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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

*Tigran W. Eldred**

I. INTRODUCTION

After Wesley Ira Purkey was sentenced to death, he followed the familiar path of filing a claim of ineffective assistance of counsel against his trial lawyer.¹ Initially, the lawyer seemed willing to protect Purkey's interests, even after this claim against him, stating that he would not provide any information to the prosecution without a court order to do so.² In turn, the post-conviction court ordered the lawyer to file an affidavit addressing Purkey's claims.³ It is what happened next that is remarkable. Instead of filing a limited affidavit, narrowly tailored to the allegations in the petition for habeas corpus, the lawyer filed an extensive, 117-page affidavit that, according to Purkey, far exceeded the

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1. See *Purkey v. United States*, No. 06-8001-CV-W, 2010 WL 4386532, at *1 (W.D. Mo. Oct. 28, 2010); 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, 90-91 (1999) [hereinafter Siegel, *My Reputation or Your Liberty*] ("While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.").

2. See *Purkey*, 2010 WL 4386532, at *7 (noting that the attorney produced the affidavit after it was ordered by the court); Letter from Frederick Duchardt to the U.S. Attorney's Office (Oct. 30, 2007) (on file with *Hofstra Law Review*).

3. See *Purkey v. United States*, No. 06-8001-CV-W, 2009 WL 5176598, at *2 (W.D. Mo. Dec. 22, 2009).

allegations in dispute.⁴ Even more remarkably, twenty-five pages of the affidavit were dedicated to legal analysis, including extensive citation of legal authority arguing why the lawyer's conduct was not constitutionally defective.⁵ By any stretch of the imagination, this argumentative response—described as more akin to an “adversarial briefing”⁶ than an affidavit of factual information—did not seek to protect Purkey's interests. Rather, it was a full throttled defense by Purkey's trial lawyer of his own conduct.

*Purkey v. United States*⁷ demonstrates the importance of defining with precision the role of predecessor counsel (as the lawyer accused of ineffectiveness is known) in post-conviction proceedings. Often, predecessor counsel will feel defensive about being accused of providing deficient performance, especially in situations where a finding of ineffectiveness will harm the lawyer's personal interests. As a result, the lawyer may want to assist the prosecution to defend against the allegation, or at least, not help the former client to prove it. Yet, the lawyer who was purportedly ineffective is neither a formal party in the litigation nor merely a witness with critical information in the case. Rather, as the former advocate for the client who is now seeking relief, predecessor counsel owes a set of continuing obligations to the very person who is now challenging the lawyer's conduct.

Given the gravity and urgency of death penalty litigation, this Article focuses on the continuing duties of predecessor counsel in capital

4. See *Purkey*, 2010 WL 4386532, at *7-8. The parties disagreed about whether the affidavit was broader than necessary to address Purkey's claim of ineffectiveness. See *id.* Ultimately, the court agreed with the prosecution, finding that the 117-page affidavit was appropriate to resolve the allegations against the attorney. See *id.* at *8. By its own admission, the court reached this conclusion without reviewing every specific detail set forth in the affidavit to determine whether the lawyer exceeded what was appropriate to address and resolve the claims of ineffectiveness. See *id.* (finding that the court is not required to analyze every response in the attorney's affidavit if it is “reasonably necessary to answer the allegations”).

5. See Reply to Government's Response to Movant's Application for Certificate of Appealability at 15-16, *Purkey*, 2010 WL 4386532 (No. 06-8001-CV-W) (describing the advocacy positions advanced in the trial attorney's affidavit); see also *Purkey*, 2010 WL 4386532, at *8. Neither the prosecution nor the district court contested that the trial counsel's affidavit included approximately twenty-five pages of legal argument. See generally *Purkey*, 2010 WL 4386532. However, an independent assessment is not possible because the affidavit itself was filed under seal pursuant to a protective order, making it unavailable for review. See Docket Sheet at 1, *Purkey*, 2010 WL 4386532 (No. 06-8001-CV-W). The court granted the prosecution's motion to seal the affidavit. See *Purkey v. United States*, No. 06-8001-CV-W, slip op. at 15-16 (W.D. Mo. May 19, 2008). This was based on a request that had been initiated by successor counsel. See Telephone Interview with Teresa Norris, Partner, Blume Norris & Franklin-Best, LLC (Mar. 12, 2013) (Mar. 11, 2013).

6. Reply to Government's Response to Movant's Application for Certificate of Appealability, *supra* note 5, at 14.

7. No. 06-8001-CV-W, 2010 WL 4386532 (W.D. Mo. Oct. 28, 2010).

cases. The starting point is Guideline 10.13 of the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”),⁸ promulgated by the American Bar Association (“ABA”), which set forth many of counsel’s central obligations.⁹ These include a “continuing duty to safeguard the interests of the [former] client,” and the obligation to “cooperate fully with successor counsel.”¹⁰ Guideline 10.13 illustrates these obligations with a series of examples—including the duty to maintain proper records during representation, and thereafter, to provide information to successor counsel and to cooperate in appropriate legal strategies during the pendency of post-conviction proceedings.¹¹ And, while Guideline 10.13 does not specifically address duties relating to confidentiality and privilege, the duty to safeguard the interests of the former client logically includes such obligations. Further guidance comes from ABA Formal Opinion 10-456, applicable in any case where ineffectiveness is alleged, which concludes that lawyers may disclose information “reasonably necessary” for resolution of the ineffectiveness claim, but only during a formal judicial proceeding and only after the judge has determined that such disclosure is appropriate.¹²

The familiar standard for ineffective assistance of counsel, set forth in *Strickland v. Washington*,¹³ reveals why these continuing obligations are so important. Under the *Strickland* test, a defendant must prove that his former lawyer rendered deficient performance that prejudiced the representation.¹⁴ To satisfy this test, the defendant must overcome the presumption that the challenged conduct “might be considered sound trial strategy.”¹⁵ Even with competent successor counsel and the means

8. 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>.

9. See, e.g., *id.* Guideline 10.13, at 1074.

10. *Id.* The title “successor counsel” denotes the lawyer who represents the defendant in the post-conviction proceedings. See *id.*

11. *Id.* Guideline 10.13 cmt., at 1074-75.

12. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf; see also Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Claims of Ineffective Assistance*, CRIM. JUST., Winter 2011, at 42, 42; David M. Siegel, *What (Can) (Should) (Must) Defense Counsel Withhold from the Prosecution in Ineffective Assistance of Counsel Proceedings?*, CHAMPION, Dec. 2011, at 18, 18 [hereinafter Siegel, *Withhold from the Prosecution*].

13. 466 U.S. 668 (1984).

14. See *id.* at 687 (discussing the test for proving a claim of ineffective assistance of counsel). This test pays “a heavy measure of deference” to the strategic choices that were made by counsel. See *id.* at 691.

15. *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)) (internal quotation

to investigate and pursue an ineffectiveness claim, it is difficult to meet this heavy burden.¹⁶ It becomes all the more difficult to prove ineffectiveness of counsel when predecessor counsel is an obstacle to, rather than an ally in, pursuing the claim.

As a result of the critical nature of these duties, scholars have argued persuasively that lawyers must prioritize them. For example, as my colleague David Siegel has demonstrated, lawyers who face claims of ineffectiveness should place duties owed to former clients above their own interests by zealously guarding the interests of their former clients, even at personal risk to their own reputations.¹⁷ Others have made similar arguments, concluding that, while lawyers may have personal misgivings about the prospect of being found ineffective, they must put those feelings aside to satisfy the obligations owed to their former clients.¹⁸ And, because of the elevated stakes in capital cases, special attention has been paid to the obligations of predecessor counsel set forth in Guideline 10.13.¹⁹

One area that has not been explored, however, is the extent to which lawyers accused of ineffectiveness are actually meeting these professional duties. In other words, while, as a normative matter, predecessor counsel should comply with the professional obligations set forth in Guideline 10.13 and related authority—even at a personal cost—how often do they so comply? Unfortunately, there is sparse data directly on point, as the informal interactions between lawyers throughout post-conviction proceedings infrequently result in reported decisions. Other sources of authority, such as the opinions of seasoned

marks omitted); see also *Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011) (quoting *Strickland*, 466 U.S. at 689).

16. See NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 39-41 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> (describing the difficulty of prevailing on a claim of ineffective assistance of counsel); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (noting the difficulty of proving ineffectiveness, "even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable").

17. See Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 88-89; David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14, 15 [hereinafter Siegel, *Three Questions*]; Siegel, *Withhold from the Prosecution*, *supra* note 12, at 19-20.

18. Michael Mears, *The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims*, GA. B.J., Oct. 1999, at 40, 42; see also Jenna C. Newmark, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699, 708 (2010).

19. See Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1184 & n.23 (2003) [hereinafter Fox, *Making the Last Chance Meaningful*].

veterans in death penalty litigation, do provide important additional information about existing practices, although without a systemic basis for assessment.

This Article seeks a more complete understanding of attorney compliance with their continuing obligations to former clients in capital post-conviction litigation. To do so, it relies on research into a phenomenon known as “motivated reasoning.”²⁰ Now a mainstay of academic study and of growing importance in legal scholarship,²¹ the central idea is that people do not realize how unconsciously they seek conclusions that favor their own wishes, wants, and desires.²² By applying this research to the continuing duties lawyers owe to their former clients, the Article concludes that lawyers do not evaluate their obligations objectively.²³ Rather, the motivations that they possess will be a significant factor in how they respond to the allegations.

This Article proceeds in three remaining parts. Part II contextualizes the discussion by reviewing the obligations owed by predecessor counsel to their former clients in death penalty cases, and then assesses anecdotal evidence about whether these obligations are

20. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990) (explaining the concept of “motivated reasoning”).

21. See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19-20 (2011) (explaining motivated reasoning and its application); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 851-54 (2009) (discussing theories that motivate cognition in fact perception); Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029-33 (2005) [hereinafter Kim, *The Banality of Fraud*] (explaining the role of motivated reasoning for in-house counsel); Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 137-39 (2011) [hereinafter Kim, *Naked Self-Interest?*] (discussing the importance of self-interest in the legal profession); Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1670-75 (2012) (explaining motivated reasoning relating to judicial decision-making); Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 444-46, 448-49 (2012) (explaining motivated reasoning and illustrating its application).

22. See Eric G. Helzer & David Dunning, *On Motivated Reasoning and Self-Belief*, in HANDBOOK OF SELF-KNOWLEDGE 379, 379-80 (Simine Zavire & Timothy D. Wilson eds., 2012); see also Roy Baumeister & Leonard Newman, *Self-Regulation of Cognitive Inference and Decision Processes*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 3, 3-19 (1994); Kunda, *supra* note 20, at 480-81.

23. See *infra* Part III.A. For previous work on how unconscious biases, including the power of motivated reasoning, influences the ethical judgments of criminal defense lawyers, see Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 340-44, 357-59 (2013) [hereinafter Eldred, *Prescriptions*] (discussing the duty of criminal defense attorneys to investigate and the power of ethical blindness); Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 74-76 (2009) [hereinafter Eldred, *Psychology of Conflicts*] (discussing the conflicts between a lawyer’s self-interest and ethical obligations).

being satisfied.²⁴ Part III turns to motivated reasoning, reviewing the empirical basis for the conclusion that people engage in an unconscious biased reasoning process that favors predetermined goals, and applies the research to the decisions that lawyers make when facing claims of ineffective assistance of counsel.²⁵ The ways that motivated reasoning can be expected to influence compliance with the duties under Guideline 10.13 and related authority are also addressed in detail.²⁶ Part IV addresses the implications of the analysis, recommending ways to reduce the power of the biased reasoning process.²⁷

II. DUTIES AND PRACTICES OF PREDECESSOR COUNSEL IN DEATH PENALTY LITIGATION

A. *The Duties of Predecessor Counsel*

This Subpart sketches the contours of the duties owed by lawyers who can anticipate, and then are accused of, ineffective assistance of counsel. Because others have discussed these matters in depth, there is no need to recount every aspect of a lawyer's duty to a former client who has brought a claim of ineffectiveness.²⁸ Instead, this Subpart provides an overview of those duties, highlighting the central obligations and exploring their implications.

The starting point is Guideline 10.13, which details the duties of predecessor counsel in capital cases and sets forth a chronological set of obligations that begin before the original representation ends, and continue through the completion of post-conviction proceedings.²⁹ Guideline 10.13 reads:

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part III.

27. See *infra* Part IV.

28. See *supra* notes 16-17.

29. ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

C. sharing potential further areas of legal and factual research with successor counsel; and

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.³⁰

These duties derive from various sources, most notably the ethical rules of the profession.³¹ To start, the duty of competence requires that a lawyer engage in representation that does not impair the ability of the client to ensure, after the fact, that the representation received was effective.³² This obligation, which comes from Rule 1.1 of the Model Rules of Professional Conduct (“Model Rules”),³³ imposes an obligation on a lawyer during representation to maintain the client’s file in a manner that will allow the former client to determine what steps predecessor counsel took, or did not take, during representation.³⁴

In addition, all lawyers owe a duty to safeguard the interests of a client to the extent reasonably practicable at the termination of the attorney-client relationship under Model Rule 1.16.³⁵ At the very minimum, this obligation requires surrender of the file to the client at the end of the case.³⁶ In addition, coupled with the duty of competence, this places an affirmative duty on predecessor counsel to assist successor counsel in understanding the file’s contents, including what is missing,

30. *Id.*

31. See Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 776, 794 (2008); Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1185-91. See generally Siegel, *My Reputation or Your Liberty*, *supra* note 1 (discussing the various ethical duties that serve as the basis for obligations of predecessor counsel in death penalty cases).

32. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013); Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 102.

33. MODEL RULES OF PROF’L CONDUCT (2013).

34. As Lawrence Fox has noted:

[T]he capital defense lawyer has an even heightened obligation beyond that in the run of the mill matter, to maintain an orderly file, permitting anyone who follows to know what steps the lawyer considered, what steps the lawyer took, what information was available, what motions were contemplated, what motions were filed, what areas of inquiry and research were suggested, which were pursued and which were rejected, who was interviewed (and who was not), how jury selection was conducted, and every other material step counsel undertook.

Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1189-90; see also 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, 358-60 (2009) (discussing criminal defense attorney obligations); Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 93-99 (discussing criminal defense attorney obligations).

35. See MODEL RULES OF PROF’L CONDUCT R. 1.16.

36. See *id.*; Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1189; Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 112; Siegel, *Three Questions*, *supra* note 17, at 18.

and when necessary, to help organize the file so that its contents can be readily understood by successor counsel.³⁷

The continuing duty of loyalty augments these responsibilities. In particular, fidelity to the interests of a former client requires that predecessor counsel do more than merely be honest and candid in answering questions posed by successor counsel.³⁸ It also requires that the lawyer who is accused of ineffectiveness volunteer information that will assist the client's effort to prove the ineffectiveness claim.³⁹

Finally, predecessor counsel must take steps to protect against unwarranted disclosure of confidential information obtained during representation,⁴⁰ which raises two related questions: first, to what extent does the filing of an ineffectiveness claim waive the attorney-client privilege, such that predecessor counsel can disclose, when compelled to do so, communications with the client; and second, to what extent do the rules of professional ethics permit predecessor counsel to volunteer confidential information obtained during the representation? This latter question concerns the duty to protect all information related to the representation, whatever its source—an obligation that is much broader than the limited disclosure that may be permissible when the attorney-client privilege is waived.⁴¹ Because Guideline 10.13 imposes upon predecessor counsel the duty, “[i]n accordance with professional norms . . . to safeguard the interests of the client,” it plainly requires that predecessor counsel's conduct with respect to these two issues comport with the well-established body of doctrine governing them.⁴²

1. The Attorney-Client Privilege

A lawyer who has been accused of ineffectiveness will often be one of the most important witnesses in the formal judicial proceedings to

37. See Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1189-90.

38. Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 105-08 (discussing the scope of the duty of loyalty to a client).

39. See *id.* at 106-07. Of course, successor counsel should do everything reasonable to facilitate this process. In particular, it will often be sound practice for successor counsel to reach out to predecessor counsel prior to any court filing and seek to discuss interactively, as lawyers with duties to a common client, the legal and factual basis, and the phrasing of the forthcoming ineffectiveness claim with a view towards establishing a cooperative relationship. See *id.* Successor counsel should also take the opportunity to remind predecessor counsel specifically of her obligations regarding the continuing duty of client confidentiality. See *id.* at 109-10.

40. Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1186-87.

41. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2013); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (discussing the lawyer's disclosure of information when a former client brings an ineffective assistance of counsel claim). The duty to protect former client confidences is specifically set forth in Model Rule 1.9(c). See MODEL RULES OF PROF'L CONDUCT R. 1.9(c); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456.

42. See ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

resolve the claim.⁴³ It is therefore critical to determine what information counsel *must* reveal, for example, when responding to questions on the witness stand, or when filing a court-ordered affidavit. The body of case law that has developed to answer this question favors a limited waiver of the attorney-client privilege, meaning that a lawyer can disclose only information relating to the claims raised in the proceedings.⁴⁴ Most courts describe the limited waiver as extending to any information that is “relevant” to addressing the allegations of ineffectiveness,⁴⁵ although some limit disclosure to what is “necessary” to resolve the claim.⁴⁶ The minority position, which is conceptually weaker, is that the filing of the claim constitutes a full waiver of the privilege.⁴⁷

43. See *id.* Guideline 10.13 cmt., at 1075; Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 90-91 (“While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.”).

44. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 19, 23-24 nn.12-16 (citing cases from the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, as well as state cases and statutes).

45. See, e.g., *Johnson v. Alabama*, 256 F.3d 1156, 1179 (11th Cir. 2001) (“[A] habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel *relevant* to assessing the reasonableness of those decisions in the circumstances.” (emphasis added)); *Alabama v. Lewis*, 36 So. 3d 72, 77-78 (Ala. Crim. App. 2008) (noting that, by alleging “ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but *only* with respect to matters *relevant* to his allegations of ineffective assistance of counsel” (second emphasis added)); *Waldrip v. Head*, 532 S.E.2d 380, 387 (Ga. 2000) (“[W]e hold that a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel’s documents and files *relevant* to the specific allegations of ineffectiveness.” (emphasis added)); *In re Dean*, 711 A.2d 257, 258-59 (N.H. 1998) (“We hold that claims of ineffective assistance of counsel, whether brought in a motion for new trial or in a habeas corpus proceeding, constitute a waiver of the attorney-client privilege to the extent *relevant* to the ineffectiveness claim; the waiver is a limited one.” (emphasis added)).

46. See, e.g., *United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009) (“[W]hen a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney *necessary* to prove or disprove his claim.” (emphasis added)); *Arizona v. Moreno*, 625 P.2d 320, 323 (Ariz. 1981) (“The attorney may reveal at least that much of what was previously privileged as is *necessary* to defend against the charges.” (emphasis added)).

47. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 19, 24 nn.17-21 (citing cases and state court rules that emphasize that the filing of an ineffective assistance claim constitutes a broad waiver of the privilege). The dangers of a broad waiver rule were set forth forcefully by the Ninth Circuit in *Bittaker v. Woodford*:

Claims of ineffective assistance of counsel are routinely raised in felony cases, particularly when a sentence of death has been imposed. If the federal courts were to require habeas petitioners to give up the privilege categorically and for all purposes, attorneys representing criminal defendants in state court would have to worry constantly about whether their casefiles and client conversations would someday fall into the hands of the prosecution. In addition, they would have to consider the very real possibility that they might be called to testify against their clients, not merely to defend their own professional conduct, but to help secure a conviction on retrial. A broad waiver rule

Regardless of the precise definition of the waiver, predecessor counsel has an ethical duty to ensure that the former client's interests are protected. For example, if the lawyer is asked about communications that are outside the scope of the limited waiver in the case, the lawyer must assert privilege in an effort to prevent unwarranted disclosure.⁴⁸ In addition, the lawyer must "interpose any other objections if there are nonfrivolous grounds on which to do so."⁴⁹ Further protective action should be pursued, such as requesting that the court determine *ex parte* and *in camera* whether any particular communication should be disclosed, and seeking an appropriate protective order limiting disclosure only to those who need it.⁵⁰

2. The Duty of Confidentiality

There is a related question, which often poses the most serious problems: under what circumstances *may* predecessor counsel disclose information that otherwise would be protected by the ethical duty of confidentiality?⁵¹ This question typically arises when there is an informal request for information by the prosecutor, who may want to see predecessor counsel's file or meet with predecessor counsel as part of the investigation to prepare for, and respond to, the defendant's allegations of ineffectiveness.⁵² Can predecessor counsel engage in such

would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote.

331 F.3d 715, 722 (9th Cir. 2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010).

48. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 9 (2013).

49. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456. The ABA, in response to a government subpoena or court order to turn over current and former client files, concluded:

[A] lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply. Only if the lawyer's efforts are unsuccessful, either in the trial court or in the appellate court . . . and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385 (1994).

50. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 19. For examples in which courts have required *in camera* inspection of proposed disclosure or issued protective orders, *see infra* notes 56-57 and accompanying text.

51. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.9(c).

52. *See* Siegel, *Withhold from the Prosecution*, *supra* note 12, at 23.

informal interactions prior to formal judicial proceedings? Formal Opinion 10-456 is directly on point.

The focus of Formal Opinion 10-456 is on the applicability of the “self-defense” exception to confidentiality under Model Rule 1.6, which permits disclosure of otherwise confidential information that the lawyer determines is reasonably necessary to “respond to allegations in any proceeding concerning the lawyer’s representation of the client.”⁵³ Recognizing that a lawyer may seek to justify disclosure under this provision, Formal Opinion 10-456 recognizes that the provision “might be read” to include claims of ineffective assistance of counsel.⁵⁴ Even so, Formal Opinion 10-456 concludes that disclosure is permitted only to the extent that the lawyer reasonably believes necessary under the circumstances.⁵⁵ In other words, every lawyer will need to carefully scrutinize any potential disclosure to make sure that it is as narrow as possible given the lawyer’s need to respond to the allegations.⁵⁶

More controversially, Formal Opinion 10-456 also concludes that invoking the self-defense exception outside of court-supervised proceedings—such as when the prosecution seeks information from predecessor counsel before there has been a court order to do so—risks unnecessary disclosure of confidential information because there will be no judicial determination as to the propriety of the disclosure.⁵⁷ According to Formal Opinion 10-456, the potential harms that can flow from such unwarranted disclosure are prejudice to the defendant in case of a retrial and a chilling effect on future defendants from fully confiding in their lawyers.⁵⁸ As a result, this Opinion concludes that it is “highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.”⁵⁹

Critics argue that Formal Opinion 10-456 unnecessarily restricts the ability of predecessor counsel to disclose information to help the prosecution determine whether there is any merit to the ineffectiveness

53. MODEL RULES OF PROF’L CONDUCT R. 1.6 & cmts. 18–19; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456. Formal Opinion 10-456 also notes that disclosure would be permissible whenever the former client has provided informed consent, which does not occur merely by the client’s assertion of an ineffectiveness claim. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456.

54. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456.

55. See *id.*

56. See *id.* Formal Opinion 10-456 notes that this is functionally analogous to the ways that courts interpret the self-defense exception to the attorney-client privilege. See *id.*

57. *Id.*

58. *Id.*

59. *Id.*

claim, which might prevent prosecutors from conceding error in some cases, or properly defending claims in others.⁶⁰ Critics also claim that restricting disclosure to formal proceedings does not fully account for the many ways that a finding of ineffectiveness might harm predecessor counsel, including possible harm to the reputation of predecessor counsel, increased risk of disciplinary sanction, and malpractice exposure.⁶¹ In a recent ethics opinion, the D.C. Bar Legal Ethics Committee agreed that Formal Opinion 10-456 unnecessarily restricts the circumstances under which disclosure is permissible.⁶²

In contrast, supporters of Opinion 10-456 argue that, while there may be some risks to limiting disclosure to judicially supervised proceedings, on the whole, the approach taken by the Opinion 10-456 is consistent with the ethical duties of the profession and the “developing jurisprudence” on how courts approach prosecutorial requests for information in ineffectiveness cases.⁶³ For example, some courts have required supervision of any contemplated disclosure, including in some instances, requiring that predecessor counsel submit any documents that might be considered appropriate for disclosure to the court for in camera review, while others have issued protective orders limiting the use of any disclosures that occur.⁶⁴ In addition, some courts have directly approved

60. See Joy & McMunigal, *supra* note 12, at 44.

61. *Id.* For further discussion of these possible harms, see *infra* Part III.B.1.

62. See D.C. Bar Legal Ethics Comm., Op. 364 (2013), available at <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion364.cfm>. While a detailed assessment of Opinion 364 is beyond the scope of this Article, it is worth noting the cribbed and technical basis for its conclusions. For example, Opinion 364 places significant emphasis on the fact that D.C. Rule of Professional Conduct (“DCRPC”) 1.6(e)(3)—which is the analog to the self-defense exception under Model Rule 1.6(b)(5)—permits disclosure that responds only to “specific” allegations of ineffectiveness, whereas Model Rule 1.6(e)(3) has no such limitation. Compare MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013), with D.C. RULES OF PROF’L CONDUCT R. 1.6(e)(3) (2013), and D.C. Bar Legal Ethics Comm., Op. 364. Yet, this is a distinction without a difference. Both the DCRPC and the Model Rules restrict disclosure to that which is “reasonably necessary” to respond to the allegations. D.C. RULES OF PROF’L CONDUCT R. 1.6; MODEL RULES OF PROF’L CONDUCT R. 1.6. It is hard to see how a lawyer who fails to follow this command would be magically transformed into one who did fulfill the command simply because the DCRPC Rule requires the disclosure to respond to “specific allegations,” rather than just “allegations.” See D.C. Bar Legal Ethics Comm., Op. 364. Nor is there persuasive appeal to the fact that DCRPC does not require that disclosure be in response to allegations “in any proceeding,” as required under the Model Rules. See *id.* The whole point of Formal Opinion 10-456 is that, without judicial supervision, there is too much risk of lawyers disclosing more than is “reasonably necessary” to respond to allegations of ineffectiveness, not that the language of Model Rule 1.6(e)(3) limits disclosure to allegations “in any proceeding.” See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010). Fundamentally, Opinion 364 sidesteps this central question. See D.C. Bar Legal Ethics Comm., Op. 364; *supra* notes 50-56 and accompanying text.

63. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 20.

64. *Id.* at 21-22 (citing cases requiring supervision of contemplated disclosure).

the conclusions of Formal Opinion 10-456,⁶⁵ while others have noted this Opinion is not binding on courts when determining the scope of the attorney-client privilege.⁶⁶

Fortunately, in deciding what her obligations are, predecessor counsel in death penalty cases needs not parse these nuances. Guideline 10.13.D specifically requires her to cooperate “with such professionally appropriate legal strategies as may be chosen by successor counsel.”⁶⁷ If successor counsel, now representing the client, advocates for the position advanced by Formal Opinion 10-456, predecessor counsel must behave accordingly.⁶⁸

The final duty owed by predecessor counsel is uncontroversial. Like any witness, a lawyer who testifies during a judicial proceeding owes a duty to be truthful.⁶⁹ In addition, lawyers also have independent obligations of honesty and truthfulness.⁷⁰ As a result, if providing any evidence during the case, a lawyer must be honest—particularly in explaining the choices that the lawyer made during representation.

In sum, predecessor counsel owes to the former client who alleges ineffectiveness a host of duties. Whether there is compliance, however, is another question.

65. See, e.g., *Talouzi v. United States*, No. 3:12-CV-01687, 2012 WL 3778848, at *2 (S.D. W. Va. Aug. 30, 2012) (noting that Formal Opinion 10-456 “provides a reasoned discussion of the competing interests that arise in the context of an ineffective assistance of counsel claim and their impact on the continued confidentiality of attorney-client communications”); *Crusoe v. United States*, No. CR05-0071, 2012 WL 877018, at *2 n.2 (N.D. Iowa Mar. 15, 2012) (noting that Formal Opinion 10-456 provides guidance, and ordering predecessor counsel to file an affidavit responding to the allegations consistent with the Opinion); *Giordano v. United States*, No. 3:11CV9, 2011 WL 1831578, at *3 n.1 (D. Conn. Mar. 17, 2011) (noting that the policy, espoused by Formal Opinion 10-456, of limiting disclosure to formal judicial proceedings, “certainly would be a more foolproof means to ensure that former counsel did not stray beyond the scope of their former clients’ ineffective assistance of counsel claims”).

66. See, e.g., *Jones v. United States*, No. 4:11CV00702, 2012 WL 484663, at *2 (E.D. Mo. Feb. 14, 2012) (noting the non-binding nature of Formal Opinion 10-456, but requiring predecessor counsel to testify in court prior to disclosure of any information, and requiring in camera review of any proposed disclosures prior to cross-examination); *Dunlap v. United States*, No. 4:09-cr-00854, 2011 WL 2693915, at *1 n.4 (D.S.C. July 12, 2011) (noting that Formal Opinion 10-456 is not binding on courts considering the attorney-client privilege).

67. ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

68. See *id.* Guideline 10.13 cmt., at 1074 (“All members of the defense team must . . . facilitate the duty of successor counsel . . .”). Successor counsel almost certainly has an obligation to do precisely this, pursuant to Guideline 10.8, “The Duty to Assert Legal Claims.” See *id.* Guideline 10.8 & cmt., at 1028, 1032 (describing counsel’s obligation to litigate all potentially meritorious issues, even if precedent is currently adverse). Hence, predecessor counsel must assume that successor counsel will object to any disclosure beyond the bounds of Formal Opinion 10-456, and must act accordingly. See *id.*

69. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2013).

70. See *id.* R. 8.4 (establishing that it is professional misconduct for a lawyer to be dishonest).

B. Assessing Practice: Do Lawyers Comply with Continuing Duties Owed to Former Clients?

Determining whether lawyers who are accused of ineffectiveness satisfy their continuing obligations to former clients is difficult. While a number of recent cases have addressed some of these obligations—particularly those that arise when prosecutors seek discovery from predecessor counsel⁷¹—in the vast majority of ineffectiveness cases, the conduct of predecessor counsel is not litigated. As a result, what is known about compliance with the continuing duties is largely anecdotal, coming from the handful of reported decisions on the topic and other sources. In an effort to get a glimpse into these opaque practices, this Subpart reviews what is known about how defense lawyers respond to their duties set forth in Guideline 10.13 and related authority.

The duty of cooperation is the hardest to assess based on case law, as the informal interactions between lawyers during habeas proceedings are seldom reported. In rare instances, however, some mention of these encounters can be found in the filings of a case. For example, in *New Jersey v. Loftin*,⁷² where predecessor counsel was found ineffective for allowing the probation department to interview the defendant while capital murder charges were pending, successor counsel reported that predecessor “met with representatives of the . . . Prosecutor’s Office on approximately 6 separate occasions,” yet “declined to speak” with successor counsel, “who he termed ‘[his] adversary.’”⁷³

Is this type of conduct common? Many experts think so. For example, according to the former Chief Public Defender, who was responsible for all death penalty litigation in Georgia:

Commonly, lawyers against whom [allegations of ineffective assistance of counsel] are raised react with disappointment, outrage, and anger. When these feelings subside, the next usual response is to develop a strategy to defend the allegations. Unfortunately, from that point on, many attorneys facing a claim of ineffective assistance tend to distance themselves from the former clients and even to create an adversarial relationship between themselves and their former clients.⁷⁴

71. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 20-22 (describing what Siegel calls the “developing jurisprudence” of prosecutors who seek disclosure from predecessor counsel, and citing cases and judicial responses to such inquiries); see also *supra* notes 51-52 and accompanying text.

72. 922 A.2d 1210 (N.J. 2007).

73. *Id.* at 1227, 1229; *State v. Loftin*, No. 56,186, 2005 WL 6735278, at *8 n.2 (N.J. Sept. 19, 2005).

74. See Mears, *supra* note 18, at 42.

Another veteran post-conviction lawyer, who has argued multiple cases before the U.S. Supreme Court, concurs, noting: “Some lawyers whose trial work is called into question won’t even pick up the phone,” and refuse to respond to requests or inquiries until a copy of Formal Opinion 10-456 is mailed to them.⁷⁵ Other experts agree.⁷⁶ Given the depth of knowledge of these commentators, there is little doubt that many defense lawyers accused of ineffectiveness respond defensively.

On the other hand, predecessor counsel has been known to cooperate with successor counsel, at least to the extent of providing factual information needed to support the ineffectiveness claim. For example, during litigation that recently led to a successful claim of ineffective assistance in *Kansas v. Cheatham*,⁷⁷ the defendant’s trial lawyer provided a remarkable affidavit in which he conceded a litany of errors, essentially admitting that he had been unprepared for virtually all aspects of death penalty litigation.⁷⁸ These errors included: his lack of experience litigating capital murder cases; his failure to consult with or seek assistance from more qualified attorneys; his failure to become aware of the standards for capital litigation as set forth in the Guidelines; his complete failure to investigate for either the guilt or penalty phase; his failure to prepare a mitigation defense; and his agreement to represent the defendant on a contingency fee basis.⁷⁹ It is hard to measure how often lawyers provide this type of cooperation; while there have been instances in which lawyers have conceded error in death

75. See Lawrence Hurley, *Second Guesses: When Criminal Defendants Attack Their Trial Lawyers’ Competence*, CAL. LAW., Jan. 2012, at 45, 47.

76. See *id.* at 46 (quoting Professor Eric M. Freedman of Maurice A. Deane School of Law at Hofstra University, the Reporter for the ABA Guidelines, who notes that it is the lawyers whose representations are the most egregious, perhaps because of drug or alcohol abuse, who are “the most likely to be defensive”); Joy & McMunigal, *supra* note 12, at 42 (noting that a “common reaction” to being accused of ineffectiveness is “to be defensive and view the former client as an adversary”). Additionally, Fox explains:

[T]he conflict between predecessor counsel’s obligation to help the former client and inevitable reflex of predecessor counsel to wish to defend counsel’s conduct. No one wants to be accused of being ineffective. No one ever wants to be second-guessed. Everyone wants to defend his or her conduct by asserting that it was in fact effective and that the judgments that were made were defensible if not sound.

Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1185 (footnote omitted).

77. 292 P.3d 318 (Kan. 2013).

78. *Id.* at 323.

79. See Affidavit of Dennis Hawver, *Cheatham*, 292 P.3d 318 (No. 95,800).

penalty cases,⁸⁰ far more frequently no such concessions are made, which indicates that they are the exception rather than the rule.⁸¹

It is also difficult to make firm assessments regarding the other obligations of cooperation—such as helping successor counsel determine further areas of factual and legal inquiry to pursue, and sharing the strategic thinking, or lack thereof, that preceded decisions made during representation. Certainly, it would be fair to surmise that most lawyers who react defensively to an allegation of ineffectiveness do not turn around and become fully cooperative. Rather, the adversarial posture that often develops between predecessor and successor counsel suggests that little cooperation occurs. But again, little direct evidence is available. After all, lawyers who avoid their professional obligations rarely admit as much publically.

The related question is how frequently predecessor counsel complies with the duty to safeguard the interests of their former clients, for example, by refusing prosecutors' informal efforts to obtain information about what transpired during the earlier case. Again, there is conflicting information. On the one hand, some have suggested that predecessor counsel rarely volunteer information to the prosecution without a court order to do so, indicating that most lawyers continue to protect confidential information from disclosure, even after a claim of ineffectiveness has been filed.⁸² On the other hand, actual practices in

80. See, e.g., *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998) (noting counsel's admission of ineffective assistance); *Harris v. Dugger*, 874 F.3d 756, 761 (11th Cir. 1989) (describing counsel's admission that he failed to uncover witnesses who could have provided mitigation evidence); *Gentry v. Sinclair*, 576 F. Supp. 2d 1130, 1153-54 & n.38 (W.D. Wash. 2008), *aff'd*, 705 F.3d 884 (9th Cir. 2013) (noting predecessor counsel's concession regarding his failure to challenge the statistical reliability of DNA evidence admitted at trial); *Commonwealth v. Carson*, 913 A.2d 220, 265 (Pa. 2006) (describing an affidavit by counsel admitting ineffective assistance). In one recent Supreme Court case, predecessor counsel provided a series of declarations that could be interpreted, depending upon the point of view, as concessions or denials of error. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1423-24 (2011).

81. See Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1675 n.171, 1684 n.208 (2008) (stating that "attorneys often candidly admit that they rendered ineffective assistance in capital cases," but noting that there is often no affidavit from trial counsel to provide any explanation, confessional or otherwise, for decisions made during representation).

82. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) ("[I]t is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding . . ."). Formal Opinion 10-456 also notes: "In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings." *Id.* Indeed, there are instances in which defense lawyers have refused, at least initially, to provide information to prosecutors. See, e.g., *Crusoe v. United States*, No. CR05-0071, 2012 WL 877018, at *2 (N.D. Iowa Mar. 15, 2012) (noting that trial counsel refused to cooperate with the prosecution's discovery requests in an ineffective assistance

some jurisdictions suggest a very different result. For instance, one federal judge recently noted that, in his district—one of the nation's busiest—the common practice is for lawyers accused of ineffectiveness to voluntarily provide prosecutors with affidavits responding to the allegations, without either the formal consent of the defendant or a court order to do so.⁸³ In other situations, lawyers have gone so far as to voluntarily disclose their entire case files to the prosecution—again, before any compulsion to do so.⁸⁴ Prosecutors have been known to work closely with predecessor counsel; for example, as in *Loftin*, by helping predecessor counsel prepare for their post-conviction testimony—hardly the type of conduct meant to protect the interests of the former client who has alleged ineffective assistance of counsel.⁸⁵ Whether these cases are outliers is, again, hard to determine from available evidence.

case, absent a court order directing trial counsel to provide an affidavit responding to the allegations); *Wadford v. United States*, No. 2:06-cr-01294, 2011 WL 3489808, at *2, 4 (D.S.C. Aug. 9, 2011) (discussing trial counsel's affidavit detailing his representation, which was filed after a court ordered an evidentiary hearing on ineffectiveness claims); *United States v. Rankin*, No. 5:09CR00013, 2010 WL 5478472, at *2 n.3 (W.D. W. Va. Dec. 30, 2010) (noting that defense counsel refused to volunteer an affidavit to the prosecution); *State v. Cantrell*, 2011 Ark. 449, 449 (explaining that trial counsel can only provide information if the former client waives the attorney-client privilege); *State v. Buckner*, 527 S.E.2d 307, 310 (N.C. 2000) (noting that trial counsel refused to speak to the prosecution regarding his former client's claims of ineffective assistance).

83. See *Douglas v. United States*, No. 09 CV 9566, 2011 WL 335861, at *1 (S.D.N.Y. Jan. 28, 2011). According to Judge Colleen McMahon, this practice arises out of the belief that, because the filing of an ineffectiveness claim constitutes a limited waiver of the attorney-client privilege, "[f]ormal consent" from the former client is "deemed unnecessary," and a court order requiring disclosure is "guaranteed to issue." *Id.* The fallacy of this reasoning is that it erroneously conflates the duty of confidentiality and the attorney-client privilege. To be sure, by bringing the claim for ineffective assistance of counsel, the former client implicitly waives any privilege he may assert to prevent compelled disclosure of pertinent information. But, this says nothing about whether the former client has also consented to the disclosure, prior to a court order, of otherwise confidential information under Model Rule 1.6. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456.

84. See, e.g., *Jones v. United States*, No. 4:11CV00702, 2012 WL 484663, at *2 (E.D. Mo. Feb. 14, 2012) (considering whether the prosecution could review the trial file relinquished by trial defense counsel in preparation for an ineffectiveness hearing); *Binney v. State*, 683 S.E.2d 478, 479-80 (S.C. 2009) (discussing whether voluntary disclosure of entire case file to the prosecution violated a state statute defining the attorney-client privilege). It is hard to imagine how such blanket disclosure, prior to formal judicial proceedings, comports with the ethical restrictions of Model Rule 1.6, when the "self-defense" exception limits voluntary disclosures to only information that is reasonably necessary for the lawyer to respond to the allegations. See discussion *supra* Part II.A. To be sure, broad claims of ineffectiveness may require extensive disclosure, but full disclosure of the entire file—which, no doubt, will always contain information unrelated to the substance of ineffectiveness allegations—is difficult to explain.

85. See *New Jersey v. Loftin*, No. 56,186, 2005 WL 6735278, at *8 (N.J. Sept. 19, 2005); *Bane v. Tennessee*, No. W2009-01653-CCA-R3, slip op. at 29-30 (Tenn. Crim. App. July 21, 2011) (quoting trial counsel's testimony from the post-conviction hearing where counsel acknowledged that he depended on the Assistant District Attorney General to review his testimony and to help him prepare for the hearing).

Delving deeper, determining how predecessor counsel responds once there is a court order requiring disclosure to the prosecution is also difficult. *Purkey* is one of the few reported decisions where predecessor counsel's response to a court order for disclosure itself became the subject of additional litigation.⁸⁶ More frequently, once a court orders predecessor counsel to provide the prosecution with information relating to the allegations, the record of how predecessor counsel responds becomes silent. Do lawyers continue to safeguard the interests of their former clients by narrowly tailoring their responses to ensure that only information needed to resolve the ineffectiveness claim is disclosed, or do they open the floodgates of their files after a court order and provide the prosecution with whatever is requested, as alleged in *Purkey*?⁸⁷ How frequently does predecessor counsel attempt to limit disclosure in other ways—for example, by asserting as required non-frivolous claims of privilege; seeking an in camera and ex parte review by the court of proposed disclosures; or seeking protective orders to limit unwarranted disclosure?⁸⁸ Is the advocacy-style affidavit filed by predecessor counsel in the *Purkey* case unique, or do other lawyers accused of ineffectiveness respond similarly? Answers to these questions are unknown.

Last, do lawyers in death penalty cases maintain their files in a manner that meets the obligations set forth in Guideline 10.13? Although, again, little is known empirically, here a bit more may be surmised with confidence. Given the pervasive problem of poor-quality representation in death penalty cases,⁸⁹ and the burdens of limited resources under which so many lawyers operate, it would hardly be surprising if predecessor counsel's files were frequently incomplete and inaccurate.⁹⁰

86. See *Purkey v. United States*, No. 06-8001-CV-W, 2010 WL 4386532, at *1 (W.D. Mo. Oct. 28, 2010); see also *State v. Buckner*, 527 S.E.2d 307, 310 (N.C. 2000) (finding that predecessor counsel had acted properly when, in response to court ordered disclosure, he agreed to disclose correspondence with the defendant, but refused to speak directly with the prosecutor).

87. See discussion *supra* Part II.A.2.

88. See *supra* notes 62-64 and accompanying text.

89. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 41 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> (finding that thirty-nine percent of death sentence reversals in state post-conviction proceedings, and twenty-seven percent of federal reversals, were due to "egregiously incompetent lawyering"). See generally WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing deeply flawed lawyering provided to many capital defendants); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (emphasizing the inadequate representation provided to many capital defendants).

90. Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1190-91 (discussing the possibility that "beleaguered counsel, underpaid and understaffed," would not maintain files "in a

Take, for example, the Supreme Court's recent decision concerning the quality of the mitigation investigation in *Wood v. Allen*.⁹¹ *Wood* turned on whether the defendant's three trial lawyers made a "strategic" decision to stop investigating—and to present no evidence at sentencing about—the defendant's mental health deficiencies after receiving a psychological report regarding his competency to stand trial.⁹² In deciding that there was sufficient evidence to support the state court's factual determination that the decision was strategic, the Court cited contemporaneous correspondence between the lawyers, which included a statement by the lead lawyer that the psychologist's report merited no further investigation.⁹³ At first blush, this case might suggest that predecessor counsel kept the type of records contemplated by Guideline 10.13. In fact, the opposite is true. None of the correspondence, nor any other contemporaneous documentation in the record, explains *why*, after reviewing the psychologist's report, the lead lawyer decided that no further investigation was needed. Was it because there was nothing in the report suggesting any further line of inquiry? Was it because the report was so complete and thorough that no further investigation was reasonably warranted? Or, was it some other reason? These questions are hardly academic; other testimony in the post-conviction proceeding demonstrated that the defendant's mental health deficiencies placed him at or near the borderline for retardation.⁹⁴ Had there been additional documentation explaining the decisions of the defense team, a much fuller record would have been available to help the Court render its judgment. And, while it is mere conjecture at this point, one can wonder

pristine condition").

91. 558 U.S. 290 (2010).

92. See *id.* at 299, 301-03. The Supreme Court sidestepped the primary issue upon which it had granted certiorari—namely, to determine the relationship between two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 relating to federal court review of state court factual findings. *Wood*, 558 U.S. at 293; see 28 U.S.C. § 2254(d)(2), (e)(1). As a result, the Court limited its inquiry to whether, under § 2254(d)(2), the state court's finding that predecessor counsel made a strategic decision not to pursue or present evidence of the defendant's mental deficiencies was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See *Wood*, 558 U.S. at 299, 301-03.

93. *Wood*, 558 U.S. at 301-02. The letters were written by Kenneth Trotter, a young, inexperienced lawyer who was primarily responsible for the sentencing phase and who answered to the other two lawyers: lead counsel, Cary Dozier, and Frank Ralph. See Joint Appendix at 342-45, *Wood*, 558 U.S. 290 (No. 08-9156). In both letters, Trotter made the same statement: "We have not had an independent psychological evaluation done since [Dozier] said it would not be needed. As you know, in discovery materials [we learned the defendant] had anger control problems and demonstrated antisocial behavior. Based on this information, we should request an independent psychological evaluation [of the defendant]." *Id.* No such independent psychological evaluation was ever requested or conducted. *Id.*

94. See *Wood v. Allen*, 542 F.3d 1281, 1286 (11th Cir. 2008).

whether such records would have furnished the evidence needed to prove that predecessor counsel's representation was ineffective.⁹⁵

In sum, the available empirical evidence provides a partial understanding of how lawyers anticipate, and respond to, claims of ineffectiveness in death penalty cases, although, what is known is largely anecdotal and incomplete. While some lawyers appear to be willing and able to comply with their duties to an extent, a defensive response is triggered in many other lawyers upon learning of a former client's ineffectiveness claim, and such responses can undermine the professional duties owed to these clients. Because anecdotal evidence only goes so far to help assess how lawyers prepare for, and respond to, claims of ineffective assistance of counsel, empirical evidence is needed. The question is whether a more systematic approach to determining lawyer behavior is available.

III. THE POWER OF MOTIVATED REASONING

This Part takes up the task of assessing attorney behavior by focusing on one of the most studied and robust psychological factors that contribute to human reasoning and decision-making: the power of motivation. Often known as "motivated reasoning" or "motivated cognition," it is now well established that people reason in a way that is biased by their pre-existing wishes, wants, and desires.⁹⁶

A. Foundations of Motivated Reasoning

A core finding of research into the psychology of decision-making is that motivation powerfully influences judgment and behavior.⁹⁷ As one set of experts explained:

95. At least two possible legal consequences might have flowed from a fuller explanation of why predecessor counsel decided to end the investigation after receiving the psychologist's report. First, it may have demonstrated that, as a factual matter, the decision by predecessor counsel was not strategic. Alternatively, it may have demonstrated to the lower courts that, even if strategic, counsel's decision was not reasonable. See *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (noting that the relevant question for *Strickland* analysis "is not whether counsel's choices were strategic, but whether they were reasonable").

96. See Baumeister & Newman, *supra* note 22, at 3-19; Helzer & Dunning, *supra* note 22, at 380-81; Kunda, *supra* note 20, at 480, 489-95.

97. Much has been written about the relationship between cognitive and motivational aspects of reasoning and judgment, including evidence demonstrating the importance of both in the decision-making process. See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 223-33 (2000); Kunda, *supra* note 20, at 482, 488; Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 297, 297-98 (1987). The emphasis of this Article is on the motivational components, although other aspects are discussed as appropriate. See *supra* Part I.

A wealth of social psychological research suggests that in many judgment situations, particularly those that involve people and issues we care about deeply, people . . . often have a preference for reaching one conclusion over another, and these directional motivations serve to tip judgment processes in favor of whatever conclusion is preferred.⁹⁸

Moreover, motivated cognition occurs through automatic processes, that is, below the level of conscious awareness.⁹⁹ The result is that people are able to continue comfortably believing the illusion of their own objectivity, unaware of how their wishes and desires are coloring the decisions they make.¹⁰⁰ Put succinctly, they are blinded to their own biases.¹⁰¹

The robust empirical basis for motivated reasoning has been well documented.¹⁰² Indeed, “[p]sychologists now have file cabinets full of findings on ‘motivated reasoning,’ showing the many tricks people use to reach the conclusions they want to reach.”¹⁰³ Any casual search for information will produce a vast array of empirical and theoretical studies on motivated reasoning. For instance, studies have demonstrated that people consider information that is consistent with their desires—such

98. Peter H. Ditto et al., *Motivated Moral Reasoning*, in 50 *PSYCHOLOGY OF LEARNING AND MOTIVATION* 307, 310 (2009) (citations omitted).

99. See *id.* at 311 (describing the “affective reactions” that underlie motivated reasoning as “quick, automatic, and ubiquitous”); Pyszczynski & Greenberg, *supra* note 97, at 302, 311; see also DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 361 n.100 (2012) (listing sources discussing motivated reasoning).

100. Ditto et al., *supra* note 98, at 312 (“The crucial aspect of . . . motivated reasoning mechanisms is that their subtlety allows them to operate well within the confines of what people perceive as the dictates of objectivity.”); Kunda, *supra* note 20, at 483 (describing how people maintain an illusion of objectivity by not being aware that their reasoning process is biased by their goals); Pyszczynski & Greenberg, *supra* note 97, at 302 (describing the illusion of objectivity).

101. See, e.g., Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 680, 681 (2005); Emily Pronin, *The Introspection Illusion*, in 41 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 6-7 (2009); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 369, 369 (2002); see also MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT 5 (2011) (describing ethical blind spots). For a description of how the illusion of objectivity influences criminal defense lawyers who represent indigent defendants, see Eldred, *Prescriptions*, *supra* note 23, at 358 & nn.149-51.

102. Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 1379, 1379 (2002) (“There is now a great deal of evidence that people are inclined to draw conclusions that suggest positive outcomes for themselves; provide support for pre-existing opinions; and confirm their status, success, and well-being.”); Paul D. Windschitl et al., *Why So Confident? The Influence of Outcome Desirability on Selective Exposure and Likelihood Judgment*, 120 *ORGANIZATIONAL BEHAV. HUM. DECISION PROCESSES* 73, 73-74 (2013).

103. JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 98 (2012).

as, when addressing one's intelligence or professional competence—more valid than information that is inconsistent with them.¹⁰⁴ Other studies have demonstrated motivated responses in how people assess the performance of preferred presidential officeholders,¹⁰⁵ the sportsmanship of their preferred sporting team,¹⁰⁶ and even the odds of winning a bet.¹⁰⁷

Take, for example, the long-studied area of motivated political reasoning. While it would hardly be surprising to learn that political zealots can be blinded by partisan ideology, research demonstrates that motivational goals that bias political reasoning are lurking below the surface of consciousness for most people—even those with only moderate political beliefs.¹⁰⁸ Indeed, even when instructed to be accurate, people's motivations seems to reign, demonstrating “consistent evidence of directional partisan bias” which may make it “impossible to be fair-minded.”¹⁰⁹ In one study, researchers found that political identity influenced views about the propriety of the United States' intervention in Iraq: Democrats persistently concluded that the absence of weapons of mass destruction was evidence that they never existed, whereas Republicans interpreted the same data as proof that the weapons had been moved, hidden, or destroyed.¹¹⁰ As is often the case with motivated reasoners, the same information—here, the absence of weapons—was interpreted in a biased manner to help justify pre-existing beliefs and desires about the propriety of the United States' military campaign.¹¹¹ Other studies have come to similar results.¹¹²

104. See Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 569 (1992); see also SIMON, *supra* note 99, at 25-26.

105. Matthew J. Lebo & Daniel Cassino, *The Aggregated Consequences of Motivated Reasoning and the Dynamics of Partisan Presidential Approval*, 28 POL. PSYCHOL. 719, 720 (2007).

106. Albert Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129-34 (1954).

107. See SIMON, *supra* note 99, at 26.

108. Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 767 (2006).

109. *Id.* (discussing a study that “presents a compelling case that motivated biases come to the fore in the processing of political arguments even for nonzealots”).

110. See Brian J. Gaines et al., *Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq*, 69 J. POL. 957, 958 (2007). Similarly, in another study, researchers found that the partisanship of participants—who were shown television coverage of the Israeli-Arab conflict—determined the direction of the media bias that the participants perceived. See Robert P. Vallone et al., *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577, 581 (1985).

111. See Gaines et al., *supra* note 110, at 958.

112. See Charles S. Taber et al., *The Motivated Processing of Political Arguments*, 31 POL. BEHAV. 137, 139 (2009) (finding that people engage in various mechanisms of motivated reasoning to denigrate evidence that is inconsistent with their pre-existing political beliefs).

This type of biased assimilation of information is an example of the larger phenomenon that lies at the heart of motivated reasoning. Sometimes called “asymmetrical skepticism,”¹¹³ the central idea is that people subject information that is consistent with preferences to less scrutiny than they do to information that contradicts a preferred outcome.¹¹⁴ This is particularly true when there is a vested personal interest in the belief.¹¹⁵ The specific manifestations occur in various ways. For example, considerable evidence indicates that people frame questions in ways that favor their beliefs;¹¹⁶ search their memory and other sources for favorable information and then truncate their search once it is found;¹¹⁷ tend to perceive ambiguous information in a manner that is consistent with preferences;¹¹⁸ and evaluate favorable information less rigorously than unfavorable information.¹¹⁹ An apt description of the phenomena is that motivated reasoners, when confronted with favorable information, ask the permissive question: “Can I believe this?”—whereas, when confronted with hostile or unfavorable information, they ask a more demanding question that imposes a greater level of scrutiny: “Must I believe this?”¹²⁰

113. Karl Ask et al., *Elasticity in Evaluations of Criminal Evidence: Exploring the Role of Cognitive Dissonance*, 16 LEGAL CRIMINOLOGICAL PSYCHOL. 289, 290 (2011) [hereinafter Ask et al., *Elasticity in Evaluations*] (citing extensive studies of this effect, also known as the “Quantity of Information Processing” effect); Karl Ask & Pär Anders Granhag, *Motivational Bias in Criminal Investigators’ Judgments of Witness Reliability*, 37 J. APPLIED SOC. PSYCHOL. 561, 579 (2007). For a review of the literature in this area, see Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237, 269-76 (discussing the influence of motivational biases).

114. See Ask et al., *Elasticity in Evaluations*, *supra* note 113, at 290.

115. See Ask & Granhag, *supra* note 113, at 562, 579 (discussing the subjectivity of witness interpretation of information in criminal investigations).

116. See Helzer & Dunning, *supra* note 22, at 381 (“One of the most powerful—and subtle—strategies people can use to arrive at desired conclusions is to frame the questions they ask in a biased manner, making confirmation of a desired conclusion more likely than disconfirmation.”); see also SIMON, *supra* note 99, at 37.

117. See Dawson et al., *supra* note 102, at 1379. In the article *Motivated Recruitment of Autobiographical Memories*, Rasyid Sanitioso and his colleagues stated:

People attempt to construct a rational justification for the conclusions that they want to draw. To that end, they search through memory for relevant information, but the search is biased in favor of information that is consistent with the desired conclusions. If they succeed in finding a preponderance of such consistent information, they are able to draw the desired conclusion while maintaining an illusion of objectivity.

Rasyid Sanitioso et al., *Motivated Recruitment of Autobiographical Memories*, 59 J. PERSONALITY & SOC. PSYCHOL. 229, 229 (1990).

118. See Ditto et al., *supra* note 98, at 311.

119. Ditto & Lopez, *supra* note 104, at 569-70.

120. Dawson et al., *supra* note 102, at 1379; see also THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 31-37 (1991); Helzer & Dunning, *supra* note 22, at 382 (describing studies that support findings of “motivated skepticism”). In one classic study of particular pertinence, researchers found that participants’ pre-existing beliefs about capital punishment determined how they perceived studies on its deterrent effects. See

The power of motivation, however, is not unconstrained. Rather, competing with the desire for a preferred conclusion is the motive for accuracy, which moderates the power of wishful reasoning.¹²¹ Basically, people tend not to bend the rules of reason to achieve implausible conclusions.¹²² It is situations of ambiguity where, because there is more room for biased selection and interpretation of information, motivated reasoning can flourish.¹²³ In contrast, when there is little ambiguity and the conclusion to be reached is clear-cut, the power of motivated reasoning is substantially diminished.¹²⁴

The role of ambiguity is well documented. For example, a large body of research demonstrates what is known as the “above average effect,” in which people persistently rate themselves as above average in a variety of ways, such as driving a car, managerial prowess, productivity, and other desirable traits.¹²⁵ The ability to make such self-serving assessments is constrained by the elasticity of the trait.¹²⁶ To list just a few examples: athletes asked to rate their capabilities are more likely to exaggerate their abilities regarding ambiguous characteristics—such as mental toughness—than less ambiguous traits, such as running speed;¹²⁷ people are more likely to consider themselves environmentalists when asked about general traits that are easily manipulated than when asked about more objective criteria—such as

Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979). For example, those opposed to capital punishment were more likely to question the methodology of a study that demonstrated its deterrent effect than were those who favored the death penalty. *Id.* In short, participants were more suspicious of data they did not want to believe. *Id.*

121. Kunda, *supra* note 20, at 481-82.

122. Ditto et al., *supra* note 98, at 314 (“People only bend data and the laws of logic to the point that normative considerations challenge their view of themselves as fair and objective judges, and motivated reasoning effects are most pronounced in situations where plausibility constraints are loose and ambiguous.”); Kunda, *supra* note 20, at 491 (“[I]f directional goals do exert an influence on reasoning, this influence is limited by people’s perceptions of reality and plausibility.”). *But see* Helzer & Dunning, *supra* note 22, at 385-92 (arguing that the research on plausibility constraints may need to be updated to take into account instances where motivated reasoning occurs despite the implausibility of the conclusion reached).

123. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, J. ECON. PERSP., Winter 1997, at 109, 111 (citing studies that demonstrate that “self-serving assessments of fairness are likely to occur in morally ambiguous settings”).

124. See Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS LAW, MEDICINE, AND PUBLIC POLICY 74, 82 (Don A. Moore et al. eds., 2005).

125. See Babcock & Loewenstein, *supra* note 123, at 110-11.

126. See *id.*

127. Scott T. Allison & Dafna Eylon, *Ambiguity as Friend or Foe: The Use of Ambiguous Information in the Self-Serving Achievement of Task Goals*, 8 CURRENT RES. SOC. PSYCHOL. 253, 254 (2003).

whether they recycle, donate to environmental organizations, or use energy-saving light bulbs, all of which can be verified;¹²⁸ and college students produce more flattering self-reports the more ambiguous the trait—whether desirable or not.¹²⁹ As one noted expert has stated: “one of the royal roads to constructing a pleasant and congenial self-image is the constant exploitation of ambiguity and uncertainty.”¹³⁰

Given the powerful psychological influence of motivated reasoning, it is not surprising that it has permeated considerations about the criminal justice process. For instance, significant attention has focused on how police and others in law enforcement too often narrowly seek to prove that an identified suspect committed a crime, rather than objectively evaluating available evidence.¹³¹ Central to these inquiries are the motivations at play.¹³² The pressure to clear cases, the professional pride generated by helping make an arrest, and the prestige that can follow from a successful prosecution are only some of the motivations that can cause asymmetric skepticism of evidence uncovered during a case.¹³³

Prosecutors also can experience motivated reasoning as part of the cluster of psychological biases that can produce erroneous judgments.¹³⁴ For example, as a number of legal scholars have demonstrated, part of the explanation for prosecutorial misconduct—such as the failure to meet *Brady* obligations or to properly respond to post-conviction claims

128. Chugh et al., *supra* note 124, at 82.

129. See DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF 102-03 (2005).

130. *Id.* at 99; see also Kim, *The Banality of Fraud*, *supra* note 21, at 1030 (“[C]omplex and ambiguous contexts . . . where multiple arguments can be generated are ideal environments for triggering self-serving biases, because they allow subjects to focus on, or weight, differentially, arguments favoring themselves (or their clients or de facto principals) over other parties.”).

131. See Ask & Granhag, *supra* note 113, at 561-62; Deborah Davis & Richard A. Leo, *To Walk in Their Shoes: The Problem of Missing, Misunderstood, and Misrepresented Context in Judging Criminal Confessions*, 46 NEW ENG. L. REV. 737, 738-39 (2012).

132. See SIMON, *supra* note 99, at 25-33 (discussing comprehensive research demonstrating how motivated reasoning can bias the investigation of a criminal case); Ask & Granhag, *supra* note 113, at 579 (reporting that research demonstrates that investigators engage in asymmetric skepticism when considering evidence regarding an identified suspect); Davis & Leo, *supra* note 131, at 764-65 (discussing the role that motivated reasoning can play in producing false confessions during the investigation of crime).

133. SIMON, *supra* note 99, at 26-27. Other motivations that can skew the investigatory process include the emotional arousal of police—especially anger and disgust—toward a particular suspect, the affinity of group membership, and the escalation of commitment to the guilt of a suspect who has been identified on preliminary evidence gathered in the case. See *id.*

134. See *id.* at 20 (noting that much of the psychological phenomena that influence police and others in law enforcement also affect prosecutors, “who are often involved in one way or another in major investigations, and who are subjected to similar incentives and pressures in the performance of their role”).

of innocence—rests with motivated reasoning.¹³⁵ The central argument of these scholars is that, once a person has been accused of a crime, the unconscious need to confirm the accused's guilt overrides concerns for accuracy.¹³⁶

Finally, defense lawyers are not immune from these psychological forces, especially in circumstances of extreme workload pressure.¹³⁷ The result can be a form of what I call “ethical blindness,” which causes defense lawyers who are motivated to dispose of cases quickly to shortchange their professional obligations.¹³⁸ Again, these motivations that bias judgment—just as with police and prosecutors—occur below the level of consciousness, meaning they go undetected, leaving their mark without a trace.

B. Predecessor Counsel as Motivated Reasoner

The research on motivated reasoning helps to provide an accurate picture of how lawyers will respond when faced with allegations of ineffective assistance of counsel. Of course, no one motive will exist for all lawyers.¹³⁹ Many lawyers will react defensively to a claim of ineffectiveness, believing that the allegation is an unwarranted assault against their competence and good name. Some may view the claim with less hostility, recognizing that accusations of ineffectiveness should be

135. *Brady v. Maryland*, 373 U.S. 83, 88-90 (1963); see, e.g., Alafair S. Burke, *Improvising Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1597-98 (2006) (discussing the influence of motivational factors on selective information processing); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 313 (discussing motivational factors). Most of the work on prosecutorial error has focused on the cognitive aspects of judgment bias, particularly with regard to the role of “confirmation bias,” which is the well-documented psychological phenomenon in which people unconsciously seek out information that confirms pre-existing beliefs or opinions. Burke, *supra*, at 1596. However, the long debate in psychology over differentiating cognitive and motivational aspects of reasoning is well beyond the present purposes, other than to note that the cognitive processes that produce confirmation bias and the goal directed aspects of motivational reasoning tend to work together. See, e.g., Kunda, *supra* note 20, at 494-95. Indeed, psychologists have found that motivated reasoning will often be responsible for the initial hypothesis that starts the process of confirmatory reasoning. *Id.* In other words, confirmation bias describes one mechanism by which motivated reasoning occurs. For a discussion that brings together the cognitive and motivational factors in prosecutorial decision-making, see Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1010-15 (2009).

136. See Findley & Scott, *supra* note 135, at 292-93.

137. See AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 4 (2009); Eldred, *Prescriptions*, *supra* note 23, at 337-40; Findley & Scott, *supra* note 135, at 292.

138. See Eldred, *Prescriptions*, *supra* note 23, at 368-74.

139. See Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 358 (2006) [hereinafter Bandes, *Repression and Denial*] (describing the vagaries of motives that exist for death penalty litigators).

expected, especially in death penalty cases. There may even be a few lawyers who, being so committed to their client's interest, view an allegation of ineffectiveness as a welcome opportunity to prevent or delay the client's execution. The next Subpart surveys these various motives, and examines how they can be expected to influence decisions lawyers make regarding their professional duties under Guideline 10.13 and other relevant authority.¹⁴⁰

1. Lawyers Motivated to Resist Allegations of Ineffectiveness

For defense lawyers who are accused of ineffective assistance of counsel, two motives are likely to take priority. The first concerns the role of emotion. Contrary to common perception, people cannot simply disregard their emotional reactions when making a decision. Rather, it is the experience of emotion that produces an immediate motivated response.¹⁴¹ In other words, motivated reasoning is emotion-based reasoning,¹⁴² which occurs automatically, effortlessly, and without awareness.¹⁴³ And, while the role of emotion continues to be studied in a wide range of disciplines,¹⁴⁴ its role as a significant factor in how decisions are made is now firmly established.¹⁴⁵

It is also understood that lawyers frequently react defensively to allegations of ineffectiveness.¹⁴⁶ They may feel scorned, angry,¹⁴⁷ and as

140. See *infra* Part III.B.1–2.

141. See Ditto et al., *supra* note 98, at 311; Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947, 1947 (2006).

142. See Drew Westen & Pavel S. Blagov, *A Clinical-Empirical Model of Emotion Regulation*, in HANDBOOK OF EMOTION REGULATION 373, 382 (2007) (describing how the “emotional influence on judgment and decision making occurs in a phenomenon known as motivated reasoning, whereby people draw emotionally biased conclusions”); see also Ditto et al., *supra* note 98, at 311 (“[A]s people consider information relevant to a judgment where they have a preferred conclusion, they experience positive affect if that information seems to support their preferred conclusion, and negative affect if it seems to challenge their preferred conclusion.”); Westen et al., *supra* note 141, at 1947 (“Motivated reasoning can be viewed as a form of implicit affect regulation in which the brain converges on solutions that minimize negative and maximize positive affect states.”).

143. Ditto et al., *supra* note 98, at 311; Lisa Feldman Barrett et al., *On the Automaticity of Emotion*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 173, 187-91 (2007).

144. Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 506 (2009) [hereinafter Bandes, *Repellent Crimes*] (describing how a wide range of fields, “including philosophy, psychology, sociology, political science, anthropology, and cognitive neuroscience, hold pieces of the puzzle about what emotion is and what roles it plays”).

145. See *supra* notes 134-35 and accompanying text; see also Taber & Lodge, *supra* note 108, at 756 (arguing that, based on research, “selective biases and polarization . . . are triggered by an initial (and uncontrolled) affective response”).

146. See *supra* notes 133-37 and accompanying text.

147. See Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1185.

if their pride is wounded.¹⁴⁸ Perhaps they perceive the allegation as an attack on their self-worth,¹⁴⁹ or as an unwarranted attack on their competence, from an ungrateful former client.¹⁵⁰ Whatever the cause, lawyers who experience such negative reactions can be expected to engage in biased selection, recall, and interpretation of information. Coupled with the emotionally charged environment of capital litigation itself, which can be deeply draining and is so often infused with strong passions about the death penalty,¹⁵¹ the power of these emotional reactions to produce motivated responses can be anticipated to be especially strong.

The power of self-interest is also a significant component of the decision-making process. It should surprise no one that self-interested goals are often consciously pursued. But, the more subtle point here is that self-interest also influences decisions automatically, outside of the conscious awareness of the decision-maker.¹⁵² Indeed, a wealth of psychological data indicates that people engage in biased reasoning to achieve self-interested results.¹⁵³ The result is that they fail to perceive the ways in which self-interest corrupts their choices.¹⁵⁴ Lawyers and

148. Siegel, *My Reputation or Your Liberty*, *supra* note 1, at 99-100.

149. Chugh et al., *supra* note 124, at 84-85 (noting that people possess an illusion of their own competence to maintain and protect their self-esteem); *see also* SIMON, *supra* note 99, at 110 (describing how memory can be influenced by the "ubiquitous need to enhance one's prestige and sense of self-worth").

150. Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1185-86 (discussing many reasons why predecessor counsel may feel that the client has contributed to his own predicament).

151. *See* ABA GUIDELINES, *supra* note 8, Guideline 1.1 cmt., at 923 (noting the emotional toll of death penalty defense work); Bandes, *Repression and Denial*, *supra* note 139, at 342-43 (recounting the case of a defense lawyer who, years after the event, acknowledged that he was so repelled by his client that he intentionally lost the capital case). *See generally* Bandes, *Repellent Crimes*, *supra* note 144 (discussing the emotional environment of capital litigation).

152. *See* Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 199 (2004) (explaining how self-interest is processed consciously, below the level of awareness); *see also* BAZERMAN & TENBRUNSEL, *supra* note 101, at 8, 81 (explaining the unconscious processing of self-interest). For a review of the literature and research on the automatic power of self-interest, *see* Eldred, *Prescriptions*, *supra* note 23, at 361-68.

153. *See* Babcock & Loewenstein, *supra* note 123, at 111 ("[R]esearch on the self-serving bias has shown that people tend to arrive at judgments of what is fair or right that are biased in the direction of their own self-interests."); Kim, *Naked Self-Interest?*, *supra* note 21, at 137 (describing "the decades of social cognition research showing that we are motivated by our own economic self-interest and that we tend to conflate 'fairness' with that which benefits ourselves financially").

154. Kim, *The Banality of Fraud*, *supra* note 21, at 1030 & n.305 ("Because we are imperfect information processors, we first automatically determine our 'preference for a certain outcome on the basis of self-interest and then justify this preference on the basis of fairness by changing the importance of attributes.'" (quoting Max H. Bazerman et al., *The Impossibility of Auditor Independence*, 38 SLOAN MGMT. REV. 89, 91 (1997))).

other professionals are not immune; rather, like everyone else, they will often fail to appreciate how self-interest influences their judgment.¹⁵⁵

In the present context, lawyers accused of ineffectiveness have a host of self-interested reasons to resist the allegations. Most directly, the determination that a lawyer has been ineffective can be perceived as a blemish to that lawyer's professional reputation and good name.¹⁵⁶ Indeed, as Formal Opinion 10-456 notes, it is the possibility of such reputational harm that serves as the rationale for permitting a lawyer to disclose information that would otherwise be protected under the duty of confidentiality.¹⁵⁷ And, while some have questioned whether such reputational concerns should matter,¹⁵⁸ reputation is, for many lawyers, the commodity they most cherish.¹⁵⁹ Other, more concrete, injuries can also flow. In some cases, a lawyer who has been adjudicated ineffective may find it harder to obtain additional court appointments.¹⁶⁰ And, while criminal defense lawyers typically have little reason to fear professional discipline,¹⁶¹ a finding of ineffectiveness can make it more likely—at least in more egregious cases—that the disciplinary process will be initiated.¹⁶²

155. See Babcock & Loewenstein, *supra* note 123, at 121 (describing studies of bankruptcy lawyers and judges demonstrating the existence of self-serving biases); Page, *supra* note 113, at 261-65 (reviewing literature on biased decision-making in various professions). For a discussion of how automatic self-interest can influence the choices made by criminal defense lawyers, see Eldred, *Prescriptions*, *supra* note 23, at 368-74; Eldred, *Psychology of Conflicts*, *supra* note 23, at 72-77. See generally Max H. Bazerman & Deepak Malhotra, *Economics Wins, Psychology Loses, and Society Pays*, in *SOCIAL PSYCHOLOGY AND ECONOMICS* 263 (David De Cremer et al. eds., 2006) (describing research on biased reasoning in various professions, including doctors, lawyers, accountants, and investment bankers).

156. See Eldred, *Psychology of Conflicts*, *supra* note 23, at 75 & n.159 (citing sources discussing the effects of an ineffective assistance of counsel claim on the lawyer himself); Joy & McMunigal, *supra* note 12, at 44 (noting that defense lawyers accused of ineffectiveness have reputational interests at stake).

157. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010).

158. See Newmark, *supra* note 18, at 731.

159. See Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 822 n.96 (2000); Judith A. McMorro et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1428 n.15 (2004).

160. See, e.g., *Burger v. Kemp*, 483 U.S. 776, 806 n.11 (1987) (Blackmun, J., dissenting) (describing how the lawyer accused of ineffectiveness based on an alleged conflict of interest was not "fully disinterested," in that he "ha[d] an interest in disavowing any conflict of interest so that he may receive other court appointments that [could be] a source of clients for the criminal defense work of the partners' practice").

161. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1186 (2003); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrongs with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 10 (1995).

162. There are at least three reasons for this conclusion. First, because all lawyers have a mandatory reporting requirement under Model Rule 8.3, any violation that raises a substantial question as to the lawyer's honesty, trustworthiness, and fitness to practice law must be reported to

How will these negative emotions and self-interested motivations influence the choices that lawyers make when responding to claims of ineffectiveness? Recall that one of the primary constraints on motivated reasoning is the competing desire for accuracy, meaning that reasoning towards a desired conclusion flourishes when there is room to maneuver.¹⁶³ Determining the power of motivated reasoning for defense lawyers in post-conviction cases, therefore, requires careful scrutiny of the obligations set forth in Guideline 10.13 and other relevant authority.

To begin, Guideline 10.13 is crafted in a manner that limits the likelihood of motivated reasoning being deployed to defeat its core goal of giving primacy to the interests of the client.¹⁶⁴ Some of the duties in Guideline 10.13 simply do not provide much room for motivated reasoning. For example, it would be hard for a defense lawyer to plausibly argue that there is no obligation to turn over the entire case file to successor counsel.¹⁶⁵ As a result, there is little reason to believe that lawyers will attempt to find a rationalization not to do so. Similarly, the categorical obligations to safeguard the best interests of the former client and to cooperate fully with successor counsel make it hard for predecessor counsel to completely ignore these obligations under a belief that there is a plausible reason for such conduct.¹⁶⁶

At the same time, as with any set of obligations, there is space for interpretation. It is, therefore, in these interstices where motivated reasoning is likely to occur. Recognizing this and the power of motivated reasoning already described, courts applying Guideline 10.13,

the appropriate professional authority. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2013). And, while not every finding of ineffectiveness triggers a duty to report, a finding of ineffectiveness based on egregious error arguably does so. *See* Henak, *supra* note 34, at 357-58 (discussing Model Rule 8.3's obligations for findings of ineffective assistance of counsel); *see also* Ariz. Comm. on Rules of Prof'l Conduct, Op. 98-02 (1998). Second, while judges are often reluctant to report findings of ineffectiveness to disciplinary authorities, the fact that such referrals do occur should be enough to ring a cautionary bell for defense lawyers. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 74 (Gerald Uelman ed., 2008) [hereinafter CCFA FINAL REPORT]; *see also* Graham, *supra* note 81, at 1674-75 & n.171 (citing cases showing judicial reluctance to report ineffective assistance of counsel); McMorrow et al., *supra* note 159, at 1436 & n.50 (citing cases demonstrating the reluctance of judges to report ineffective assistance of counsel). Indeed, at least in one state—California—there is an effort underway to encourage such referrals in appropriate cases. *See* CCFA FINAL REPORT, *supra*, at 74-75. Third, there is at least some evidence that disciplinary counsel do not initiate charges against defense lawyers until the record is fully developed through a post-conviction claim of ineffective assistance of counsel. *See* Donald R. Lundberg, *Two Case Studies in the Exercise of Discretion in Lawyer Discipline Systems*, 2009 J. PROF. LAW. 107, 108.

163. *See supra* Part III.A.

164. *See* ABA GUIDELINES, *supra* note 8, Guideline 10.13 cmt., at 1074-75.

165. *See id.*

166. *See id.* Guideline 10.13, at 1074.

and lawyers considering the obligations that it imposes, must keep a steady eye on its client-centered purpose.¹⁶⁷

Take, for example, perhaps the most important duty of predecessor counsel: to provide successor counsel with information regarding all aspects of the representation of the former client, including details about the strategic thinking that took place during the case.¹⁶⁸ This duty is complicated, and certainly requires predecessor counsel to help successor counsel understand which areas of factual and legal inquiry were undertaken, which were not, and the reasons for those decisions or omissions.¹⁶⁹ Yet, there is a degree of flexibility in how to interpret these obligations. Must the lawyer discuss every aspect of decision-making, or only those which predecessor counsel considers significant? What information may predecessor counsel offer freely, even if not sought directly by successor counsel, and which must await a request? Can predecessor counsel assume that much of the file will speak for itself, or must there be an affirmative effort to provide explanations for any ambiguities—and, if so, what is the proper standard for determining what is ambiguous? These and other questions open the doors to motivated answers. Successor counsel might volunteer only a small percentage of available information; or limit the amount of time that is made available to successor counsel for an interview; or fail to return phone calls in a timely manner; or engage in any other number of actions that could burden successor counsel's efforts to prove the defendant's claim. None of these actions would be consistent with effective assistance during the course of a representation, and hence, none of them should be tolerated in a situation where successor counsel has "a continuing duty to safeguard the interests of the client."¹⁷⁰

In addition, most claims for ineffectiveness are litigated long after the defendant was sentenced, requiring predecessor counsel to remember events years after they happened.¹⁷¹ Recall that people tend to remember information in a manner that is favorable to their goals, and then truncate their search upon finding it.¹⁷² Unless there are contemporaneous notes

167. See *id.* Guideline 10.13 cmt., at 1075.

168. See *id.* Guideline 10.13, at 1074.

169. See *id.*

170. *Id.*

171. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 695 (2007) (discussing the extensive delay that typically occurs between the sentencing of a defendant and collateral proceedings brought to challenge the effectiveness of counsel).

172. See SIMON, *supra* note 99, at 110 (discussing the many psychological factors that influence memory, explaining the various reasons why recall can be biased by directional goals, and noting that memories are "susceptible to motivational influences also because perception itself can

recording decisions that were made—a duty discussed in more detail below—predecessor counsel will need to rely on memory to recall the details of what transpired during the representation of the former client. Motivated to reduce the chance of being found ineffective, lawyers will naturally favor memories that benefit their own interests over those of their former clients.

Once again, *Wood* serves as an example.¹⁷³ As previously noted, the question was whether the three-member trial team made a strategic decision to curtail investigation into the defendant's mental health deficiencies upon reviewing a psychologist's report that had been prepared for the defense.¹⁷⁴ At the habeas hearing, which occurred more than six years after the trial, none of the lawyers could recall much regarding the psychologist's report.¹⁷⁵ For example, the lead lawyer could not recall whether he was present during the defendant's psychological assessment or whether he ever met with the psychologist.¹⁷⁶ The lawyer primarily responsible for the penalty phase had a hard time even remembering the doctor's name or what interactions, if any, he had with him.¹⁷⁷ Yet, notwithstanding their expansive lack of recall, both lawyers, as well as the third lawyer who was more tangentially involved, were able to remember that they did, in fact, review the psychologist's report, which later became the key factual finding to deny the ineffectiveness claim.¹⁷⁸ Was this a process of selective recall,¹⁷⁹ remembering facts that would benefit the lawyers, but not recalling those that would damage their self-interests? It is certainly

be shaped by motivation"); *supra* note 95 and accompanying text. In *Dishonest Deed, Clear Conscience: Self-Preservation Through Moral Disengagement and Motivated Forgetting*, Lisa Shu and her colleagues state:

Individuals are persistent "revisionist historians" when recalling their pasts. They tend to recall selectively in ways that support their decisions; for instance people engage in "choice supportive memory distortion" for past choices, over-attributing positive features to options chosen and negative features to options not chosen. This memory bias does not exist for experimenter-assigned selections, but does exist when people are led to an incorrect belief about what their previous choice was. These findings point to the role of motivation in recall.

Lisa Shu et al., *Dishonest Deed, Clear Conscience: Self-Preservation Through Moral Disengagement and Motivated Forgetting* 6 (Harv. Bus. Sch., Working Paper No. 09-078, 2009) (citations omitted).

173. *Wood v. Allen*, 558 U.S. 290, 296 (2010).

174. *Id.* at 295-96.

175. *Id.* at 296.

176. See Joint Appendix, *supra* note 93, at 343-45.

177. See *id.*

178. See *Wood*, 558 U.S. at 301-02.

179. See Kathleen M. Schmitt et al., *Why Partisans See Mass Media as Biased*, 31 COMM. RES. 623, 625 (2004) (defining selective recall as paying more attention to, and therefore remembering more clearly, aspects of content that are hostile to your own beliefs).

possible.¹⁸⁰ After all, had the lawyers denied remembering whether they reviewed the report, it would have been much easier for the habeas court, and any subsequent reviewing court, to conclude that the decision to end the investigation into the defendant's mental health was the result of neglect or oversight.

The confidentiality obligations of predecessor counsel are also susceptible to motivated responses. One of the core questions in post-conviction litigation, as described in Part II, is whether predecessor counsel can share information with the prosecution prior to any court ordered disclosure.¹⁸¹ On this point, will the lawyer follow ABA Formal Opinion 10-456 and conclude that the limited self-defense exception to the duty of confidentiality rarely, if ever, justifies such disclosure? Or, will the lawyer decide that informal disclosure to the prosecution is appropriate? Again, motivated reasoning helps to predict the result. Because the ABA Opinion provides only guidance on how ethical questions should be resolved, a lawyer can easily rationalize the self-interested answer by reasoning that, in the absence of binding authority to the contrary, there is no need to follow its conclusions. Even if this choice is not made consciously, the strong automatic power of self-interest can override any concerns the lawyer may have about protecting the interests of the former client, allowing the lawyer to conclude that broad permissive disclosure is acceptable. This is precisely why it is necessary for courts and lawyers to understand clearly that the fundamental tenets of professional ethics embodied in Guideline 10.13 entrust this decision to successor counsel, not predecessor counsel.¹⁸²

Similar concerns will arise when predecessor counsel face decisions about the attorney-client privilege. Again, Guideline 10.13 has anticipated the issue, and provides the appropriate framework for sheltering the client from the predictable exigencies of predecessor counsel's moment of stress.¹⁸³ Guideline 10.13 ties predecessor counsel to the mast of client interests before the sirens of self-interest assault her in the storm of litigation.¹⁸⁴

In cases where a court finds that the filing of the ineffectiveness claim constitutes a limited waiver of the attorney-client privilege, and

180. This conclusion is buttressed by the remarkable lack of memory all three of the lawyers had regarding the case. Over the course of his questioning, lead counsel responded, "I do not recall," over seventy-seven times, whereas the lawyer primarily responsible for the penalty phase responded, "I do not recall," over ninety-one times. See Joint Appendix, *supra* note 93, at 343-45. The third attorney's memory was even worse. *Id.*

181. See *supra* Part II.A.

182. See *supra* Part II.A.1.

183. See ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

184. See *id.*

for some reason there is no successor counsel involved,¹⁸⁵ the predecessor lawyer will need to decide which information is, and is not, subject to disclosure. Will the lawyer utilize this discretion to justify broad or limited disclosure? Here, the framing of the question matters. If the lawyer sees the issue solely as a matter of staying within the bounds of the court's order, then any information that meets the liberal evidentiary standard for relevancy—that is, “any tendency” to be of concern in the habeas proceeding—can be disclosed.¹⁸⁶ In contrast, if the lawyer frames the issue as one of professional duty owed to the former client, and considers ethical obligations in deciding how to respond, then the lawyer would be required to limit the court ordered disclosure as much as possible—by releasing only the information the lawyer believes is necessary to the claim; challenging, if possible, the scope of the court ordered waiver of privilege; seeking a protective order to restrict access to the disclosed information; asking for in camera review of any questionable material; or by asserting other non-frivolous objections.¹⁸⁷ According to motivated reasoning research, predecessor counsel facing ineffective assistance claims will choose the path that is more likely to lead to counsel's desired result.¹⁸⁸ For lawyers who want to maximize their chances of being found effective, framing the disclosure as a response to the ineffectiveness allegations—as opposed to a limited response protecting the attorney-client privilege—will make it easier to rationalize a broad disclosure of information.

Perhaps this is what happened in *Purkey*, the case that started this discussion.¹⁸⁹ There, the court order directing predecessor counsel to file an affidavit was broad, in that it did not limit disclosure to only that

185. Although this situation is inconsistent with the ABA Guidelines, which contemplate continuous representation throughout the life of each capital case, it does in fact occur because states' systems for the provision of post-conviction counsel in capital cases vary widely in their on-the-ground effectiveness. See Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591, 591-92 (2013).

186. See FED. R. EVID. 401 (defining as relevant any evidence if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action”); GEORGE FISHER, EVIDENCE 23 (3d ed. 2013) (“It would be hard to devise a more lenient standard of probativeness than Rule 401’s ‘any tendency’ standard.”).

187. See discussion *supra* Part II.A.2.

188. See Helzer & Dunning, *supra* note 22, at 381-82. For example, people tend to seek out confirming evidence when they ask themselves, “Am I extroverted?” This makes them likely to perceive themselves as gregarious and outgoing. In contrast, people tend to seek out evidence that they are reticent and private when they ask themselves, “Am I shy?” This, in turn, often leads them to believe they are more reserved. *Id.*; see discussion *supra* Part III.A.

189. *Purkey v. United States*, No. 06-8001-CV-W, 2010 WL 4386532, at *1 (W.D. Mo. Oct. 28, 2010); see *supra* Part I.

which was needed to resolve the claim.¹⁹⁰ The frame used by predecessor counsel to decide how to respond might explain what happened next. Given the power of motivated reasoning, the expansive 117-page affidavit may have resulted from counsel simply asking himself: “What information is responsive to the court order?”—rather than asking a question that focused on the best interests of his former client, such as: “how can I try to limit the disclosure ordered by the court?” Though attempting to peer into the decision-making process of predecessor counsel is largely speculative at this point,¹⁹¹ research on motivated reasoning suggests that, even if predecessor counsel did not consciously choose a frame that better aligned with his own interests, a motivated process would have achieved the same result.¹⁹²

The *Purkey* case also introduces a slightly different wrinkle. Recall that Purkey’s trial lawyer initially resisted disclosure, but later responded to the court’s order with an affidavit including extensive legal argumentation as to why he was not ineffective.¹⁹³ What explains why a lawyer would seemingly seek to protect the defendant’s interests, at least initially, but then have such a change of heart thereafter? One possible explanation comes from research on what is called “moral self-licensing,” which describes the phenomenon in which past moral deeds make “people more likely to do potentially immoral things without worrying about feeling or appearing immoral.”¹⁹⁴ Documented in various domains—including demonstrations of prejudice, charitable giving, and consumer purchasing of luxury goods—researchers have demonstrated how prior conduct that is deemed socially worthy can permit future selfish or otherwise immoral behavior.¹⁹⁵ Two possible explanations have been offered for this phenomenon. The first is that people monitor their own moral credit, similar to a bank account, such that a deposit (acting morally) permits a withdrawal (acting immorally),

190. Indeed, the trial court arguably issued an order that exceeded even the relevancy standard. See *Purkey v. United States*, No. 01-00308-01-CR-W, 2009 WL 3160774, at *3 (W.D. Mo. Sept. 29, 2009).

191. No independent assessment of the affidavit is possible, as it was filed under seal by court order and is therefore not available for viewing. See *id.* at *7. However, this should not be taken to mean that predecessor counsel took the initiative to protect Purkey’s interests after the court issued its order. Rather, the request for the protective order was initiated by successor counsel, and the formal motion was made by the prosecution. See *id.*

192. See discussion *supra* Part III.A.

193. See *Purkey*, 2009 WL 3160774, at *7.

194. Anna C. Merritt et al., *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 344, 344 (2010); see also Benoit Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33, 34 (2001).

195. Merritt et al., *supra* note 194, at 346-48.

yet leaves the account balanced.¹⁹⁶ The second is that past acts change the meaning of future ones, such that prior moral acts help convince a person that they are moral, and thus the future conduct (even if immoral in an objective sense) is deemed permissible.¹⁹⁷ Perhaps this is what can happen when a court orders predecessor counsel to file an affidavit responding to allegations of ineffectiveness: the more the lawyer had attempted to protect the client's interests before the order, the more room there is to act selfishly after the order.¹⁹⁸

Finally, there is the duty to maintain files in a proper manner.¹⁹⁹ Given the problems of selective recall, the documentation requirement of Guideline 10.13—requiring lawyers in death penalty cases to maintain contemporary records in a manner that will inform successor counsel of significant developments in the case—becomes that much more important.²⁰⁰ To be sure, this obligation, if followed, would go a long way to rectifying some of the problems with memory that have been described. But, there are also reasons to be cautious about the accuracy of contemporary records. Research has indicated, for example, that contemporaneous notes taken during interviews of crime victims often omit important details.²⁰¹ Other studies have compared contemporaneous notes of police interviews to later official police reports, finding that the later reports often include information recalled by the interviewer from memory that were not in the contemporaneous notes themselves.²⁰² Motivations, such as self-serving biases and pre-existing views about the interview subject, can undermine the accuracy of contemporaneous notes and distort the records that are generated.²⁰³ While the external

196. *Id.* at 349.

197. *Id.*

198. *See id.* One more time, Guideline 10.13 serves to deter these potential problems. ABA GUIDELINES, *supra* note 8, Guideline 10.13 & cmt., at 1074-75. As already indicated, predecessor counsel knows that successor counsel (a lawyer who will presumptively be acting competently) will seek to resolve all debatable issues of privilege in the client's favor, and predecessor counsel will be required to act accordingly. *See supra* notes 61-62 and accompanying text.

199. *See* ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

200. *See* Schmitt et al., *supra* note 179, at 625.

201. *See, e.g.,* Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 LAW & HUM. BEHAV. 699, 703-04 (2000) (finding that twenty-five percent of the forensically relevant utterances from child abuse victims and more than fifty percent of the utterances by interviewers themselves did not make it into the contemporaneous notes of the interviews); *see also* SIMON, *supra* note 99, at 40 (discussing studies about the accuracy of investigatory notes).

202. *See* Amy Hyman Gregory et al., *A Comparison of U.S. Police Interviewers' Notes with Their Subsequent Reports*, 8 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 203, 212-14 (2011).

203. *See* Becky Milne & Ray Bull, *Interviewing Victims of Crime, Including Children and People with Intellectual Disabilities*, in PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 1, 11-12 (Mark R. Kebbell & Graham M. Davies eds., 2006) (describing how

validity of such studies is not known, it would not be surprising to find out that the efforts of predecessor counsel to record earlier events are inaccurate in important details. Indeed, given the powerful ways in which motivation can influence memory, recall, and interpretation of information, it is likely that, in many instances, such records—whether interview notes, correspondence, formal memos to the file, or mere jottings about the case—would be subject to the same errors in judgment that have been described above.²⁰⁴

Because many of the obligations set forth in Guideline 10.13 and the related authority offer predecessor counsel significant discretion in making responsive disclosures after a claim of ineffectiveness has been filed, there is good reason to believe that lawyers with strong motives to resist the claim will engage in asymmetric skepticism in deciding how to respond. The likely result is that predecessor counsel's choices will be self-serving, advancing the attorney's own interests rather than those of the former client.

2. Lawyers Motivated to Comply with Professional Duty

What about those lawyers who, from time to time, willingly cooperate with successor counsel, for example, by filing affidavits that concede some form of deficient performance? Are they simply able to overcome their emotions and self-interest to meet their professional duties to their former clients? Perhaps, as some people can overcome their implicit biases through the sheer power of rational deliberation.²⁰⁵ The research on motivated reasoning, however, provides another explanation: these lawyers' primary motivation is to protect the interests of their former clients.²⁰⁶ In these instances, Guideline 10.13 and related authority may assist lawyers in achieving legal outcomes that are satisfying to all stakeholders: themselves, their clients, the profession, and the justice system.

To start, some lawyers possess a strong moral antipathy toward the death penalty that outweighs the self-interested concerns that have been discussed. For these lawyers, the conscious desire to prevent the former client's execution may be the primary motivation, meaning that they

pre-existing views regarding an interviewee can bias the information obtained); see also Saul K.assin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 26 (2010) (arguing in favor of requiring videotaped confessions so that trial judges and juries would have an "an objective and accurate record of the process by which a statement was taken—a common source of dispute that results from ordinary forgetting and self-serving distortions in memory").

204. See Kasson et al., *supra* note 203, at 25.

205. See Eldred, *Psychology of Conflicts*, *supra* note 23, at 70-71.

206. See Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1185.

would be consciously willing to sacrifice their own self-interests for those of their clients.²⁰⁷ Take, for example, *Harris v. Dugger*,²⁰⁸ a capital case in which predecessor counsel, who had conceded error in his mitigation investigation, announced his opposition to the death penalty on cross-examination.²⁰⁹ In such cases, where counsel's conscious and unconscious motivations can be expected to work together, there will be little danger that her motivated reasoning will undermine the professional obligations owed to the former client.²¹⁰

Other lawyers may conclude that it is in their reputational interest to admit to errors that serve as the basis for the ineffectiveness allegation. As many scholars have noted, informal norms can regulate the behavior of lawyers through imposing reputational costs on members who do not conform to the dominant ethos of the local community in which they practice.²¹¹ Too often, practice norms for criminal defense lawyers discourage the protection of client interests.²¹² Yet, there are also communities of practice where the informal norms encourage conduct that benefits clients.²¹³ One might assume, for example, that lawyers who work for public defender offices—at least those in which there is a strong ethos of client protection—might regard allegations of ineffectiveness as simply part of the job.²¹⁴ For these lawyers, the motive

207. For a discussion of lawyers dedicated to the end of the death penalty, see generally Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

208. 874 F.2d 756 (11th Cir. 1989).

209. See *id.* at 761 n.4.

210. See Moore & Loewenstein, *supra* note 152, at 190 (explaining that automatic self-interest and rational or controlled processes of reason often do not clash, but instead work together to produce judgment and behavior).

211. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 9-11 (1991); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1045-49; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021-25 (1995); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1969 (2001). For a discussion of the powerful effects that reputation generated by group norms can have on automatic processes, see Jonathan Haidt & Selin Kesebir, *Morality*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 797, 797-832 (Susan T. Fiske et al. eds., 5th ed. 2010); Page, *supra* note 113, at 250 (citing a number of studies that demonstrate the power of group dynamics on automatic processing and decision-making).

212. For a detailed discussion, see Brown, *supra* note 159, at 802, 819-33.

213. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152 (2013).

214. See *id.* (describing multiple reasons why so many criminal defense lawyers provide inadequate representation, but noting that “[s]ome jurisdictions have provided the resources, independence, structure, and supervision that enable capable, caring, and dedicated lawyers to zealously represent their clients”). For a discussion of high quality defender organizations where caseloads are manageable, see NORMAN LEFSTEIN, *SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE* 192-228 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

to protect client interests may be dominant, again suggesting that both conscious and unconscious motives would work in the same direction.

Finally, there are lawyers who willingly admit ineffectiveness, but for whom there is not an obvious motive for doing so. Here, one can only speculate what motivates their conduct. Some may genuinely place the interests of their clients above their own, despite the negative consequences that could flow from a finding of ineffectiveness. Others may not care about their professional reputation by the time a claim of ineffectiveness arises. Maybe they have been disbarred for other misconduct and are therefore essentially immune from community censure.²¹⁵ Or, maybe they have such little regard for their public persona that a finding of ineffectiveness could hardly cause reputational harm.²¹⁶

In sum, the research on motivated reasoning provides a valuable prism through which to understand how lawyers can be expected to respond when accused of ineffective assistance. For lawyers whose primary interest is to resist such allegations, and where there is discretion on how to interpret or respond to the duties owed to former clients, they can be expected to engage in preference-consistent reasoning. It is in these situations that Guideline 10.13 has bite, forestalling what would otherwise likely be reduced compliance with the professional obligation to prioritize client interests.²¹⁷ In contrast, for lawyers whose primary motivation runs in favor of protecting the interests of a former client, the power of unconscious reasoning will pose little danger to compliance with professional obligations, and Guideline 10.13 and related authority can serve to support the attorneys' laudable goals.

215. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1423 (2011) (noting that defendant's trial lawyer, who provided successor counsel with a series of declarations concerning the case, had been disbarred by that time).

216. This may explain the expansive concessions of error by predecessor counsel in *Cheatham*, where the trial lawyer who was found ineffective had a history of running for various political offices, including governor, while dressed as Thomas Jefferson. *Kansas v. Cheatham*, 292 P.3d 318, 323-24 (Kan. 2013). The Kansas Supreme Court made special note of these activities in its opinion:

[Predecessor counsel] described his political activities . . . as a "hobby" that he engaged in as a "bully pulpit" to express disagreement with certain public policies, such as the Iraq war. Often, [counsel] said, he would attend political events dressed in costume as Thomas Jefferson to reflect [his] views about the original underpinnings to the United States Constitution.

Id. In addition, the court noted that "these political and professional activities occupied a significant enough portion of [counsel's] time that he wanted [defendant] to acknowledge they would coincide with the defense of the murder charges." *Id.* at 324.

217. See ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

IV. THE IMPLICATIONS OF MOTIVATION

Reducing biased judgments of predecessor counsel in ineffectiveness cases will not be easy. For example, research indicates that merely informing people about their implicit biases is of marginal utility in improving decision-making.²¹⁸ As a result, other strategies are needed. This Part sets forth recommendations that may be more successful—including explicit acknowledgment by courts of the importance of reading Guideline 10.13 with an unwavering focus on its client-centered purpose; encouraging judicial supervision of disclosures made by predecessor counsel in ineffectiveness cases; encouraging judges in post-conviction cases to account for motivated reasoning when making credibility assessments of predecessor counsel; and encouraging successor counsel to learn about strategies that can help reduce implicit bias.²¹⁹

A. *Understanding Guideline 10.13*

In large measure, Guideline 10.13 is clearly written, as it forcefully and unambiguously states the two primary obligations of predecessor counsel: “to safeguard the interests [of the former] client,” and to “cooperate fully with successor counsel.”²²⁰

As noted earlier, any interstitial interpretations that may need to be made in particular cases should conform to these purposes.²²¹ Thus, for example, hide-and-seek behavior is simply inconsistent with predecessor counsel’s ethical duties under Guideline 10.13.²²² Predecessor counsel has an affirmative duty to volunteer all information relevant to the representation, even in the absence of a specific request from successor counsel.²²³ Similarly, the duty of cooperation includes a timeliness element, meaning that predecessor counsel must respond to requests for information without delay.²²⁴

218. Research reveals that people are unable to control subconscious biases even when they are aware of them. Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 248-49 & n.239 (2008) (citing Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 114, 117 (1980)); see Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185, 189-92 (Thomas Gilovich et al. eds., 2002).

219. See *infra* Part IV.A–D.

220. ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

221. See *supra* notes 169-74 and accompanying text.

222. ABA GUIDELINES, *supra* note 8, Guideline 10.13, at 1074.

223. See *supra* Part II.A.

224. See *supra* Part II.A.

In addition, for the reasons already discussed, safeguarding the interests of the former client requires both predecessor and successor counsel to act to minimize any compelled disclosure of client information.²²⁵ This includes reminding predecessor counsel of the duty to assert the attorney-client privilege until disclosure is ordered by the court, and after the court's order, to take all permissible steps to minimize the scope of disclosure. To minimize disclosure, counsel may seek ex parte and in camera review of any document that plausibly might still be considered privileged, pursue appropriate protective orders, and consider appellate remedies if the court ordered disclosure is broader than necessary to resolve the ineffectiveness claim.²²⁶

Further, both successor and predecessor counsel must be vigilant in maintaining the position of Formal Opinion 10-456—that informal disclosure of information from predecessor counsel to the prosecution prior to a court order is not permissible.²²⁷ Successor counsel should, moreover, remind predecessor counsel that the self-defense exception is permissive, not mandatory, and that any disclosures made under the self-defense exception must be narrowly tailored to protect as much confidential information as possible.²²⁸

B. Judicial Supervision of Disclosure

As noted earlier, some courts have been willing to oversee the process of disclosure without much concern for the additional burden it might cause; in some instances, courts have required in camera review of any proposed disclosures by predecessor counsel.²²⁹ Other courts, however, have been hesitant to oversee the process of disclosure, fearing great burdens given the large number of ineffectiveness cases that are litigated each year.²³⁰ Which is the right approach?²³¹

The research on motivated reasoning provides two arguments in favor of greater judicial supervision. The first is obvious—by taking the

225. See *supra* Part II.

226. See *supra* notes 32, 58 and accompanying text.

227. See *supra* Part II.A.2.

228. See *supra* Part II.

229. See *supra* notes 56-58 and accompanying text.

230. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 21-22 (citing cases demonstrating courts' hesitance to oversee the process of disclosure).

231. Even before considering how motivated reasoning might mediate this dispute, it seems that—at least in death penalty cases where the ultimate penalty is so grave, and which concern only a small percentage of overall habeas litigation—courts would not be too severely overtaxed by engaging in *a priori* review of proposed disclosures by predecessor counsel. As a result, the objection that supervision will be too burdensome loses most of its force in the death penalty context.

decision out of the hands of the biased decision-maker, bias will be lessened.²³² In the present context, this means ensuring that it is the court, rather than predecessor counsel, that makes the final disclosure determinations. For example, more courts could follow the procedure used in some cases, in which predecessor counsel submits the trial file to the court, which in turn decides (with the input of successor counsel) the items that should be disclosed to the prosecution.²³³ If this approach is deemed too burdensome (or otherwise unwise), a modified approach may be available: predecessor counsel would be ordered to prepare a draft affidavit (with attachments) responding to the allegations in the petition, which would be submitted to successor counsel for review prior to disclosure. Successor counsel, in turn, would be permitted to make objections, flagging for the court those aspects of the affidavit that successor counsel believes should not be disclosed. The court would resolve the dispute and decide whether the proposed disclosure was appropriate. Only then would the affidavit be finalized and disclosed to the prosecution. The benefit of this procedure is that court involvement would reduce the power of motivational bias by shifting much of the final decision-making authority to the court.

A second reason for increased judicial scrutiny concerns the power of accountability. Multiple studies demonstrate that the power of biased decision-making is reduced when the decision-maker is aware that his choice will be evaluated by others.²³⁴ Where the desires of the audience are not known, decision-makers engage in a form of preemptive self-criticism in which they anticipate and take account of the objections they are likely to face.²³⁵ This results in increased accuracy.²³⁶ As long as the court itself has not already predetermined the result it wants—for example, by signaling that it will rule that disclosure should be as broad

232. See *supra* Part III.A.

233. See Siegel, *Withhold from the Prosecution*, *supra* note 12, at 26 n.55. Notably, there are courts that have ordered even more protection than this recommendation. See, e.g., *Jones v. United States*, No. 4:11CV00702, 2012 WL 484663, at *2 (E.D. Mo. Feb. 14, 2012) (refusing to require a court ordered affidavit, instead requiring predecessor counsel to testify in court prior to any disclosure, then, prior to cross-examination, ordering an in camera review of any proposed disclosures).

234. See Richard P. Larrick, *Debiasing*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 316, 322-23 (Derek J. Koehler & Nigel Harvey eds., 2004); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999) (reviewing literature discussing accountability).

235. See Lerner & Tetlock, *supra* note 234, at 257.

236. See SIMON, *supra* note 99, at 39 (“Accountability has been found to lead to closer attention to evidence, higher calibration between confidence and accuracy, increased sophistication of thought processes, and lower effects of emotions on unrelated judgments.”); Lerner & Tetlock, *supra* note 234, at 257.

as possible—lawyers evaluating what information to disclose to prosecutors will be more accurate in their judgments when the lawyer expects to be supervised by the court.

Of course, judicial supervision will not eliminate all bias. There are judges who will doubtlessly resent being asked to assess the propriety of disclosures by predecessor counsel, and as a result, such judges may not adequately exercise this function. In addition, judges are not immune to the same implicit biases of judgment that affect everyone else.²³⁷ Therefore, judicial supervision is not a miracle cure. That acknowledged, shifting to the court responsibility to review proposed disclosures is preferable to allowing prosecutors to approach predecessor counsel unsupervised, given the powerful biases that can guide counsel to defensively attempt to minimize the chance of being found ineffective, and the dire consequences for defendants who are denied relief.

C. *Assessing Credibility of Predecessor Counsel Testimony*

The same concerns that encourage judicial supervision of disclosures by predecessor counsel apply to other aspects of post-conviction litigation. Perhaps the place where this is most important is judicial assessment of the credibility of witnesses in post-conviction cases. In all situations where predecessor counsel's testimony matters, courts should be attuned to the significant possibility that implicit motivation is likely to color what predecessor counsel says. That is, courts should bear in mind these powerful motivations when making credibility determinations and assessing whether a lawyer has provided accurate testimony during post-conviction proceedings. Some courts already judge skeptically the testimony of lawyers who admit to error, with at least a subtle suggestion that biases may be influencing such testimony.²³⁸ The research on motivated reasoning suggests that, given the reasons for lawyers to resist allegations of ineffectiveness, more concern should be paid to whether lawyers are unintentionally skewing their testimony in their own favor.

237. See Bibas, *supra* note 16, at 2-6 (discussing hindsight bias).

238. See, e.g., *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998) (viewing counsel's concession with "extreme skepticism"); *Gentry v. Sinclair*, 576 F. Supp. 2d 1130, 1154 n.38 (W.D. Wash. 2008), *aff'd*, 705 F.3d 884 (9th Cir. 2013) (explaining that, "given the understandable desire to protect a former client, a concession by trial counsel in a post-conviction proceeding is not conclusive for purposes of the Sixth Amendment").

D. Educating Successor Counsel

Finally, successor counsel should be educated about strategies that can be effective in reducing implicit bias. One of the most significant strategies is counter-factual thinking, which entails taking positions that are inconsistent with those expected to be produced by the bias.²³⁹ For predecessor counsel whose motive is to resist allegations of ineffectiveness, this would mean consciously attempting to take positions that would assist, rather than resist, the allegations of ineffectiveness. Of course, given the motivations that so many lawyers have toward self-preservation, it would be foolish to expect predecessor counsel to take the initiative to learn about and implement such strategies on their own. But successor counsel might be able to employ them as part of the litigation strategy. For example, while talking to predecessor counsel, successor counsel might ask: “Can I ask you to assume for a moment that you are not the lawyer who is the subject of this litigation? If you were bringing this post-conviction claim on behalf of the defendant, what strategies would you think would be most effective?”—or something to that effect. How to employ such efforts to strip the bias from predecessor counsel would have to be considered carefully, but there is no reason why successor counsel—armed with sufficient background in the psychology of implicit bias—should not be able to find ways to help predecessor counsel reduce their own motivated reasoning.²⁴⁰

V. CONCLUSION

Wesley Ira Purkey remains on death row.²⁴¹ But, more than a decade ago, another defendant, Walter Mickens, was executed for murdering a teenager, even though his trial lawyer had been representing the victim in an unrelated matter at the time of the crime.²⁴² What was

239. Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997) (discussing techniques to reduce bias). Recognizing these benefits, scholars have advanced reforms meant to encourage prosecutors to engage in counter-factual thinking. See, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 523-24 (2007).

240. See *supra* note 32 and accompanying text. Any lawyer who wants a comprehensive discussion of the psychology of decision-making and the power of motivation in the criminal justice process should start with Professor Dan Simon’s recent book, *In Doubt: The Psychology of the Criminal Justice Process*. See generally SIMON, *supra* note 99.

241. See Michael Doyle, *Boston Bombing Case May Take Years to Unfold*, ANCHORAGE DAILY NEWS, Apr. 26, 2013, http://www.adn.com/2013/04/26/2880713_boston-bombing-case-may-take-years.html (noting that Purkey received a death sentence in 2003 and “has since filed more than a dozen lawsuits and appeals,” one of which—an appeal—remains pending).

242. See Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1181-84. For a more

the critical evidence that doomed Mickens's claim for ineffective assistance of counsel despite this glaring conflict of interest? According to the record, it was the trial lawyer's own post-conviction testimony in which counsel stated that his representation of the victim had not influenced the choices he made on behalf of Mickens in any way.²⁴³ Lawrence Fox, who chaired the ABA's efforts to adopt the ABA Guidelines, correctly views this bewildering testimony as a glaring example of why Guideline 10.13 is so important: it sets down in detail how lawyers, such as Mickens's trial attorney, are supposed to respond to allegations of ineffective assistance of counsel.²⁴⁴ But at the same time, *Mickens v. Taylor*²⁴⁵ is also a cautionary tale about how lawyers, motivated to protect their own self-interests, can rationalize their own misbehavior and thereby undermine the very purposes that the Guidelines are meant to achieve.²⁴⁶ Simply put: motivation matters. And, because it does, efforts to reduce its power, such as those recommended here, must matter more.

detailed discussion of *Mickens v. Taylor*, see Eldred, *Psychology of Conflicts*, *supra* note 23, at 44-45.

243. See *Mickens v. Taylor*, 536 U.S. 162, 177 (2002) (Kennedy, J., concurring).

244. Fox, *Making the Last Chance Meaningful*, *supra* note 19, at 1182-84.

245. 536 U.S. 162 (2002).

246. See Eldred, *Psychology of Conflicts*, *supra* note 23, at 76 & n.162 (describing how Mickens's trial lawyer was motivated by economic and reputational interests). See generally ABA GUIDELINES, *supra* note 8, Guideline 1.1, at 919 ("The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition . . . of a death sentence . . .").
