent in Model Rule of Professional Conduct (“Model Rule”) 1.6(b)(5).<sup>74</sup> The requirement of “court-supervised proceedings,” however, was an interpreted application of the Model Rule, implied by the concern that without court supervision, disclosures that were otherwise unnecessary, or more than necessary, might be made.<sup>75</sup> This requirement is entirely appropriate to discharge the continuing duty, given the lawyer’s inherent conflict as both the subject of the IAC allegation and the source of information concerning it.<sup>76</sup> While many opinions begin and end their treatment with the observation that the filing of an IAC claim waives the attorney-client privilege, which to a limited degree it does, as I have argued

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2013-216, § 27.7045 (West). This statute sets a financial incentive directly countering counsel’s continuing duty, imposes an additional hurdle for successor counsel to obtain the cooperation of prior counsel, and links what may be an unrelated consideration (whether relief was granted) to analysis of counsel’s performance.

70. See *infra* Part III.A–C.

71. See generally ABA Opinion, *supra* note 10.

72. *Id.* at 1-2.

73. *Id.* at 5.

74. *Id.* at 3-4; see MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2013).

75. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5); ABA Opinion, *supra* note 10, at 5.

76. Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 368-69 (2009).



elsewhere, the ethical obligations are especially significant outside judicial supervision:

However, the evidentiary privilege only matters in a formal proceeding (in which testimony is given); outside formal proceedings disclosures are limited only by ethical rules, so the circumstance under which access to defense counsel occurs is quite significant. Three key issues have emerged: (1) Must disclosures of non-privileged information occur in supervised or non-supervised settings? (2) Are releases of information subject to pre-disclosure judicial review? (3) What control is made over subsequent use of the disclosures, e.g., by protective orders, in later proceedings?<sup>77</sup>

While the ABA Opinion did not resolve these issues, it did make their treatment much more explicit, and, at least judging from the state ethics opinions discussed in the next Subpart, more intentional.

### *B. State Ethics Opinions*

To date, four ethics bodies (District of Columbia, North Carolina, Tennessee, and Virginia) have weighed in on the issue addressed in the ABA Opinion.<sup>78</sup> While all four have acknowledged the basis for the ABA Opinion's concern about unnecessary disclosures, three of the four have nevertheless concluded, without specifically explaining why, that judicial supervision was not required.<sup>79</sup> Virginia's ethics body, which addressed the matter a month before issuance of the ABA Opinion, foreshadowed its analysis, and specifically rejected efficiency and procedural speed as reasons for permitting out of court disclosures.<sup>80</sup> The Virginia authority recommended that, without facts and circumstances justifying an earlier release of information, former counsel should

77. Siegel, *Withhold from the Prosecution*, *supra* note 63, at 20-21.

78. D.C. Bar Legal Ethics Comm., Op. 364 (2013); N.C. State Bar, Formal Ethics Op. 16 (2011); Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156 (2013); Va. State Bar, Legal Ethics Op. 1859 (2012).

79. D.C. Bar Legal Ethics Comm., Op. 364; N.C. State Bar, Formal Ethics Op. 16; Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156.

80. Va. State Bar, Legal Ethics Op. 1859. The Virginia ethics committee commented:

Although a pre-litigation disclosure of all relevant information may make it more likely that the claim of ineffective assistance will be disposed of quickly, that fact alone does not make it necessary that the lawyer reveal the information. In the absence of additional facts and circumstances justifying an earlier release of the information, the lawyer can reach the same outcome by disclosing the information under judicial supervision in a formal proceeding, after a full determination of what information should be revealed, and without the danger of revealing more information than would be permitted by Rule 1.6(b)(2).

*Id.*

disclose information only under judicial supervision in a formal proceeding after full determination of what information should be revealed.<sup>81</sup> It noted that, while an IAC claim “concerns” lawyer’s representation, it is usually not reasonably necessary to disclose anything in response to a mere filing given the number of petitions that fail on legal and procedural grounds.<sup>82</sup> This is fully consistent with the ABA Opinion.

The North Carolina State Bar, however, explicitly rejected the ABA Opinion, explaining that Model Rule 1.6(b)(6) did not require that a lawyer’s exercise of discretion, to determine what disclosures were reasonably necessary, be done only in a court-supervised proceeding.<sup>83</sup> Moreover, the state’s post-conviction statute specifically provided that the filing of an allegation of IAC was deemed a waiver of the privilege for both written and oral communications “to the extent the defendant’s prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.”<sup>84</sup> Despite its rejection of the need for judicial supervision of disclosures, the North Carolina opinion cautioned that the Rule (and the post-conviction statute) required former counsel to “respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim”; that counsel “still has a duty to avoid the disclosure of information that is not responsive to the specific claim”; and that the prosecutor “must limit his request to information relevant to the defendant’s specific allegations of ineffective assistance.”<sup>85</sup>

The District of Columbia Bar Ethics Committee (“D.C. Committee”) also rejected the ABA Opinion’s restriction on disclosures outside court supervision, but it did so based on a distinction between the D.C. Rules and the Model Rules.<sup>86</sup> D.C. Rule 1.6(e)(3) provides:

A lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer’s representation of the client . . . .<sup>87</sup>

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81. *Id.*

82. *Id.* (internal quotation marks omitted).

83. N.C. State Bar, Formal Ethics Op. 16.

84. *Id.* (internal quotation marks omitted) (citing N.C. GEN. STAT. § 15A-1415(e) (2011)).

85. *Id.*

86. D.C. Bar Legal Ethics Comm., Op. 364 (2013).

87. D.C. RULES OF PROF’L CONDUCT R. 1.6(e) (2007).

The D.C. Committee noted the distinction in D.C. Rule 1.6(e)(3) between disclosure to establish a defense to formal charges and “to respond to specific allegations,” which the drafters of the rule suggested would extend to public allegations made by the client even if there were no formal charges against the lawyer.<sup>88</sup>

The D.C. Committee relied heavily on the distinctions between the wording of Model Rule 1.6 and D.C. Rule 1.6(e)(3):

The permissive disclosure exception in D.C. Rule 1.6(e)(3) differs from its Model Rule counterpart in three respects. D.C. Rule 1.6(e)(3) applies only to “specific” allegations, and only when made “by the client.” By contrast, Model Rule 1.6(b)(5) does not condition disclosure on the allegations being “specific,” and does not require that the “allegations” come from the lawyer’s client. Finally, D.C. Rule 1.6(e)(3), unlike Model Rule 1.6(b)(5), does not require that the disclosure be made in the context of a “proceeding.”<sup>89</sup>

The problem with this argument, as applied to IAC claims, is that it ignores the fact that *there is a proceeding* (if the former client has alleged IAC); and the relevant issue is not whether there must be a proceeding for the disclosure, but whether disclosures permissible under the D.C. Rule 1.6(e)(3) should be made in the proceeding or can be made anywhere. Unless the D.C. Committee thinks that such disclosures pose no risks of compromising any obligations to former clients, it is hard to imagine the disclosures could be equally properly made in a court-supervised proceeding (where the former client may object) or through an editorial of a newspaper. The failure to recognize this difference is particularly odd when the D.C. Committee had nevertheless acknowledged the potential for a lawyer’s own motivation to affect his or her judgment about disclosures: “Further complicating a lawyer’s analysis is the emotional reaction that the lawyer may have upon learning that a former client has accused her of IAC. Feelings of anger and betrayal may impede an objective analysis of these issues.”<sup>90</sup> These are just the types of concerns that make judicial supervision appropriate.

Most recently, the Board of Professional Responsibility of the Supreme Court of Tennessee (“Tennessee Board”) opined that Tennessee’s Rules of Professional Conduct (“Tennessee Rules”) “permit, but do not require [a lawyer] to make limited voluntary disclosure[s] to the prosecution of information” “outside the in-court

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88. D.C. Bar Legal Ethics Comm., Op. 364 (internal quotation marks omitted).

89. *Id.*

90. *Id.*

supervised proceeding.”<sup>91</sup> Rule 1.6(b)(5) of the Tennessee Rules governing permissive disclosure is identical to ABA Model Rule 1.6(b)(5).<sup>92</sup> The Tennessee Rule governing mandatory disclosure, like the Model Rule, requires disclosure in response to the order of a tribunal. However, it is slightly *more* protective against disclosure than the Model Rule because it includes the obligations of counsel to “asser[t] on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law,” whereas the Model Rule only explains these obligations in a Comment.<sup>93</sup>

Thus, while Tennessee imposes duties on counsel to oppose court-ordered disclosures concerning former clients under in-court supervision, which are *more* explicit than those under the Model Rules, it is particularly curious that its ethics body nevertheless decided that unsupervised, out-of-court disclosures for some reason require *less* restriction.

The Tennessee Board recognizes, as did the ABA Committee, that the self-defense exception might be read to extend to situations in which a lawyer has been alleged to have rendered ineffective assistance, but simply notes that “[t]he exception does not require that the disclosures be made in an in-court supervised proceeding or setting nor with the supervision or approval of the court.”<sup>94</sup> While this is true, since the Model Rule does not mention court supervision of disclosures either, it is difficult to see why this matters. Indeed, the language of court supervision originally comes from Comment 14 to Model Rule 1.6,<sup>95</sup> which, as noted above, Tennessee has imported into the text of Tennessee Rule 1.6(b)(5).<sup>96</sup>

The Tennessee Board notes in passing the apparent concern about inappropriate motivations for out-of-court disclosures: “Neither

91. Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156 (2013) (“May a criminal defense lawyer alleged by a former criminal client to have rendered ineffective assistance of counsel voluntarily provide information to the prosecutor defending the claim outside the court supervised setting?”).

92. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013).

93. Compare *id.* R. 1.6(c)(2), with MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2013).

94. Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156.

95. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14. Comment 14 to Model Rule 1.6 states:

If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

*Id.*

96. See *supra* notes 91-93 and accompanying text.

anger nor retaliation toward the former client for having alleged ineffective assistance of counsel justify the former lawyer to disclose such information outside the in-court proceeding.”<sup>97</sup> Curiously, it never suggests what would be appropriate justifications for making unsupervised, out-of-court disclosures—since any appropriate “self-defense” by the former counsel can be accomplished through in-court disclosures.<sup>98</sup>

### *C. Developing Case Law Since the ABA Opinion*

While some state ethics bodies have questioned the ABA Opinion’s workability (acknowledging the force of its basic assertion), most cases addressing the issue since the ABA Opinion have largely followed its recommendations. Virtually all the reported cases to date are federal, although many are non-capital. Workability has been raised in some cases by the government, though at least once workability has been raised as a reason that the IAC claims can be addressed without seeking disclosures from former counsel.<sup>99</sup> This Subpart offers a snapshot of how the limits on informal and unsupervised disclosures to the prosecution are being interpreted.<sup>100</sup>

#### 1. To What Extent Are Lawyers Refusing to Make Disclosures Outside Court-Supervised Proceedings?

This is a difficult question to examine systematically because of the range of circumstances in which allegations of IAC might arise (state post-conviction, federal habeas, motions to vacate or set aside, motions for new trial), and counsel’s resistance to disclosures may not reach the level of a formal pleading. For example, if a lawyer simply informs the government that she will not cooperate or make disclosures outside of a court-supervised proceeding, the government may simply seek an evidentiary hearing. There have been reported instances, reflected in

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97. Tenn. Supreme Court Bd. of Prof’l Responsibility, Formal Ethics Op. 2013-F-156.

98. *Id.*

99. Government’s Opposition to Petition to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody at 10 n.1, *United States v. Trigilio*, No. 2:08-CR-00292, 2010 WL 1329069 (C.D. Cal. Mar. 31, 2010) (No. 2:08-CR-00292) (responding to defendant’s motion to vacate on grounds of IAC in sentencing by stating that claims can be resolved without disclosures because “procedures required to define the contours of the appropriate waiver and implement it with the required limitations could significantly delay proceedings in this case,” though acknowledging, if the court finds that disclosures are required, that it “find a limited waiver of the attorney-client privilege and permit the government to submit a filing setting forth procedures for implementing the waiver”).

100. See *infra* Part III.C.1–2.

pleadings and orders, of individual lawyers refusing to make disclosures concerning former clients outside of supervised proceedings.<sup>101</sup>

In all of these cases, obviously, the prosecution sought disclosures from former counsel. If these disclosures were sought outside supervised proceedings, under the ABA Opinion, they could be considered misconduct, as attempts to induce another (the former counsel) to violate the Model Rules.<sup>102</sup> There is already an ethical restriction on subpoenas of defense lawyers by prosecutors unless the information is not protected by privilege: that is, “essential to the successful completion of an ongoing investigation or prosecution,” *and* there is “no other feasible alternative to obtain the information.”<sup>103</sup> Given the importance of ensuring an accurate record of any prospective disclosures, and the ethical restriction on compelled (that is, subpoenaed) disclosures, it would seem prudent that there be at least as great a restriction on efforts to obtain *voluntary* disclosures from former counsel as there are on efforts to obtain *compelled* disclosures. Since the court handling the IAC petition must determine the scope of the privilege waiver, even if it is “essential” to the prosecution’s defense against the IAC claim, there is always a feasible alternative to unsupervised disclosures—namely, subpoenaing the former counsel.

A general policy by prosecutors not to seek unsupervised disclosures would be useful in this regard for at least two reasons.<sup>104</sup> First, it would enable lawyers trying to comply with their ethical obligations to have a clearer path to do so. There are instances of former lawyers seeking to intervene when their former clients filed pro se post-conviction claims of IAC, in an effort to obtain court supervision of

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101. See, e.g., *United States v. Rankin*, No. 5:10CV80253, 2010 WL 5478472, at \*1 (W.D. Va. Dec. 30, 2010) (explaining that an evidentiary hearing is required where a former attorney declined to provide an affidavit refuting defendant’s claim that he had asked the attorney to file a direct appeal); see also, e.g., *Response of the United States to Attorney’s Motion to Quash* at 2, *United States v. Mitchell*, No. 3:11-CR-286-2, 2012 WL 2049944 (E.D. Va. June 6, 2012) (No. 3:10CR286) (“In several discussions, [former counsel] has refused to provide the United States with information regarding the allegations of ineffective assistance and indicated he would likely not meet with the government before the hearing . . . .”); *United States’ Motion to Compel Testimony of Defendant’s Former Attorney* at 1, *United States v. Tronco-Ramirez*, No. 5:10-cr-00028, 2011 WL 3841528 (W.D. Va. Aug. 29, 2011) (No. 10CR00028) (seeking court order because former counsel informed the government he would not disclose prior communications with the former client who sought to withdraw his guilty plea without court order).

102. MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (2013).

103. *Id.* R. 3.8(e)(1)–(3).

104. A former version of Model Rule 3.8 would have required judicial pre-approval of such a subpoena as well, although this was removed in 1990. See *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 9 (1st Cir. 2000) (citing AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT 101, at 1 (1995)).

disclosures.<sup>105</sup> Second, it would avoid unfairly disadvantaging petitioners whose former counsel did not adhere to this ethical standard. There have been instances of lawyers rejecting the existence of the continuing duty,<sup>106</sup> including doing so by refusing to provide former clients' information.<sup>107</sup>

It has been reported that some lawyers have also begun citing the ABA Opinion as a basis for refusing to simply provide the government a refutation of their former client's claims when responding to an allegation of ineffective assistance.<sup>108</sup> Discipline has been recommended for at least one lawyer who was found to have pre-emptively disclosed, outside of a court-supervised proceeding, confidential information in response to an IAC allegation.<sup>109</sup> While the matter is on appeal, the disciplinary authority has cited the ABA Opinion to specifically reject the argument that former counsel could justify his conduct as preventing his former client's perjury, noting that he "no longer had a duty to act to prevent any alleged client perjury. That duty transferred to successor counsel. Instead, [former counsel] owed a continuing duty of

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105. See, e.g., *Mitchell v. United States*, No. CV10-01683, 2011 WL 338800, at \*1-3 (W.D. Wash. Feb. 3, 2011) (ruling that former counsel could not intervene, for the purpose of having the court conduct an in camera hearing with pro se petitioner and former counsel, and that it would not appoint counsel for pro se petitioner). The *Mitchell* court found privilege waiver and authorized former counsel "to provide evidence of his otherwise privileged conversations with petitioner by way of affidavit, testimony, or in any other form," but did specifically limit the use of disclosures only to IAC claims in the 28 U.S.C. § 2255 petition or otherwise keep them confidential. *Id.*

106. See, e.g., *Daugherty v. Dingus*, No. 5:12-0043, 2013 WL 1694878, at \*3-5 (S.D. W. Va. Apr. 18, 2013) (recounting that former counsel explicitly rejected the idea of continuing duty of loyalty, barring subsequent use of material disclosed in future proceedings, and barring further communications between former counsel and state attorney general's office in the § 2255 proceeding, explaining that "[u]nsupervised communications between the Petitioner's or Movant's trial and appellate attorney and the attorney for the State or the United States in Section 2254 and Section 2255 proceedings are prohibited").

107. See, e.g., *United States v. Sharp*, Crim. No. 2:07CR19, 2009 WL 1867619, at \*1 (N.D. W. Va. June 29, 2009) (discussing that petitioner, who claimed that former counsel entered secret agreement with prosecution to prevent his testifying, was refused an affidavit by former trial counsel).

108. *United States v. Rankin*, No. 5:10CV80253, 2010 WL 5478472, at \*2 n.3 (W.D. Va. Dec. 30, 2010) ("According to the government's motion to dismiss, the defendant's attorney declined to provide an affidavit refuting the defendant's claim that he asked the attorney to file a direct appeal, based on [the ABA Opinion].").

109. Brief of Complainant-Respondent at 14-17, *In re Thompson*, (No. 11AP2458-D), 2012 WL 6569753. The Brief of Complainant-Respondent in *In re Thompson* stated:

This *ABA Ethics Opinion* makes it clear that Thompson went far beyond any reasonable or necessary standards. He did not have to send the letter to the Court. He could have waited and testified at the *Machner* hearing and then been afforded all the necessary protections of a Court order. Instead, without the client's knowledge or approval, he bulled ahead and, without justification, totally undermined the appellate defense being mounted on behalf of his former client.

*Id.*

confidentiality and loyalty to his former client and should not have taken an adverse or antagonistic position against that client.”<sup>110</sup>

## 2. Is the Continuing Duty Being Interpreted to Prevent Disclosures of Former Counsel Outside Court Supervision?

A few court decisions have rejected the ABA Opinion as unworkable,<sup>111</sup> or have developed a boilerplate order that effectively undermines it by providing that petitioners alleging IAC must waive all claims of privilege without limit, and authorize counsel to disclose confidential information without any opportunity for the client to contest the former counsel’s need to make disclosures.<sup>112</sup> This interpretation of court-supervised testimony, namely a court ordering that it be provided without subsequently supervising it, seems to place all decision-making for the necessity of disclosures on the former counsel who, as the ABA Opinion noted, obviously has a conflict. Court “supervision” should mean more than simply a court ordering former counsel to submit an affidavit that will be immediately disclosed to the prosecution.<sup>113</sup>

While the law, in all jurisdictions to consider the matter, holds that the filing of a post-conviction allegation of IAC is a waiver of the privilege, virtually all also hold that it is a limited waiver. Thus, despite the efforts of some prosecutors, several courts have refused to order privilege waivers by IAC petitioners, and have instead focused on authorizing former counsel to make limited disclosures that are reasonably necessary to address the allegations.<sup>114</sup> Several decisions

110. *Id.* at 12 (citation omitted).

111. *See, e.g., Dunlap v. United States*, No. 4:11-cv-70082-RBH, 2011 WL 269315, at \*1 & n.4 (D.S.C. July 12, 2011) (noting that ABA Opinion 10-456 is unpersuasive); *Giordano v. United States*, No. 3:11cv9, 2011 WL 1831578, at \*3 (D. Conn. Mar. 17, 2011) (rejecting ABA Formal Opinion 10-456’s position that the court must directly supervise discussions between government counsel and the attorney accused of ineffectiveness); Government’s Motion for an Order Finding Waiver of Attorney Client Privilege & Motion to Compel Production of Records at 7, *United States v. Ugochukwu*, No. 1:10CR405, 2012 WL 6730064 (N.D. Ohio Dec. 28, 2012) (No. 653), 2011 WL 7809857 (citing *Giordano*, 2011 WL 1831578, at \*3). The *Giordano* court held that “[a]s far as this Court is aware, no federal court has ever required that Government counsel’s interview with a prisoner’s former counsel in the context of an ineffective assistance of counsel claim be on-the-record,” and further noted that “[i]t would be highly impractical to require federal district court judges . . . to directly supervise every interaction between the Government and the attorney who allegedly provided ineffective assistance.” *Giordano*, 2011 WL 1831578, at \*3.

112. *Douglas v. United States*, No. 09 CV 9566, 2011 WL 335861, at \*3 (S.D.N.Y. Jan. 28, 2011) (“The form authorizes your attorney to disclose confidential communications (1) only in response to a court order and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by your motion.”).

113. *Purkey v. United States*, No. 06-8001-CV-W-FJG, 2010 WL 4386532, at \*3-5, \*8 (W.D. Mo. Oct. 28, 2010) (relying solely on affidavits, the court found all disclosures in a 117-page pre-hearing affidavit filed by former counsel necessary to rebut IAC allegations).

114. *See Belcher v. United States*, No. 3:12-cv-04717, 2012 WL 5386564, at \*3-4 (S.D. W.



have specifically barred unsupervised communications between the government and former counsel.<sup>115</sup> A few decisions have created sequential disclosure procedures in which former counsel's proposed disclosures are made before the hearing to successor counsel and the court for review; the court may then consider and rule on any objections before the disclosures are made to the prosecution.<sup>116</sup> Finally, a few courts have imposed restrictions on subsequent use of disclosures, the most detailed and extensive of which seem to have been in capital cases.<sup>117</sup>

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Va. Nov. 1, 2012) (refusing to order a privilege waiver by a § 2255 petitioner, but ordering former counsel to respond to allegations by affidavit with documents he believed necessary, authorizing disclosures that counsel found reasonably necessary, and issuing a protective order barring any future use by the government); *Talouzi v. United States*, No. 3:12-cv-01687, 2012 WL 3778848, at \*3 (S.D. W. Va. Aug. 30, 2012) (ordering counsel to provide an affidavit including "all of the information [counsel] believes is necessary to fully respond to the claim and [to] include as attachments copies of any documents from his file specifically addressing the subject of Movant's appeal," noting, however, that documents may be redacted if they address other aspects of counsel's representation of movant, and that "counsel should disclose only that information reasonably necessary to ensure the fairness of these proceedings"); *see also* *Young v. United States*, No. 2:13-cv-10108, 2013 WL 2468623, at \*3 (S.D. W. Va. June 7, 2013) (ordering former counsel to file an affidavit specifically restricted to the claim of IAC, and specifically authorizing disclosure of only communications "necessary to fully respond to the claim"—documents relating to plea offer and petitioner's decision to go to trial—ordering that former counsel may redact other matters from the documents, and specifying that counsel should "disclose only that information reasonably necessary to ensure the fairness of these proceedings"); *Hall v. United States*, No. 3:12-cv-01039, 2012 WL 3822163, at \*3-4 (S.D. W. Va. Sept. 4, 2012) (issuing same order as in *Talouzi*, plus a protective order specifying that attorney-client privilege "shall not be deemed automatically waived in any other Federal or State proceeding by virtue of the above-ordered disclosure in this § 2255 proceeding" and prohibiting the government from using privileged disclosures in any other proceeding without a court order).

115. *Daugherty v. Dingus*, No. 5:12-0043, 2013 WL 1694878, at \*4-5 (S.D. W. Va. Apr. 18, 2013); *Hudson v. United States*, No. 3:10-cv-00981, 2011 WL 3667602, at \*4 (S.D. W. Va. Aug. 22, 2011) (ordering movant's counsel to file an affidavit, but denying government's request to speak with counsel outside presence of movant and the court).

116. *Jones v. United States*, No. 4:11CV00702, 2012 WL 484663, at \*2 (E.D. Mo. Feb. 14, 2012) (ordering hearing before government's cross examination of trial counsel, the court's determination of scope, and in camera file review if needed); *Nelson v. United States*, No. 4:04-CV-8005-FJG, 2010 WL 3398791, at \*3-4 (W.D. Mo. Aug. 24, 2010) (ordering prior counsel's pre-hearing affidavit reviewed by court and successor counsel for objection and ruling before its release to the government).

117. *See, e.g., Lambright v. Ryan*, 698 F.3d 808, 813, 817, 820 (9th Cir. 2012). This was the protective order:

IT IS FURTHER ORDERED that all discovery granted to Respondents, including the requests to depose sentencing counsel Brogna, Petitioner's experts and Petitioner, shall be deemed to be confidential. Any information, documents and materials obtained vis-a-vis the discovery process may be used only by representatives from the Office of the Arizona Attorney General and only for purposes of any proceedings incident to litigating the claims presented in the petition for writ of habeas corpus (and all amendments thereto) pending before this Court. None may be disclosed to any other persons or agencies, including any other law enforcement or prosecutorial personnel or

That successor counsel may seek to restrict disclosures by former counsel is hardly surprising, as successor counsel is ethically obligated to pursue all potentially meritorious claims.<sup>118</sup> Unless these are professionally inappropriate strategies, former counsel is ethically obligated to cooperate with these strategies.<sup>119</sup> In fact, *all* the ethical obligations in this scenario are aligned. Former counsel has a continuing duty to petitioner to avoid disclosures that are not reasonably necessary (as well as a duty to continue to maintain and defend as privileged anything not subject to the limited waiver inherent in the filing of an IAC claim).<sup>120</sup> Present counsel has an ethical obligation to competently and diligently represent the petitioner (which includes, in advancing the IAC claim, ensuring that information disclosed is not used in any subsequent prosecution). And, while the prosecutor certainly has an obligation to competently and diligently defend against the petition, this cannot include efforts to obtain disclosures through means that require a lawyer to violate her ethical duties. Against these obligations are obvious personal reactions and incentives: no one likes being accused of having done a poor job; people are often more forthcoming in informal, private settings (like a phone call), than they are in formal, public ones (such as testifying in court); and individuals are demonstrably poor judges of their own compliance with rules (such as the continuing duty to avoid disclosures that are not reasonably necessary) when they could benefit (for example, by disputing an accusation about their work, or undermining the effectiveness of such a claim by showing that it would not have affected the outcome) from not complying with the Model Rules.

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agencies, without an order from this Court. This Order shall continue in effect after the conclusion of the habeas corpus proceedings and specifically shall apply in the event of a resentencing, except that either party maintains the right to request modification or vacation of this Order upon entry of final judgment in this matter.

IT IS FURTHER ORDERED that Respondents' deposition of Petitioner must specifically relate to assertions Petitioner has made in this habeas petition (or amendments thereto), and for which it is likely that Petitioner has personal knowledge. The questions must be phrased in such a manner that they are directly linked to the federal claim upon which Petitioner is being deposed. Petitioner may assert his Fifth Amendment privilege, but the assertion of that privilege may be cause for the Court to draw an adverse inference in this habeas proceeding.

*Id.* at 813.

118. ABA GUIDELINES, *supra* note 1, Guideline 10.8, at 1028-29.

119. *Id.* Guideline 10.13(D), at 1074; *see Eldred, supra* note 68, at 478-86.

120. *See Eldred, supra* note 68, at 478-86.

## IV. CONCLUSION

The continuing duty of counsel to former clients has been recognized by some lawyers, as evidenced by their conduct, well over a century before the ABA Guidelines identified it.<sup>121</sup> While discharge of the duty can be difficult, professionally and personally, as the ABA Opinion acknowledged, that is hardly a reason for disregarding it.<sup>122</sup> Compliance with this duty is neither technically difficult nor legally complex. If prosecutors do not seek informal disclosures from former counsel, former counsel are aware that it is unethical to make such disclosures, and present counsel know there are established mechanisms to avoid them and ensure they do not occur, disclosures should not occur. Most lawyers quickly develop an inherent and almost instantaneous reluctance to discuss anything concerning the details of a client's case with anyone outside carefully delineated contexts. A dissatisfied former client is simply not one of these contexts.

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121. *See supra* Part II.

122. *See supra* Part III.A.