Fordham Law Review

Volume 79 | Issue 2 Article 8

November 2011

The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims

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THE LAWYER'S "PRISONER'S DILEMMA": DUTY AND SELF-DEFENSE IN POSTCONVICTION INEFFECTIVENESS CLAIMS

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Many criminal defendants who face significant sentences and are unsuccessful on appeal petition for collateral habeas corpus relief. One common ground for postconviction relief is that defense counsel was unconstitutionally ineffective before, during, or after trial. This presents an ethical dilemma for those defense attorneys who have withdrawn from representation and are accused of being ineffective. Should an accused lawyer disclose confidential client information to the prosecution in self-defense against these claims? Or should the lawyer, even in the face of attacks on his work, help his former client in substantiating ineffectiveness claims? Lawyers and courts must balance the competing interests that underlie the relevant Model Rules of Professional Conduct (or corresponding ethical rules in each jurisdiction) to determine which course of action is appropriate.

Some courts permit (or even require) trial counsel to disclose confidential client information in defense against ineffective assistance of counsel claims. Such disclosures may be justified because, under the Model Rules of Professional Conduct, a lawyer's duty to keep client information confidential may be limited by an ability to defend himself against charges of wrongful conduct. However, some commentators argue that, notwithstanding attacks on his work, a lawyer accused of ineffectiveness should not exercise his right to self-defense and should instead provide information to his former client to help substantiate ineffectiveness claims.

This Note examines both theories of a lawyer's role in the postconviction context and concludes that trial counsel should not invoke the confidentiality duty's self-defense exception to respond to ineffectiveness claims. The interests that underlie the confidentiality duty are paramount and should not be undermined in response to claims that pose little threat to a lawyer's career. Additionally, this Note argues that a lawyer has a limited duty to turn over files and documents relating to representation to his former client.

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INTRODUCTION

Joseph J. Kindler was sentenced to death after being convicted of first-degree murder.[1] After his conviction was upheld by the Pennsylvania Supreme Court and his state petition for postconviction relief was denied, Kindler filed a habeas corpus petition in federal court.[2] Among the grounds

1. *See* Kindler v. Horn, 542 F.3d 70, 73 (3d Cir. 2008) (stating the facts of Kindler's trial).

2. *See id.* at 73–75. Under 28 U.S.C. § 2254(a), "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the

for relief was a claim that his trial lawyer, Daniel-Paul Alva, was ineffective during the sentencing phase.[3] Alva submitted an affidavit in which he admitted to his own ineffectiveness, stating that, due to inexperience, he did not conduct a proper pre-sentencing investigation.[4] Based in part on Alva's affidavit, the U.S. Court of Appeals for the Third Circuit affirmed the district court's grant of a writ of habeas corpus and order for a new sentence.[5]

Similarly, Jonathan Kyle Binney was also convicted of murder and sentenced to death.[6] After an unsuccessful appeal,[7] Binney petitioned for postconviction relief, alleging that his trial counsel rendered ineffective assistance during trial and sentencing phases.[8] Binney's trial lawyer met with the South Carolina Attorney General's office to discuss the ineffective assistance of counsel claims against him.[9] At the meeting, trial counsel made a copy of Binney's entire file and submitted it to the Attorney General's office for review, which then used the file's contents to counter Binney's petition.[10] The South Carolina Supreme Court denied Binney's application for relief and upheld his sentence.[11]

As these two cases demonstrate, lawyers react differently when former clients accuse them of rendering ineffective assistance. If a lawyer wishes to defend against ineffectiveness claims, the self-defense exception to the ethical confidentiality rule seems to permit him to do so.[12] However, his ability to defend his own self-interest is limited by his ethical obligations to his former client.[13]

After a criminal defendant has been convicted and has exhausted his right to an appeal, he may petition for a writ of habeas corpus, which would vacate his sentence.[14] Many such defendants seek postconviction relief on the grounds that their lawyers rendered ineffective assistance,[15] thus

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judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (2006). For an in-depth discussion of habeas corpus proceedings, see *infra* Part I.A.

3. *Kindler*, 542 F.3d at 75–76.

4. *See id.* at 84.

5. *See id.* at 90.

6. *See* State v. Binney, 608 S.E.2d 418, 419–21 (S.C. 2005) (describing the facts leading to Binney's conviction).

7. *See id.* at 421.

8. *See* Binney v. State, 683 S.E.2d 478, 479 (S.C. 2009) (reviewing Binney's petition for postconviction relief).

9. *See id.*

10. *See id.* at 479–80.

11. *See id.* at 481.

12. See *infra* Part I.B.1 for an explanation of the confidentiality rule and its self-defense exception and Part II.A for a discussion of courts that permit lawyers to defend against ineffectiveness claims.

13. See *infra* Part I.B.2 for an explanation of a lawyer's duties to former clients and Part II.B for the view that a lawyer may not provide extrajudicial information to the prosecution and should provide substantial assistance to successor defense counsel.

14. See *infra* Part I.A for an explanation of postconviction habeas corpus relief.

15. *See infra* notes 30–31 and accompanying text (discussing the prevalence of ineffectiveness claims in habeas petitions).

depriving them of their Sixth Amendment right to counsel.[16] Criminal defense trial counsel respond to such claims in two ways: (1) they cooperate with the prosecution in order to defend against attacks on their work, or (2) they provide substantial assistance to successor defense counsel. The choice is crucial because the lawyer's cooperation often bears heavily on the claim's success—the defendant probably will not prevail if his former lawyer "vigorously contests" the allegations, but is much more likely to succeed with the lawyer's assistance.[17]

Part I of this Note explores the background of postconviction proceedings and the various ethical duties lawyers owe to their former clients. Specifically, Part I discusses the duties articulated by the American Bar Association's Model Rules of Professional Conduct (the Model Rules)[18] and the Restatement of the Law Governing Lawyers (the Restatement).[19] Part II presents the different opinions as to whether trial counsel ought to assist successor counsel or whether he may assist the prosecution. Part III argues that, because of a lawyer's ethical duties to former clients and important public policy concerns, trial counsel should not assist the prosecution by defending against ineffectiveness allegations outside of court. Part III also argues that the self-defense exception to the ethical duty of confidentiality should not apply to ineffective assistance of counsel claims. Part III concludes that trial counsel has the duty to provide at least some information to successor defense counsel, but that he is not required to provide more assistance than handing over the file.

I. POSTCONVICTION PROCEDURES AND LAWYERS' ETHICAL DUTIES

The Sixth Amendment guarantees all defendants the right to the assistance of counsel in defending against criminal charges.[20] The U.S. Supreme Court has interpreted this to mean not only a right to the assistance of counsel, but a right to the *effective* assistance of counsel.[21] If a defendant believes his lawyer failed to effectively represent him, the defendant may

16. See *infra* Part I.A for the U.S. Supreme Court's interpretation of the Sixth Amendment right to counsel as the right to effective assistance of counsel.

17. Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 7 (1995) (stating that, because defendants are collaterally estopped from bringing malpractice claims against their former lawyer if the defendant does not prevail on an ineffective assistance of counsel claims, trial counsel has an incentive to contest such claims); *see also* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 27 (explaining that a defendant is more likely to prevail on an ineffectiveness claim if aided by former counsel).

18. *See* MODEL RULES OF PROF'L CONDUCT (2009).

19. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

20. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

21. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (interpreting the right to assistance of counsel as the right to effective assistance of counsel); Glasser v. United States, 315 U.S. 60, 76 (1942) (recognizing that the Sixth Amendment guarantees the right to effective assistance of counsel).

move to vacate his sentence in a postconviction petition, claiming that the ineffective assistance was a violation of his Sixth Amendment right to counsel.[22] How a lawyer participates in the postconviction process is determined by the lawyer's own interpretation, or the reviewing court's interpretation, of a lawyer's ethical duties to former clients. This section will describe the postconviction process, ineffective assistance of counsel claims, and the ethical duties a lawyer generally owes his clients after representation ends.

A. Postconviction Claims and the Strickland *Standard*

After a court has rendered a conviction and imposed a sentence, a defendant may appeal the court's decision.[23] If the appeal is unsuccessful, the defendant may further challenge a conviction through collateral remedies in state and federal courts.[24] Modern collateral remedies are derived from common law writs of habeas corpus, by which defendants would seek relief by filing a civil suit against the warden of the prison in which they were being held.[25]

Today, a federal defendant may move to vacate a sentence "upon the ground that [it violated] the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was [excessive], or is otherwise subject to collateral attack."[26] Similarly, a state defendant may seek habeas corpus relief in federal court if he believes his conviction is unconstitutional or violates federal law.[27]

22. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.7 (5th ed. 2009). The denial of effective assistance of counsel constitutes a constitutional violation, a claim that a defendant may allege during a collateral proceeding. *See id.* (explaining that ineffective assistance violates the Sixth Amendment). Additionally, indigent defendants have the right to court-appointed counsel. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (affording the right to court-appointed counsel to indigent defendants); Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (holding that the defendants' inability to retain private counsel did not constitute a waiver of the right to counsel).

23. While there is no federal constitutional right to appeal a judgment, statutes and state constitutional provisions grant the right to appeal in all felony cases. *See* LAFAVE ET AL., *supra* note 22, § 27.1 (discussing the history of appellate review).

24. *Id.* at § 28.1 (explaining collateral remedies); *see also* Mackey v. United States, 401 U.S. 667, 682–83 (1971) (Harlan, J., concurring) (describing collateral remedies as "an avenue for upsetting judgments that have become otherwise final").

25. *See* LAFAVE ET AL., *supra* note 22, § 28.1.

26. 28 U.S.C. § 2255(a) (2006).

27. *See id.* § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). For state prisoners to pursue a writ of habeas corpus in federal court, they must first exhaust all available state remedies. *Id.*; *see also* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 9 (2010) (describing 28 U.S.C. § 2254).

Habeas review is especially common for death penalty cases,[28] because a defendant whose motion is successful receives a retrial.[29]

One of the most common grounds for habeas relief[30] is that a defendant was deprived of his Sixth Amendment right because he received ineffective assistance of counsel before, during, or after trial.[31] Ineffective assistance of counsel claims typically arise on collateral appeal—rather than direct appeal—because direct appellate review may consider only the trial record, and ineffectiveness claims require an analysis of more than just the trial record.[32]

It is extremely difficult and uncommon for one to prevail on an ineffectiveness claim under the standard announced in *Strickland v. Washington*.[33] In *Strickland*, the Supreme Court articulated the test that

28. *See* LAFAVE ET AL., *supra* note 22, § 28.2(d) (explaining that collateral review has been "particularly significant" for death sentences).

29. *See* Kimmelman v. Morrison, 477 U.S. 365, 382 (1986) (describing the retrial remedy for successful habeas petitions); Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1653 (2008) (same).

30. *See* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 7; 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, 91 (1999) (noting that ineffective assistance of counsel claims are "virtually guaranteed" for lawyers who represent capital defendants).

31. *See generally* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 10 (3d ed. 2005) (listing types of ineffective assistance claims). Examples of ineffectiveness before trial include failure to move for change of venue; to challenge an improperly obtained confession; to investigate witnesses; or to move to suppress evidence. *See id.* §§ 10:17–10:29. Examples of ineffectiveness during trial include failure to object to inadmissible or prejudicial evidence; to object to prosecutorial misconduct; to properly cross-examine or call witnesses; or to submit proper jury instructions. *See id.* §§ 10:30–10:56. Examples of ineffectiveness after trial include failure to present mitigating evidence in a death penalty case; to bring appropriate post-trial motions; or to raise certain issues on appeal. *See id.* §§ 10:48, 10:57–10:62.

32. *See, e.g.*, United States v. Warman, 578 F.3d 320, 348 (6th Cir. 2009) (declining to evaluate the merits of defendant's ineffectiveness claim on direct appeal, noting that such claims are properly analyzed through collateral review); United States v. Lampazianie, 251 F.3d 519, 527 (5th Cir. 2001) ("[A] claim of ineffective assistance of counsel cannot be reviewed on direct appeal when . . . it was not raised in the district court, because there has been no opportunity to develop record evidence on the merits of the claim."); Commonwealth v. Grant, 813 A.2d 726, 735 (Pa. 2002) ("[A]n overwhelming majority of states indicate a general reluctance to entertain ineffectiveness claims on direct appeal.").

33. 466 U.S. 668 (1984). *See also* Kimmelman v. Morrison, 477 U.S. 365, 382 (1986) (noting that the standard for evaluating ineffective assistance of counsel claims announced in *Strickland v. Washington* is "highly demanding"). Since the *Strickland* decision, many commentators have criticized the standard for making it too difficult for defendants to prevail on ineffectiveness claims. *See, e.g.*, Duncan, *supra* note 17, at 19 (noting that, because of the strong presumption of attorney competence, *Strickland* challenges are "exceedingly difficult to win"); Elizabeth Gable & Tyler Green, Wiggins v. Smith*: The Ineffective Assistance of Counsel Standard Applied Twenty Years After* Strickland, 17 GEO. J. LEGAL ETHICS 755, 764 (2004) (discussing the criticism surrounding *Strickland* and concluding that the test has "detrimentally affected" criminal defendants); Martin C. Calhoun, Comment, *How To Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414–15 (1988) (criticizing the *Strickland* test for being "nearly insurmountable" and "unnecessarily harsh").

courts use to determine whether counsel was ineffective.[34] In *Strickland*, the defendant, David Washington, pleaded guilty to multiple charges of kidnapping, robbery, and murder in a Florida trial court.[35] Finding that the aggravating factors outweighed mitigating factors, a judge sentenced Washington to death.[36] After an unsuccessful appeal,[37] Washington sought collateral relief in state court, but was denied.[38] He then petitioned for a writ of habeas corpus in the U.S. District Court for the Southern District of Florida, alleging, among other things, that his lawyer was ineffective in previous proceedings.[39]

In reviewing Washington's case, the U.S. Supreme Court decided that, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense.[40] Courts need only determine that counsel comported with a basic standard of competency, in light of "prevailing professional norms," to find a lawyer's actions objectively reasonable.[41] Thus, a defendant has a heavy burden to prove that counsel's errors were so egregious that he was not functioning as "counsel" within the meaning of the Sixth Amendment,[42]

This criticism, though prevalent in commentary, is not the subject of this Note but highlights the obstacles habeas petitioners must overcome.

34. *See generally Strickland*, 466 U.S. 668 (articulating a two-prong test to determine whether counsel rendered ineffective assistance).

35. *See id.* at 671–72.

36. *See id.* at 672–75.

37. *See* Washington v. State, 362 So. 2d 658, 667 (Fla. 1978) (per curiam) (upholding Washington's convictions and sentences), *cert. denied*, 441 U.S. 937 (1979).

38. *See* Washington v. State, 397 So. 2d 285, 286–87 (Fla. 1981) (affirming the trial court's denial of postconviction relief).

39. *See Strickland*, 466 U.S. at 678.

40. *See id.* at 687–95 (establishing the two-prong test); *see also* Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009) ("*Strickland* requires a defendant to establish deficient performance and prejudice."); Graham, *supra* note 29, at 1653 (describing the two prongs of the *Strickland* test as the "essential elements of an ineffective assistance of counsel claim").

41. *See Strickland*, 466 U.S. at 690 (noting that courts should look at "whether, in light of all the circumstances, the [alleged] acts or omissions were outside the wide range of professionally competent assistance"); *see also* Wiggins v. Smith, 539 U.S. 510, 521 (2003) (explaining that, while there are no "specific guidelines" for adequate attorney performance, courts should look at "reasonableness under prevailing professional norms" (internal quotation marks omitted) (citing *Strickland*, 466 U.S. at 688)); Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) ("[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms . . . ." (citing *Strickland*, 466 U.S. at 688–89)).

42. *Strickland*, 466 U.S. at 687; *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 146–47 (2006) (explaining that ineffective assistance of counsel violates the Sixth Amendment right to counsel); Christopher M. Johnson, *Not for Love or Money: Appointing a Public Defender To Litigate a Claim of Ineffective Assistance Involving Another Public Defender*, 78 MISS. L.J. 69, 75 (2008) (observing that, under *Strickland*, a defendant must show that his lawyer's performance was "very poor indeed" to make a successful ineffectiveness claim). The Sixth Amendment guarantees not only the right to the assistance of counsel in criminal proceedings, but the right to the *effective* assistance of counsel in such proceedings. See *supra* notes 20–22 and accompanying discussion of the Supreme Court's interpretation of the right to counsel.

and that the acts or omissions were not the result of a valid strategy.[43] The inquiry must be "highly deferential" to the accused lawyer's performance and presume that counsel exercised adequate professional judgment.[44]

A court may dispense with the reasonableness inquiry and consider the prejudice prong first.[45] To show prejudice, a defendant must establish that there was a reasonable probability that, but for counsel's deficient performance, the proceeding would have yielded a different result.[46] Prejudice rests on whether the attorney's performance undermined the confidence and overall fairness of the proceeding,[47] although courts should presume that the proceeding was fair.[48] With strong presumptions of attorney competence and fairness to overcome, it is very difficult for a defendant to succeed on an ineffectiveness claim.[49]

The *Strickland* Court imposed a high standard to discourage ineffectiveness challenges.[50] If the standard were less deferential to attorney performance, "[c]riminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial,"

43. *See Knowles*, 129 S. Ct. at 1421 (explaining that a lawyer's decisions resulting from thorough investigation are "virtually unchallengeable" (citing *Strickland*, 466 U.S. at 690)); LAFAVE ET AL., *supra* note 22, § 11.10(c) (explaining that courts must give great deference to counsel's strategic choices, so long as the lawyer completely investigated the case).

44. *Strickland*, 466 U.S. at 689; *see also* Duncan, *supra* note 17, at 21–22 (noting the strong presumption that a lawyer acted within the wide range of reasonable professional conduct); Johnson, *supra* note 42, at 74–75.

45. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *see also Gonzalez-Lopez*, 548 U.S. at 147 (explaining that a constitutional violation is not complete unless the lawyer's mistakes actually prejudice the defense). *But see* Calhoun, *supra* note 33, at 430–31 (criticizing *Strickland* for permitting courts to consider prejudice before attorney performance); Duncan, *supra* note 17, at 20–21 (same).

46. *See Knowles*, 129 S. Ct. at 1422 ("To prevail on his ineffective-assistance claim, Mirzayance must show . . . that there is a 'reasonable probability' that he would have prevailed on his insanity defense had he pursued it." (quoting *Strickland*, 466 U.S. at 694)); Graham, *supra* note 29, at 1654 (citing *Strickland*, 466 U.S. at 694). "[S]ome conceivable effect on the outcome" is insufficient to establish prejudice. *Strickland*, 466 U.S. at 693.

47. *See Strickland*, 466 U.S. at 694 (defining "reasonable probability" as "a probability sufficient to undermine confidence in" the proceeding's outcome). The *Strickland* Court emphasized that an ineffective assistance of counsel claim is actually an attack on the fundamental fairness of the challenged proceeding, so the inquiry should focus primarily on whether the defendant received a fair trial. *See id.* at 687, 697; *see also* Kimmelman v. Morrison, 477 U.S. 365, 395 (1986) (explaining that the prejudice prong of the *Strickland* test rests on whether the outcome of the proceeding was "fundamentally unfair"); Graham, *supra* note 29, at 1653–54 (discussing the necessity of finding a link between the lawyer's performance and the trial's fairness).

48. *See Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."); Duncan, *supra* note 17, at 16–17 (explaining that the *Strickland* Court emphasized that lower courts should presume that trials are reliable).

49. *See supra* note 33 and accompanying text.

50. *See Strickland*, 466 U.S. at 690; HALL, *supra* note 31, § 10:1 ("[T]he prospect of defending unjustified ineffective assistance claims filed by disgruntled convicted clients can have a chilling effect on zealous advocacy.").

undermining judicial finality and efficiency.[51] Widespread scrutiny of trial counsel's performance would also discourage attorneys from accepting defense cases, particularly capital cases.[52]

If a reviewing court decides the defendant has made a colorable ineffectiveness claim in his petition, it may choose to conduct an evidentiary hearing to determine whether trial counsel's actions or omissions were the result of valid strategy or mere incompetency.[53] The decision to conduct a hearing rests on whether "a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."[54] Evidentiary hearings are rare in both capital and non-capital cases.[55] During an evidentiary hearing, a court may find it necessary to inquire into the nature of counsel's communications with the defendant to make a proper determination about trial counsel's performance and may call the trial lawyer as a witness to testify about his decisions before, during, and after trial.[56]

Usually, if a defendant does not prevail on his ineffective assistance of counsel claim, he is collaterally estopped from bringing a subsequent legal malpractice claim against the same lawyer he accused of being ineffective.[57] Furthermore, in many jurisdictions, an ineffective assistance of counsel claim, successful or not, does not subject the accused attorney to a disciplinary proceeding.[58]

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51. *Strickland*, 466 U.S. at 690; HALL, *supra* note 31, § 10:1 (warning that, if courts consistently find lawyers ineffective, there will never be finality).

52. *See Strickland*, 466 U.S. at 690; HALL, *supra* note 31, § 10:1 (explaining that widespread success for ineffectiveness claims would discourage criminal defense attorneys from accepting cases).

53. *See* Schriro v. Landrigan, 550 U.S. 465, 474–75 (2007) (explaining how courts considering federal habeas petitions determine when evidentiary hearings are appropriate). Evidentiary hearings are unnecessary where the record clearly refutes any factual allegations found in the habeas corpus petition and may not be conducted if barred by statute. *See Schriro*, 550 U.S. at 474–75 (listing federal cases that have found no evidentiary hearing is required where the factual allegations in the petition are contrary to the facts contained in the record).

54. *Schriro*, 550 U.S. at 474 (citing Mayes v. Gibson, 210 F.3d 1284, 1287 (10th Cir. 2000)), 481 (finding that the district court did not abuse its discretion in declining to conduct an evidentiary hearing because "[e]ven assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief").

55. *See* LAFAVE ET AL., *supra* note 22, § 28.7.

56. *See Strickland*, 466 U.S. at 691 (explaining that a court may find the inquiry critical to a thorough assessment of counsel's trial or appellate strategy); *see also* Duncan, *supra* note 17, at 27 ("A successful [ineffectiveness] claim often inquires into defense counsel's conversations and interactions with the defendant."); Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 63 (2009) (noting that trial counsel's testimony is usually crucial to the ineffectiveness determination).

57. *See* HALL, *supra* note 31, §§ 10:2, 31:16; Duncan, *supra* note 17, at 27; Koniak, *supra* note 17, at 7 (discussing how the collateral estoppel rule incentivizes former counsel to defend against ineffective assistance of counsel allegations).

58. *See, e.g.*, *In re* Steven Dean Applegate, Commission No. 96 SH 90, 1997 WL 713726, at *11–13 (June 30, 1997) (declining to professionally discipline a lawyer who was found to have rendered ineffective assistance); Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1125–26 (1999) ("[I]neffective or incompetent counsel may have little to fear from state ethics boards.").

B. Lawyers' Ethical Obligations to Former Clients

Although a defendant claiming ineffective assistance of counsel as grounds for postconviction relief will retain new counsel or represent himself, trial counsel still has a continuing duty to protect his former client's interests.[59] This section will describe the duties a lawyer owes his client after their formal relationship ends. Part I.B.1 examines the duty of confidentiality owed to a former client and Part I.B.2 examines the duty to provide information to the former client. The Model Rules[60] and the Restatement[61] guide lawyers and courts on these ethical duties.

The Model Rules originated with the Canons of Professional Ethics, which the American Bar Association (ABA) adopted in 1908, and later, the Code of Professional Responsibility (the Code), adopted in 1969.[62] The ABA adopted the Code as private law, governing lawyers who were members of the ABA.[63] In 1978, the ABA changed the title of these rules to the Model Code of Professional Responsibility (the Model Code), acknowledging that they served only as a model for state and federal courts and were not binding law.[64] The ABA was able to persuade state and federal courts to adopt the Model Code as rules of the court.[65] Even in states where the Model Code was not officially adopted, courts treated it as evidence of the law.[66] In 1983, the Model Rules, which have since replaced the Model Code, became effective, and many jurisdictions adopted them as law.[67] Those jurisdictions that have not adopted the Model Rules as law view them as persuasive authority.[68] The ABA has amended the Rules several times since 1983.[69]

Like the Model Rules, the American Law Institute's Restatement of the Law Governing Lawyers is a resource that lawyers and judges use to

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59. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009) (duties to former clients); *id.* R. 1.16 (duties upon termination); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (2000) (duties upon termination). *See also* Siegel, *supra* note 30, at 95–96 (discussing lawyers' duties to former clients in criminal cases).

60. MODEL RULES OF PROF'L CONDUCT R. 1.9.

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33.

62. *See* MARGARET RAYMOND, THE LAW AND ETHICS OF LAW PRACTICE 11 (2009) (providing a history of the Model Rules); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE, § 1-1(d) (2009) (same).

63. *See* ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-1(d).

64. *See* RAYMOND, *supra* note 62, at 11 ("The Model Code, like any model statute, was not the law anywhere—the ABA has no power to impose rules of professional responsibility on any jurisdiction.").

65. *See id.* at 11 ("In the years following its adoption by the ABA, many states adopted Model Code-based rules of professional conduct."); ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-1(d) ("The ABA was quite successful in persuading state and federal courts to adopt its Model Code as law, an enacted rule of court.").

66. *See* ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-1(d).

67. *See* Ria A. Tabacco, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568, 573 (2008) ("Most state courts adopt the Model Rules with some modifications.").

68. *See* ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-1(e)(4).

69. *See* RAYMOND, *supra* note 62, at 12 (discussing changes to the Model Rules since their initial adoption in 1983); ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-1(e)–(f) (same).

determine what the law is.[70] However, unlike the Model Rules, the Restatement was not intended to be adopted as rules of the court.[71] Rather, the Restatement is a series of principles that covers an array of areas that affect the practice of law.[72] It aims to "nudge the developing case law in a particular direction," and influence courts in interpreting the Model Rules.[73] Both the Model Rules and the Restatement impose duties after the formal attorney-client relationship ends.[74]

1. Confidentiality

One of the most fundamental duties a lawyer owes to a former client is a duty to keep the former client's confidences.[75] A lawyer's duty to keep a client's secrets is apparent in the ethical rule of confidentiality,[76] the attorney-client privilege,[77] and the work product doctrine.[78]

Confidentiality principles are rooted in agency law, by which a lawyer, the agent, acts on behalf of the client, the principal.[79] According to agency law, an agent has a duty not to use or reveal the principal's confidential information.[80] An agent's duty to keep the principal's confidences continues even after the agency relationship ends.[81]

a. The Ethical Duty of Confidentiality

A lawyer's duties to former clients include the confidentiality duty owed to current clients.[82] Nearly every American jurisdiction has professional

70. *See* RAYMOND, *supra* note 62, at 17.

71. *See* ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1-3(a).

72. *See id.*

73. *See id.* (describing the Restatement's purpose).

74. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (2000).

75. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.1 (Student ed. 1986) ("[T]he principle of the confidentiality of client information is well-embedded in the traditional notion of the . . . client-lawyer relationship."); Michael H. Berger & Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, COLO. LAW., Jan. 2009, at 35, 35 ("Confidentiality is a fundamental tenet of the attorney-client relationship.").

76. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (governing confidentiality). For a discussion of the ethical duty of confidentiality and the difference between the ethical duty of confidentiality and the attorney-client privilege, see *infra* Part I.B.1.b.

77. *See infra* Part I.B.1.b.

78. *See infra* Part I.B.1.c.

79. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 250 (1943) (finding the principles underlying attorney-client confidentiality rules in agency law (citing 2 PHILIP R. MECHEM, SELECTED CASES ON THE LAW OF AGENCY, §§ 2297, 2313 (2d ed. 1898))); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 361 (1989) ("At the heart of attorney-client confidentiality rules is the notion that lawyers are clients' agents, and often their fiduciaries.").

80. *See generally* RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.05 (2006).

81. *See id.* § 8.05 cmt. c ("An agent's duties concerning confidential information do not end when the agency relationship terminates. An agent is not free to . . . disclose a principal's . . . confidential information whether the agent maintains a physical record of them or retains them in the agent's memory.").

82. *See infra* note 91 and accompanying text.

rules that prohibit lawyers from disclosing confidential client information.[83] Model Rule 1.6 governs a lawyer's duty of confidentiality, stating that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"[84] or unless one of the rule's exceptions apply.[85] The ethical duty of confidentiality requires a lawyer to protect his client's confidences at all times, both in and out of court.[86] Information is protected regardless of whether it is public and regardless of whether disclosure would harm the client or not.[87] A lawyer has a duty to protect his former client's confidences in the same way he would a current client's confidences because the duty of confidentiality lasts forever.[88]

Model Rule 1.9 governs a lawyer's duties to former clients.[89] Under Rule 1.9(a), a lawyer has a duty to avoid conflicts of interest between former and current clients without the former client's written informed consent.[90] More importantly, Rule 1.9(c) provides that a lawyer may not reveal information relating to a former client's representation "except as these Rules would permit or require with respect to a [current] client."[91] This part of Rule 1.9(c) implicates Model Rule 1.6, which outlines the duty of confidentiality a lawyer has to current clients.[92] Similarly, the

83. *See* Zacharias, *supra* note 79, at 352 (explaining that professional codes in almost every American jurisdiction forbid attorneys to disclose client information, and that codes range from "nearly absolute prohibitions on attorney disclosures to general rules containing significant exceptions").

84. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009); *see also* Patrick Shilling, *Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741, 2742 (2001) (describing Model Rule 1.6).

85. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b). For a discussion of when a lawyer may reveal a client's confidences, see *infra* Part I.B.1.d, which discusses exceptions to the confidentiality rule.

86. *See* Shilling, *supra* note 84, at 2743.

87. Model Rule 1.6 does not contain an exception for public information; it simply protects all information related to representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a); *see also* WOLFRAM, *supra* note 75, § 6.7.2; Bruce A. Green, *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1634 n.126 (2008) ("Even publicly available information is subject to the confidentiality duty . . . .").

88. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] ("The duty of confidentiality continues after the client-lawyer relationship has terminated." (citing MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2))); *see also* Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266, 270–71 (D. Conn. 1992) (noting that Model Rule 1.9 protects confidences after representation ends).

89. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009) (outlining duties owed to a former client).

90. *Id.* R. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to [those] of the former client . . . .").

91. *Id.* R. 1.9(c); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-424 (2001) ("[A] principal obligation[] of a lawyer to her former client [is] to continue to maintain the confidentiality of the client information learned during the course of the representation . . . .").

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (confidentiality); *see also* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 461 (4th ed. 2005) ("[Rule 1.9] is a reminder that the lawyer also has a continuing duty of confidentiality to a former client.").

Restatement describes duties to a client upon termination of a formal attorney-client relationship,[93] providing that an attorney must refrain from using or disclosing client information.[94] These ethical duties are essential to making a determination about the proper course of action for former trial counsel during the postconviction process.[95]

The Restatement also provides that a lawyer may not use or disclose confidential information during and after representation "if there is a reasonable prospect that doing so will adversely affect a material interest of the client."[96] During representation, a lawyer must take reasonable steps to "protect confidential . . . information against impermissible use or disclosure" by others.[97] Upon termination of the attorney-client relationship, a lawyer may not take advantage of a former client by "abusing knowledge or trust" gained through representation and may not use or reveal client information if doing so would harm a client's material interests.[98]

The purpose of this duty is to foster trust between lawyers and their clients, encouraging clients to fully disclose all information related to the course of representation.[99] Client disclosure is important because it permits an attorney to make informed decisions about how to proceed with the representation.[100] Maintaining confidentiality is especially important in cases involving indigent defendants, who are less likely to trust their court-appointed counsel.[101]

b. The Attorney-Client Privilege

The ethical confidentiality duty encompasses the attorney-client privilege.[102] The attorney-client privilege is a construction of an

93. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (2000).

94. *See id.*

95. *See infra* Parts II–III.

96. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (2000) (describing the duty to safeguard confidences).

97. *Id.*

98. *Id.* § 33.

99. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 54 (1998) ("The purpose of confidentiality safeguards, of course, is to induce clients to make disclosures to lawyers."); *see also* Zacharias, *supra* note 79, at 364 ("A client who expects the lawyer to reveal embarrassing or damaging facts may not be willing to tell all.").

100. *See* Zacharias, *supra* note 79, at 358 ("By encouraging clients to communicate information they would otherwise withhold from their lawyers, confidentiality enhances the quality of legal representation and thus helps produce accurate legal verdicts.").

101. *See* Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83, 119 (2003) ("Clients who are unable to choose [their counsel] because they cannot pay for their own lawyer are more likely to be unsophisticated about the law, to feel more alienated in a legal setting, and to believe that their lawyer is not really working for them."). Ineffectiveness claims are most often brought by indigent defendants, so preserving trust and confidence is particularly important in such cases.

102. *See* Louima v. City of New York, No. 98 CV 5083(SJ), 2004 WL 2359943, at *71 (E.D.N.Y. Oct. 5, 2004) (finding the ethical confidentiality rule "broader than the common law [privilege] in that it deals not only with confidential attorney client communications but

evidentiary rule by which a lawyer may refuse to disclose or a client may prevent disclosure of communications between them in court.[103] There are two important distinctions between the ethical duty and the testamentary privilege.[104] First, the attorney-client privilege only applies whenever a lawyer may be called as a witness in judicial proceedings, whereas the ethical rule "applies in situations other than those where evidence is sought from the lawyer through compulsion of law."[105] Second, the privilege only protects *communications* between an attorney and his client, unlike the ethical duty, which protects *any information* related to representation.[106] Like the ethical duty of confidentiality,[107] the attorney-client privilege protects communications indefinitely, even after the client's death.[108]

The privilege is supported by the same policy concerns that underlie the ethical duty of confidentiality. Knowing that the privilege will protect communications between the client and his lawyer, the client will be encouraged to disclose to the lawyer everything relating to the particular course of representation.[109] A client's full disclosure allows an attorney to perform to the best of his abilities by ensuring that he will have all of the information available to make an informed, professional judgment about how to represent his client.[110]

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secrets as well"), *aff'd sub nom.* Roper-Simpson v. Scheck, 163 Fed. App'x 70 (2d Cir. 2006).

103. Federal Rule of Evidence 501 states the general rule of privileges. *See* FED. R. EVID. 501. The rule recognizes privileges prescribed by the Constitution, federal laws, rules promulgated by the Supreme Court, and general principles of common law. *See id.* Professor John Henry Wigmore's familiar formulation of the attorney-client privilege is:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton rev. ed., 1961).

104. *See* WOLFRAM, *supra* note 75, § 6.7 (explaining the difference between the scope of the ethical rule of confidentiality and the attorney-client privilege); Shilling, *supra* note 84, at 2743 (same).

105. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2009) (distinguishing the attorney-client privilege from the ethical rule); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–86 (2000) (expanding on the attorney-client privilege).

106. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3]; *see also* WOLFRAM, *supra* note 75, § 6.7.2.

107. For an explanation of a lawyer's duties after the attorney-client relationship ends, as dictated by Model Rule 1.9(c), see *supra* notes 91–94 and accompanying text.

108. *See* Swindler & Berlin v. United States, 524 U.S. 399, 404–07 (1998) (holding that the attorney-client privilege survives the death of the client).

109. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (acknowledging that the privilege's purpose "is to encourage full and frank communication between attorneys and their clients"); SIMON, *supra* note 99, at 54.

110. *See Upjohn*, 449 U.S. at 389 ("[S]ound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's being fully informed by the client."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (noting that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law . . . which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); *In re* Grand Jury

Under certain circumstances, the attorney-client privilege may be waived.[111] The right to waive the privilege rests solely with the client.[112] Waiver may be expressly stated or implied by the client's conduct.[113] Examples of implied waiver include when a client discloses otherwise privileged information to a third party,[114] when a client uses the privileged information in court through testimony,[115] or when a defendant makes an allegation against his lawyer that calls into question the client's conversations with his lawyer.[116] One such situation is when a defendant files a habeas petition and raises ineffective assistance of counsel claims on the basis that his lawyer gave improper advice.[117] As will be discussed in Parts II and III, when the client disputes communications with his lawyer by claiming his lawyer rendered ineffective assistance, the extent of the waiver is often unclear.[118]

Investigation, 399 F.3d 527, 530–32 (2d Cir. 2005) (discussing the important public policy concerns the attorney-client privilege serves).

111. *See* 8 WIGMORE, *supra* note 103, § 2327 (explaining waiver).

112. *See* WOLFRAM, *supra* note 75, § 6.3.4 ("The duty to invoke the privilege . . . is defined . . . by the client's own rights.").

113. *See* Hawkins v. Stables, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (noting that a client may either expressly or impliedly waive the attorney-client privilege); *see also* RAYMOND, *supra* note 62, at 191 (offering an example of when a client impliedly waives the privilege).

114. *See generally In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir. 2006). In *Qwest*, a corporation had produced documents to government agencies to aid in an investigation, but then refused to provide the same documents to the plaintiffs in a securities class action suit, claiming that the documents were protected by the attorney-client privilege. *See id.* at 1181–82. The U.S. Court of Appeals for the Tenth Circuit rejected the notion that the corporation had "selectively waived" the privilege and held that the privilege is waived when the client voluntarily discloses otherwise confidential information to an unprivileged third party. *See id.* at 1192, 1201.

115. *See, e.g.*, *Hunt*, 128 U.S. at 470–71. In *Hunt*, a civil action, the defendant offered testimony that included advice her attorney gave her. *See id.* When her attorney offered his account of their conversations, his client objected, claiming that their conversations were protected by the attorney-client privilege. *See id.* at 470. The Supreme Court found that, when the defendant testified about her attorney's advice, she waived the privilege and thus the right to object to the attorney's testimony about their conversations. *See id.* at 470–71.

116. Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001) (finding the privilege waived when one "'injects into this litigation an issue that requires testimony from [his] attorneys or testimony concerning the reasonableness of [his] attorney's conduct'" (quoting GAB Bus Servs., Inc. v. Syndicate 627, 809 F.2d 755, 762 (11th Cir. 1987))).

117. *See* United States v. Sharp, No. 2:07CR19, 2009 WL 1867619, at *1 (N.D. W. Va. June 29, 2009) (holding that the defendant's collateral attack on his attorney's performance "squarely puts his attorney-client relationship with his trial attorneys at issue" and that the defendant thus impliedly waives the attorney-client privilege with respect to his conversations with those lawyers); *see also* Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) (explaining that an ineffective assistance of counsel claim is an attack on a lawyer's work and an implied waiver of the attorney-client privilege); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967) ("The privilege is not an inviolable seal upon the attorney's lips. . . . [Where] the client alleges a breach of duty to him by the attorney, we have not the slightest scruple about deciding that he thereby waives the privilege as to all [relevant] communications . . . ."). For an in-depth discussion of ineffectiveness claims waiving the attorney client privilege, see *infra* Part II.A.2.

118. *See* Part II.A.2 (examining cases where courts find ineffective assistance of counsel claims effect broad waivers of the attorney-client privilege that extend to information generally protected by the ethical duty of confidentiality).

c. The Work Product Doctrine

Like the attorney-client privilege, the work product doctrine gives effect to confidentiality principles. The work product doctrine, which is separate from the attorney-client privilege,[119] protects from discovery an attorney's work relating to representation.[120] Work product is written work produced in anticipation of litigation, including "its intangible equivalent in unwritten or oral form."[121] Like attorney-client communications, work product is protected because a lawyer will be most candid in his work if he knows it will be immune from discovery by the opposing party.[122] Uninhibited trial preparation facilitates truth-seeking, the ultimate goal of the criminal justice system.[123] Work product is protected throughout litigation, unless the opposing side makes a showing of necessity to overcome these protections,[124] or the client waives work product immunity.[125]

d. Exceptions to the Duty of Confidentiality

A lawyer's duty to protect confidential client information is not absolute.[126] Model Rule 1.6 permits a lawyer to reveal information protected under the confidentiality duty in certain extraordinary circumstances.[127] Under the confidentiality rule's self-defense exception, a

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119. *See* United States v. Nobles, 422 U.S. 225, 238 n.11 (1975) (acknowledging that the attorney-client privilege and the work product doctrine are separate protections); Hickman v. Taylor, 329 U.S. 495, 508 (1947) (same).

120. *See generally Hickman*, 329 U.S. 495 (establishing the work product doctrine). *See also Nobles*, 422 U.S. at 236–40 (applying the work product doctrine in the criminal context); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87(3) (2000) ("[W]ork product is immune from discovery or other compelled disclosure . . . when the immunity is invoked . . . .").

121. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87(1) (defining work product); *see also Hickman*, 329 U.S. at 511 (same).

122. *See Hickman*, 329 U.S. at 510–11 (noting that, as an officer of the court, a lawyer has the duty to advance justice, which is best done when a lawyer enjoys a high degree of privacy in his work); *In re* Grand Jury Subpoena, 220 F.R.D. 130, 142 (D. Mass. 2004) ("[T]here is a need to protect the privacy of the attorney's mental processes.").

123. *See Nobles*, 422 U.S. at 238 ("The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."); *Hickman*, 329 U.S. at 511 (warning that, if work product were made available to the opposing party, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . [a]nd the interests of the clients and the cause of justice would be poorly served."); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 58 (Conn. 1999) (discussing the "detrimental effect" a "threat of disclosure" would have on the lawyer's ability to effectively advocate for his client) (citing *Hickman*, 329 U.S. at 511)).

124. *See* WOLFRAM, *supra* note 75, § 6.6.3.

125. *See id.* § 6.6.2.

126. *See* Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 783 (1977).

127. An attorney may reveal some information relating to representation to prevent reasonably certain death or substantial bodily harm; to prevent the client from committing a crime or fraud; to seek legal advice about compliance with the Model Rules; to defend oneself; and to comply with a law or court order. *See* MODEL RULES OF PROF'L CONDUCT

lawyer may reveal client information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client."[128] Disclosures are permitted only to the extent the lawyer reasonably believes necessary to protect his own self interest.[129] If a lawyer does reasonably believe it is necessary to make disclosures in connection with a judicial proceeding, he should make such disclosures "in a manner that limits access to the information to the tribunal or other persons having a need to know it" and should take measures to protect the confidential information.[130] The Restatement also recognizes exceptions to the confidentiality rule, including an exception to protect a lawyer's self-interest when a client brings or threatens to bring a charge of wrongful conduct.[131] Like the Model Rules, the Restatement allows disclosure only to the extent the lawyer reasonably believes necessary to defend against such a charge.[132] While the self-defense exception permits some disclosure when the lawyer and client are adverse to each other in some way, the lawyer may not "rummage through every file he has on that particular client . . . and to publicize any confidential communication he comes across [that] may tend to impeach his former client. . . . [T]he probative value of the disclosed material [must] be great enough to outweigh the potential damage [of] disclosure."[133]

There are a limited number of situations in which a lawyer may wish to reveal information under the self-defense exception.[134] These situations include civil malpractice claims,[135] an action to recover a fee,[136] a

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R. 1.6(b)(1)–(6) (2009). It is important to note that all of the exceptions to the confidentiality rule are discretionary, not mandatory. *See id.* R. 1.6 cmt. [15] (stating that the rule permits but does not require disclosure under the excepted circumstances). *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006) (analyzing the difference between mandatory and permissive Model Rules).

128. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5). Lawyers typically invoke this exception before or during a lawsuit with a former client. *See* Levine, *supra* note 126, at 783.

129. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b), cmt. [14] ("In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish that purpose."); Levine, *supra* note 126, at 793 (explaining that, without the self-defense exception, lawyers will suffer injustice in some cases where their own interests are at stake).

130. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [14].

131. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000).

132. *See id.*

133. Levin v. Ripple Twist Mills, 416 F. Supp. 876, 886–87 (E.D. Pa. 1976) (evaluating the extent to which a lawyer may make disclosures in a situation where he is adverse to his former client).

134. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [10] (describing situations where invoking the self-defense exception would be appropriate); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (same); *see also* WOLFRAM, *supra* note 75, § 6.7.8 (same).

135. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [10]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c; HALL, *supra* note 31, § 28:58 (listing situations in which a lawyer may invoke the self-defense exception); Levine, *supra* note 126, at 783, 791 n.42 (examining malpractice cases in which courts permitted the defendant attorney to make disclosures).

disciplinary charge,[137] a civil action brought by a third party,[138] or any other adverse proceeding, including collateral proceedings where ineffective assistance of counsel claims arise.[139] A lawyer need not wait until charges are filed or a lawsuit commences to invoke the self-defense exception.[140]

A lawyer may, however, invoke the self-defense exception only in response to a legitimate threat to his interests. In *Louima v. City of New York*,[141] the court found that protecting one's reputation does not warrant the self-defense exception.[142] Abner Louima was involved in criminal and civil suits against several police officers who brutally beat him.[143] Two of Louima's attorneys made statements to the press regarding Louima's case during representation and after withdrawing.[144] The lawyers argued that they were simply responding to and defending against public allegations that they had engaged in misconduct.[145] The self-defense exception to New York's confidentiality rule,[146] they argued, justified such a response.[147] The U.S. District Court for the Eastern District of New York rejected this assertion and concluded that "[m]ere press reports" about an attorney's conduct do not justify disclosure of client information, even if those reports are incorrect.[148]

The court also found that protecting one's reputation is not the sort of attorney self-interest the self-defense exception aims to protect, unlike an

136. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [11]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 65 (allowing disclosures in actions to recover a fee); *see also* Nakasian v. Incontrade, Inc., 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976) (interpreting New York's self-defense exception to permit disclosures in a dispute to collect a fee).

137. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [10]; *see also In re* Conduct of Robeson, 652 P.2d 336, 346 (Or. 1982) (interpreting Oregon's self-defense exception to permit disclosure in response to a disciplinary charge).

138. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1196 (2d Cir. 1974) (holding that an attorney may disclose confidential information in response to potential charges made by a third party); First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon, & Co., 110 F.R.D. 557, 568 (S.D.N.Y. 1986) (holding that a lawyer may reveal confidential documents in response to a lawsuit brought by a third party other than the client).

139. *See, e.g.*, United States *ex rel.* Richardson v. McMann, 408 F.2d 48, 53–54 (2d Cir. 1969) (permitting disclosure in response to an ineffective assistance of counsel claim), *vacated on other grounds*, 397 U.S. 759 (1970); Levine, *supra* note 126, at 791 (observing that many cases in which the self-defense exception has been deemed proper involve ineffective assistance of counsel claims made in postconviction petitions).

140. *See, e.g.*, *Meyerhofer*, 497 F.2d at 1195–96 (permitting attorney's disclosures when threatened with a lawsuit, before a suit had been formally filed); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [10] (same).

141. No. 98 CV 5083(SJ), 2004 WL 2359943, at *1 (E.D.N.Y. Oct. 18, 2004), *aff'd sub nom.* Roper-Simpson v. Scheck, 163 F. App'x 70 (2d Cir. 2006).

142. *See id.* at *76 (rejecting the notion that a lawyer may invoke the self-defense reputation when he disclosed information to a newspaper to respond to public accusations of misconduct).

143. *See id.* at *1.

144. *See id.* at *31–44 (detailing the lawyers' disclosures to the press).

145. *See id.* at *73 (setting forth the lawyers' defenses).

146. *See* N.Y. COMP. CODES R. & REGS. tit. 22 § 1200.19 (2007).

147. *See Louima*, 2004 WL 2359943, at *70.

148. *Id.* at *73.

action to recover a fee.[149] This reasoning also appears in the Restatement's confidentiality exceptions.[150] While the Model Rules do not explicitly distinguish between the extent of disclosure permitted in different cases in which the self-defense exception may apply, the comments to the Restatement contemplate a notable difference in the permissible extent of disclosure for fee cases and the permissible extent of disclosure in other self-defense cases.[151] A lawyer may use or disclose confidential information to resolve a fee dispute to the extent reasonably necessary to establish his claim for a fee[152] because disclosures necessary to establish such a claim will not involve information that would embarrass or prejudice the client.[153] For other self-defense purposes, disclosure is permitted only if and to the extent the lawyer reasonably believes such disclosure is necessary.[154] The requirement of reasonable necessity does not permit disclosure in response to "casual charges," such as comments not likely to be taken seriously by others.[155]

Another confidentiality exception that is relevant in the postconviction process permits a lawyer to reveal information to comply with a court order.[156] As with the self-defense exception, a lawyer may disclose information only to the extent reasonably necessary to comply with the court order.[157] Courts may call the lawyer as a witness during an evidentiary hearing to rule on an ineffectiveness claim, in which case a lawyer will be required to testify about his course of representing his former client.[158] Although "a court order may supersede the lawyer's obligation of confidentiality under Rule 1.6, [this] does not mean that the lawyer should be a passive bystander to attempts by a governmental agency—or by any other person or entity, for that matter—to examine her files or records."[159] Thus, when faced with a subpoena or court order directing a lawyer to turn over files relating to representation to a government entity, that lawyer has the duty to "seek to limit the subpoena, or court order, on any legitimate available grounds" to protect confidential information under Rule 1.6.[160] A lawyer must also make a good faith effort to limit his revelations to the

149. *Id.* at *70 (citing First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon, & Co., 110 F.R.D. 557, 561 (S.D.N.Y. 1986)).

150. *See infra* notes 310–13 and accompanying text (discussing the relevance of the difference between permissible revelations in actions to recover a fee and cases to defend against accusations of wrongful conduct).

151. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2009), *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 64–65 (2000).

152. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 65 (providing a fee dispute exception to the general confidentiality rule).

153. *See id.* § 65 cmt. b.

154. *See id.* § 64 cmt. e.

155. *See id.*

156. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6).

157. *See id.* R. 1.6(b) cmt. [14]; *see also supra* notes 129–30 and accompanying text.

158. *See supra* notes 53–56 and accompanying text for an explanation of the use of evidentiary hearings to evaluate the merits of ineffective assistance of counsel claims.

159. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 385 (1994) (commenting on confidentiality obligations when a lawyer's files are subpoenaed).

160. *Id.*

extent reasonably necessary when testifying as a witness in an evidentiary hearing.[161]

2. The Duty To Provide Information to a Former Client

A lawyer is obligated to protect his former client's interests, not only by keeping his confidences,[162] but also by providing information, which is considered client property, to his former client.[163] The duty to provide information to a former client, like the confidentiality duty, arises from agency law.[164] During the agency relationship, an agent has the duty to "use due care to safeguard" the principal's property[165] and then return such property to the principal upon termination.[166]

In line with this principle, Model Rule 1.16 requires that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests."[167] Even if a client unfairly discharges his lawyer, the lawyer must "take all reasonable steps" to ensure that termination does not adversely affect the client.[168] These steps include giving the client papers and property to which he is entitled.[169] This Rule is not absolute, however, as a lawyer may keep client-related papers to the extent other law permits.[170]

The Restatement's provisions relating to the duty to turn over property to the client upon termination are similar to Model Rule 1.16.[171] Under the Restatement, upon termination of the attorney-client relationship, a lawyer must surrender all property belonging to the client and, upon the client's request, "allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."[172] Substantial grounds to decline delivery exist if

161. *See id.*

162. For a discussion of the ethical duty of confidentiality, see *supra* Part I.B.1.a.

163. *See, e.g.*, Olguin v. State Bar, 616 P.2d 858, 860–61 (Cal. 1980) (disciplining a lawyer who failed to provide information and files to a former client's successor counsel).

164. *See supra* notes 79–81 and accompanying text for an explanation of how the duty of confidentiality derives from agency law.

165. *See* RESTATEMENT (THIRD) OF AGENCY § 8.12 cmt. b (2006) (describing an agent's duty of care towards the principal's property).

166. *See id.* § 8.05 cmt. b ("Termination of an agency relationship does not end an agent's duties regarding property of the principal. A former agent who continues to possess property of a principal has a duty to return it . . . .").

167. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2009).

168. *Id.* R. 1.16 cmt. [9].

169. *See id.* R. 1.16(d) ("Upon termination of representation a lawyer shall . . . surrender[] papers and property to which the client is entitled . . . ."); *see also* People v. Turner, Nos. 05PDJ080, 05PDJ083, 06PDJ089, 2006 WL 3353971, at *1 (Colo. O.P.D.J., Nov. 9, 2006) (disciplining a lawyer who failed to return files to a former client); HALL, *supra* note 31, § 21:4.

170. MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

171. *Compare id.*, *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 43–46 (2000) (governing clients' property).

172. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 46(2); *see also* 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, 18–21.

the client has not paid fees, for example, but only if withholding the documents would not "unreasonably harm" the client.[173]

Most jurisdictions adhere to the Restatement's view, or the "entire file" standard, extending a client's right to retrieve documents not only to the client's property placed in the lawyer's possession, but to the client's entire file, including documents the lawyer produced.[174] In one notable case, *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*,[175] the New York Court of Appeals adopted the Restatement view[176] and found that the client's property rights to these documents were superior to those of the attorney.[177] Upon withdrawal, the court concluded, a client should have access to work product as well as end product.[178]

While this creates a presumption in favor of full access to the file, it would be permissible to prevent access to firm documents intended solely for internal use[179] because, as some commentators assert, allowing lawyers to retain internal documents furthers important policy objectives best served by allowing lawyers to keep their work private.[180] Such internal documents include those containing an attorney's general assessment of a client, and preliminary or tentative impressions of issues recorded for the purpose of giving internal direction to facilitate performance of legal services.[181] This exception protecting the secrecy of internal documents may be overcome by court order, and "the lawyer's duty to inform the client . . . can require the

173. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43(1) (describing situations in which it would be appropriate to retain client-related materials); *id.* § 46(4) ("[A] lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 43(1).").

174. *See* Fred C. Zacharias, *Who Owns Work Product?*, 2006 U. ILL. L. REV. 127, 141 (citing Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 689 N.E.2d 879, 882 (N.Y. 1997)).

175. 689 N.E.2d 879, 882 (N.Y. 1997) (holding that counsel's former client is entitled to inspect and copy any documents which relate to representation and are in counsel's possession, absent substantial grounds for counsel to refuse access).

176. *See id.* at 882–83 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43 (2000)). In deciding to adopt this view, the court compared the Restatement view, which reflects the majority position, with the view adopted by a minority of jurisdictions. *See id.* A minority of courts and ethics authorities classify work product as the attorney's property, and only require an attorney to turn over end product to the client. *See id.*; *see also* Siegel, *supra* note 172, at 20 (discussing the different views of a former client's access to his file and work product); Zacharias, *supra* note 174, at 141 (discussing the minority view of work product). Finding that the minority view "unfairly places the burden on the client to demonstrate a need for specific work product documents in the . . . file," the court rejected the minority position in favor of the majority view, which presumes that the client is entitled to his entire file when the attorney-client relationship terminates. *See Sage Realty Corp.*, 689 N.E.2d at 882–83.

177. *See Sage Realty Corp.*, 689 N.E.2d at 882; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 cmt. c.

178. *See Sage Realty Corp.*, 689 N.E.2d at 882.

179. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46, cmt. c.

180. *Id.* ("The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."); *see also supra* notes 122–23 (discussing policy reasons for protecting work product).

181. *See Sage Realty Corp.*, 689 N.E.2d at 883.

lawyer to disclose matters discussed in a document even when the document itself need not be disclosed."[182]

In the postconviction process, a lawyer also owes his former client a duty of loyalty that is not explicit in the professional rules.[183] Loyalty is an "essential element[]" of the lawyer-client relationship.[184] Like the confidentiality duty and the duty to provide information to former clients,[185] the duty of loyalty exists in the fiduciary relationship between a lawyer and his client[186] and persists forever.[187] A lawyer not only has the duty to be loyal to his client, but he is also obligated to act as a zealous advocate for the client's interests.[188] This implied duty of loyalty helps inform the determination about predecessor counsel's role during the postconviction process.[189]

II. COMPETING VIEWS OF TRIAL COUNSEL'S ROLE DURING THE POSTCONVICTION PROCESS

An ethical dilemma arises when, in a petition for postconviction relief, the defendant, having retained new counsel, accuses his former attorney of rendering ineffective assistance during trial, sentencing, or appeal.[190] The accused lawyer must consider the ethical duties described in Part I.B to decide whether to cooperate with the prosecution and defend against ineffective assistance of counsel claims or refrain from helping the government and assist successor defense counsel instead. Very few courts and commentators have directly addressed how to respond to ineffectiveness claims. Of the few authorities that have done so, courts tend to protect a lawyer's right to serve his own self-interest by cooperating with the prosecution,[191] while commentators oppose this view, arguing that the ethical duties mandate substantial assistance to successor defense counsel.[192] Part II.A presents the analysis of courts that permit or compel

182. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46, cmt. c.

183. *See* HALL, *supra* note 31, § 9:4 ("The duty of loyalty underlies all the ethical rules . . . ."); WOLFRAM, *supra* note 75, § 4.1; Siegel, *supra* note 30, at 105–106.

184. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [1] (2009).

185. *See supra* notes 79–81, 164–66.

186. HALL, *supra* note 31, § 4:6 ("The relationship between an attorney and client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of loyalty and good faith."); Siegel, *supra* note 30, at 105.

187. *See* HALL, *supra* note 31, at §§ 4:6, 9:4.

188. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. [1] ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). The Supreme Court has acknowledged that zealous advocacy is the touchstone of the attorney-client relationship and the Sixth Amendment right to effective assistance of counsel. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 653–57 (1984) (explaining that effective assistance of counsel entails the defense vigorously advocating for his client's interests).

189. *See* Siegel, *supra* note 30, at 105–06 (considering the duty of loyalty when concluding that trial counsel should assist successor defense counsel).

190. *See* Siegel, *supra* note 172, at 14 (identifying "conflicting ethical obligations" for lawyers faced with ineffective assistance of counsel claims).

191. *See infra* Part II.A (discussing the judicial view).

192. *See infra* Part II.B (describing the commentator view).

trial counsel to cooperate with the prosecution and defend against ineffectiveness claims. Part II.B describes the commentary against cooperation with the government and for assisting successor counsel.

A. An Informed Prosecution: The Judicial View

Generally, courts have both allowed and required trial counsel to assist prosecution either through informal meetings or affidavits defending trial counsel's conduct.[193] Defendants challenge this cooperation with the prosecution by demanding a court order to prohibit counsel from doing so[194] or moving to suppress the evidence the prosecution gathered from conversations with trial counsel.[195] As this section explains, courts that reject these challenges do so based on three theories: (1) that an ineffectiveness claim triggers the self-defense exception to the confidentiality duty,[196] (2) that an ineffective assistance claim waives the attorney-client privilege (and therefore ethical protections of confidential material),[197] or (3) that the court does not have the power to control trial counsel's ex parte conversations with the prosecution.[198]

1. Applying the Self-Defense Exception

Some courts permit trial counsel to broadly disclose confidential information on the theory that a lawyer has the right to make such disclosures to protect his own self-interest.[199] When faced with an ineffectiveness allegation, it is the "inevitable reflex" of an attorney to defend himself.[200] As discussed in Part I.B.1.b, Model Rule 1.6(b)(5)—the self-defense exception to the confidentiality rule—allows a lawyer to protect his own self-interest by revealing information where he reasonably

193. *See, e.g.*, Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003) (permitting trial counsel to provide substantial information to the government); Wharton v. Calderon, 127 F.3d 1201, 1206 (9th Cir. 1997) (allowing informal meetings between the state and trial counsel); State v. Lewis, 36 So. 3d 72, 80 (Ala. Crim. App. 2008) (granting the state access to trial counsel's documents upon the judge's private review); State v. Buckner, 527 S.E.2d 307, 314 (N.C. 2000) (requiring trial counsel to turn over documents to the state); Binney v. State 683 S.E.2d 478, 480–81 (S.C. 2009) (permitting trial counsel to meet with the prosecution).

194. *See, e.g.*, *Wharton*, 127 F.3d at 1207 (reversing the district court's order to keep trial counsel from meeting with the prosecution).

195. *See, e.g.*, Purkey v. United States, No. 06-8001-CV-W-FJG, 2009 WL 3160774, at *2–3 (W.D. Mo. Sept. 29, 2009) (denying defendant's motion to suppress evidence the government received from trial counsel).

196. *See infra* Part II.A.1.

197. *See infra* Part II.A.2.

198. *See infra* Part II.A.3.

199. *See, e.g.*, Bullock v. Carver, 910 F. Supp. 551, 558–59 (D. Utah 1995) *aff'd*, 297 F.3d 1036 (10th Cir. 2002) (using the self-defense exception to justify informal interviews); State v. Click, 768 So. 2d 417, 422 (Ala. Crim. App. 1999) (finding that the self-defense exception justifies compelling trial counsel to testify at an evidentiary hearing); Binney v. State, 683 S.E.2d 478, 481 (S.C. 2009) (using the self-defense exception to excuse trial counsel's giving his file to the state).

200. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1185 (2003).

believes it necessary.[201] Under the Model Rules, the self-defense exception allows for disclosure not only during a proceeding in court, but at any time in response to any allegation of misconduct, regardless of whether a charge has been brought or a proceeding has commenced.[202] Courts permit out of court disclosures to the prosecution in self-defense through affidavits or informal meetings with the prosecution based on the plain meaning of the self-defense exception under Model Rule 1.6(b)(5), or the corresponding provision in that jurisdiction's ethical rules.[203] Two notable cases in which the court used the self-defense exception to justify trial counsel's revealing information and allowed a lawyer to make broad disclosures are *Bullock v. Carver*[204] and *Binney v. State*.[205]

In *Bullock*, the defendant raised ineffectiveness claims against his trial counsel in a petition for postconviction relief.[206] By the time the petition was filed, one attorney who had participated in the defense at trial began working for the Utah Attorney General.[207] Although she had been screened out of the case, the state bar advised her that she should be able to defend against petitioners' attacks, and the state court issued an order allowing her to do so through informal interviews and in-court testimony.[208] The U.S. District Court for the District of Utah, after reviewing the petition, deemed the order valid.[209] Based on the plain meaning of the self-defense exception to the state's confidentiality rule, which mirrors Rule 1.6(b)(5), the court found that the lawyer was justified in refuting the ineffectiveness claims.[210]

Similarly, in *Binney*, the South Carolina Supreme Court looked to the plain meaning of the self-defense exception to allow trial counsel to assist the government.[211] In that case, the defendant, Jonathan Kyle Binney, applied for postconviction relief in state court and accused his trial lawyer of being ineffective at trial.[212] A South Carolina statute provides that a lawyer accused of rendering ineffective assistance may freely discuss and disclose any aspect of the representation at issue with the government to defend against allegations, to the extent necessary to do so.[213]

Binney's former lawyer met with the South Carolina Attorney General's Office and provided them with a copy of his entire trial file for Binney's case.[214] Because the defendant made numerous broad ineffectiveness claims, the trial lawyer concluded that it was necessary for the state to

201. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2009).
202. *See id.* R. 1.6(b)(5) cmt. [10].
203. *See, e.g.*, *Bullock*, 910 F.Supp. at 557–58; *Binney*, 683 S.E.2d at 481.
204. 910 F. Supp. 551.
205. 683 S.E.2d 478.
206. *See Bullock*, 910 F. Supp. at 552.
207. *See id.*
208. *See id.* at 555–57.
209. *See id.* at 557.
210. *Id.* at 557–58.
211. Binney v. State, 683 S.E.2d 478 (S.C. 2009).
212. *See id.* at 479.
213. *See* S.C. CODE ANN. § 17-27-130 (1996).
214. *See Binney*, 683 S.E.2d at 480.

examine his entire file.[215] When the defendant sought to suppress the evidence from his former lawyer's revelations, the court denied the defendant's motion.[216] To make that determination, the court looked to the intent of the legislature and the plain meaning of the statute to determine whether the disclosures were permissible.[217] The court concluded that Binney's lawyer was permitted to turn his whole file over to the state for review where he thought it was necessary to do so.[218]

2. Finding Waiver in Ineffective Assistance of Counsel Claims

Some courts reject challenges to trial counsel's assisting the prosecution based on the theory that an ineffective assistance of counsel claim is a broad implied waiver[219] of the attorney-client privilege, and that this waiver extends to information that is generally confidential but not privileged.[220] An implied waiver occurs when a client puts his communications with his attorney at issue.[221] When a defendant brings a habeas corpus petition and alleges that trial counsel gave deficient advice, he is putting their communications at issue.[222] The defendant thus impliedly waives the privilege with respect to those communications, and may not then insist that his former lawyer remain silent about them.[223] The extent of the waiver is therefore determined by the breadth and nature of the ineffectiveness allegations, and because some defendants raise numerous ineffectiveness claims, courts permit their former lawyers to disclose a significant amount of confidential information, not only limited to attorney-client

215. *See id.* at 479 (explaining that the claims were too numerous to determine exactly which parts of the file were necessary to respond to them).

216. *See id.* at 480.

217. *See id.* at 480–81.

218. *See id.* It is noteworthy that the dissent opined that, while the statute permits disclosures, it does not say anything about handing over entire files to the state. *See id.* at 481–82 (Pleicones, J., dissenting). The dissenting justice concluded that trial counsel's actions in this case exceeded the scope of the self-defense exception under the South Carolina statute. *See id.*

219. *See supra* notes 113–17 and accompanying text (discussing implied waiver of the attorney-client privilege).

220. *See, e.g.*, Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) (finding that ineffectiveness claims waive the attorney-client privilege with respect to communications related to those claims); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967) (same); Purkey v. United States, No. 06-8001-CV-W-FJG, 2009 WL 3160774, at *2–3 (W.D. Mo. Sept. 29, 2009) (denying the defendant's motion to suppress his former counsel's 117-page affidavit based on the theory that ineffective assistance of counsel claims waived the attorney-client privilege); State v. Taylor, 393 S.E.2d 801, 806–07 (N.C. 1990).

221. *See* Hunt v. Blackburn, 128 U.S. 464 (1888); Farnsworth v. Sanford, 115 F.2d 375, 377 (5th Cir. 1940) (finding that, when "a client charges his counsel with misconduct and discharges them . . . . [h]e waives the privilege of the communication by himself making it an issue to be tried and testifying about it"); Levine, *supra* note 126, at 791–92; *see also supra* notes 113–17 and accompanying text (discussing implied waiver of the attorney-client privilege).

222. *See In re* Dean, 711 A.2d 257, 259 (N.H. 1998) ("Claims of ineffective assistance of counsel go to the core of attorney-client communications.").

223. *See Hunt*, 128 U.S. at 470; Bittaker v. Woodford, 331 F.3d 715, 716 (9th Cir. 2003); *Laughner*, 373 F.2d at 327.

communications (which are privileged).[224] These courts allow disclosure of not only information protected by the attorney-client privilege, but also other information outside the scope of the privilege that is protected by the broader confidentiality rule.[225] For example, courts in the U.S. Court of Appeals for the Second Circuit have found that, because a defendant waives the attorney-client privilege with ineffectiveness claims, the accused lawyer may provide "testimony, affidavits, or briefs" that contain any information to rebut the ineffectiveness claims.[226] Some courts only permit trial counsel to cooperate with the prosecution outside of an evidentiary hearing under close judicial supervision, through *in camera* review.[227] In these cases, when a defendant raises broad ineffectiveness claims, the court will perform an *in camera* review to determine which parts are irrelevant to the precise claims raised in the petition and then give the relevant files to the government.[228]

One example of such a case is *Coluccio v. United States*.[229] In *Coluccio*, the defendant filed a habeas corpus petition in federal court and sought relief based on the claim that his trial lawyer, Andrew J. Weinstein, was ineffective.[230] Weinstein requested to submit an affidavit in which he would disclose certain confidential information that he believed was necessary to defend himself against the defendant's claims.[231] The Eastern District of New York stated that a client cannot use the attorney-client privilege as both "'a shield and a sword'"[232] and that a defendant who claims to have relied on the advice of counsel has waived the attorney-client privilege with respect to the communicated advice.[233] The court looked to other similar Second Circuit cases, which all relied on the "shield and sword" waiver theory and permitted a lawyer to present evidence in his own

224. *See* Reed v. State, 640 So. 2d 1094, 1097 (Fla. 1994) (allowing trial counsel to turn over the former client's entire file to the state to assist in responding to ineffective assistance of counsel claims); Waldrip v. Head, 532 S.E.2d 380, 386 (Ga. 2000) ("[A]ny waiver of the attorney-client privilege is not limited solely to the attorney's testimony, but extends also to documents in trial counsel's files.").

225. *See Reed*, 640 So. 2d at 1097 (finding a waiver of the privilege also extended to a waiver of protection of other materials); *Waldrip*, 532 S.E.2d at 386 (same).

226. *See, e.g.*, Bloomer v. United States, 162 F.3d 187, 194 (2d Cir. 1998) ("[O]ur cases require that 'except in highly unusual circumstances,' the assertedly ineffective attorney should be afforded 'an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs.'" (quoting Sparman v. Edwards, 154 F.3d 51, 52 (2d Cir. 1998) (per curiam))); *see also* Cox v. Donnelly, 387 F.3d 193, 201 (2d Cir. 2004); McKee v. United States, 167 F.3d 103, 108 (2d Cir. 1999).

227. *In camera* review refers to a judge's private review of evidence in his chambers. *See* BLACK'S LAW DICTIONARY 828 (9th ed. 2009).

228. *See, e.g.*, Coluccio v. United States, 289 F. Supp. 2d 303, 305 (E.D.N.Y. 2003); State v. Lewis, 36 So. 3d 72, 78 (Ala. Crim. App. 2008); State v. Buckner, 527 S.E.2d 307, 314 (N.C. 2000).

229. 289 F. Supp. 2d at 303.

230. *See id.* at 304.

231. *See id.* Weinstein wrote a letter to the court requesting permission to make revelations before actually drafting such an affidavit, and the government requested that the court rule on the ethical issues implicated by the letter. *See id.*

232. *Id.* (quoting United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)).

233. *See id.*

defense through "testimony, affidavits, or briefs" containing information about the course of representation.[234] Ultimately the court admitted Weinstein's affidavit.[235]

Another way a court tries to limit disclosure to the government is by ordering that any parts of files trial counsel hands over to the prosecution be kept from anyone but the parties working on the prosecution's case.[236] In *Bittaker v. Woodward*, the U.S. Court of Appeals for the Ninth Circuit permitted disclosures to the prosecution, but limited the use of such information to the Attorney General.[237]

3. Refusing To Enforce Confidentiality Outside of the Courtroom

In an alternative approach, the U.S. Court of Appeals for the Ninth Circuit has found that, because the attorney-client privilege does not apply outside of the courtroom, trial counsel is free to provide information to the prosecution in an informal setting.[238] In *Wharton v. Calderon*, the Ninth Circuit declined to interfere with trial counsel's informal meetings with the prosecution.[239] In that case, the defendant petitioning for postconviction relief sought an order forbidding trial counsel from having an ex parte meeting with the prosecution.[240] However, the Ninth Circuit noted that courts do not have the power to regulate the extent to which trial counsel makes out-of-court disclosures to the prosecution, particularly because attorneys facing ineffectiveness claims are no longer appearing before the court.[241] Such regulation, the court decided, would unfairly prejudice the prosecution by preventing access to information.[242] Furthermore, because the court's responsibility to protect the attorney-client privilege exists only within the courtroom, the court refused to regulate what an attorney could do outside the courtroom.[243] The court noted that there is no explicit ethical rule that prohibits one attorney from interviewing another, and that regulating attorney conduct outside of the courtroom is the State Bar's responsibility.[244] Thus, informal, unregulated meetings between trial

234. *See supra* note 226 (listing Second Circuit cases).

235. *See Coluccio*, 289 F. Supp. 2d at 305.

236. *See generally* Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) (upholding a protective order that permitted only representatives of the state to use information in defense counsel's files for the sole purpose of responding to ineffective assistance claims).

237. *See id.* at 717, 728.

238. *See* Wharton v. Calderon, 127 F.3d 1201 (9th Cir. 1997).

239. *See id.* at 1206–07 (finding that the district court erroneously issued a protective order that prohibited trial counsel from meeting with the state to defend against ineffectiveness claims).

240. *See id.* at 1202–03.

241. *See id.* at 1206.

242. *See id.* at 1203; *see also Bittaker*, 331 F.3d at 722 (citing fairness as a reason to allow disclosure).

243. *See Wharton*, 127 F.3d at 1205 ("[A] court's authority to 'protect' the attorney-client privilege simply does not extend, at least absent some compelling circumstance, to non-compelled, voluntary, out-of-court interviews, any more than it does to an after-dinner conversation.").

244. *See id.* at 1206.

counsel and the government were permissible.[245] The court was not concerned about the prospect of the prosecution inducing Wharton's lawyers to violate any ethics rules.[246]

B. Devoted to the Defense: The Commentator View

Although courts permit trial counsel to assist the prosecution, commentators urge lawyers to remain loyal to their former clients. These commentators find that, instead, a lawyer has the professional responsibility to assist successor defense counsel in petitioning for ineffective assistance of counsel relief.[247] This section first examines the commentary that urges a lawyer to protect confidentiality by not cooperating with the prosecution.[248] Then, this section presents the commentary that states that the duty to provide information requires trial counsel to assist postconviction counsel.[249]

1. Confidentiality as a Limit to Self-Defense

Commentators who urge former counsel to refrain from assisting the prosecution rely on the ethical duty of confidentiality.[250] Confidentiality obligations promote trust between a lawyer and his client, and a lack of trust hinders the lawyer's ability to make informed strategic decisions about the representation.[251]

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (Pennsylvania Committee) has analyzed the issue of whether former defense counsel may assist the prosecution by considering the ethical duty of confidentiality.[252] The Pennsylvania Committee drafted an opinion in response to a case in which the government made a discovery request for trial counsel's entire file, which would help the state to respond to a habeas petition that asserted ineffective assistance of counsel claims.[253] In light of the relevant confidentiality considerations of the attorney-client privilege, the work product doctrine, and the ethical duty of confidentiality under Model Rule 1.6, the Pennsylvania Committee determined that the file should remain protected from the government's discovery requests.[254]

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245. *See id.*
246. *See id.*
247. *See generally* Fox, *supra* note 200 (describing capital defense lawyers' obligations during collateral proceedings); Siegel, *supra* note 172. (advocating the view that trial counsel should assist successor counsel during collateral proceedings).
248. *See infra* Part II.B.1.
249. *See infra* Part II.B.2.
250. *See supra* Part I.B.1.a–b (discussing the ethical duty of confidentiality and the attorney-client privilege).
251. *See supra* notes 99–101 (discussing policy justifications for confidentiality rules).
252. *See generally* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 72 (2002).
253. *See id.*
254. *See id.* at 6.

First, the Pennsylvania Committee looked to several notable cases that hold that an ineffectiveness claim waives the attorney-client privilege.[255] Second, the Pennsylvania Committee looked to the work product doctrine, and found that an attorney's work product was discoverable if it was the basis of a lawsuit.[256] Third, the Pennsylvania Committee noted that Model Rule 1.6 protects all information relating to representation, and that under Rule 1.6, counsel may not reveal the client's file without the client's consent or a court order to do so.[257] In addition to Rule 1.6's requirements, the Pennsylvania Committee concluded that it would be extremely difficult to determine which records would be useful and directly responsive to the ineffectiveness allegations.[258] Therefore, defense counsel may present any potentially responsive files to the Court for *in camera* review to ensure that confidential materials remain confidential.[259] Otherwise, the government still had the opportunity to call trial counsel as a witness in an evidentiary hearing.[260] It would be unacceptable for the government to be able to "take a short-cut and seek a whole-sale inspection of" client files, because those records are protected under Rule 1.6.[261] Thus, the Pennsylvania Committee concluded that the ethical duty of confidentiality would preclude predecessor counsel's substantial assistance to the prosecution in such cases.[262]

Professor David M. Siegel has briefly discussed a lawyer's duty of confidentiality as a limit to the ability to respond to ineffectiveness claims.[263] He acknowledges that an ineffectiveness claim effects some waiver of the attorney-client privilege and the ethical duty of confidentiality, but says the self-defense exception itself is confusing because it seems to enable lawyers to respond to ineffectiveness claims based on a few different rationales (as a disclosure adverse to the client, as a dispute concerning lawyers' conduct, or as a former client issue).[264] To provide clearer guidance to lawyers, Siegel proposes an amendment to the comments of Model Rule 1.6, which would specifically address ineffectiveness claims and permit disclosure "to the extent necessary to

255. *See id.* at 2–4 (citing Johnson v. Alabama, 256 F.3d 1156, 1179 (11th Cir. 2001); Anderson v. Calderon, 232 F.3d 1053, 1099–1100 (9th Cir. 2000); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974); Turner v. Williams, 812 F. Supp. 1400, 1433 (E.D. Va. 1993); Commonwealth v. Chmiel, 738 A.2d 406, 414 (Pa. 1999)).

256. *See id.* at 5 (citing *In re* John Doe, v. United States, 662 F.2d 1073 (4th Cir. 1981); Charlotte Motor Speedway, Inc. v. Int'l Ins. Co., 125 F.R.D. 127, 130 (M.D.N.C. 1989); Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981); Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975)).

257. *See id.*; *see also supra* Part I.B.1 (discussing confidentiality).

258. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 72, at 6 (2002).

259. *See id.*

260. *See id.* at 7.

261. *Id.*

262. *See id.*

263. *See* Siegel, *supra* note 30, at 108–11.

264. *See id.* at 109 ("Unfortunately, the concerns which the Model Rules address regarding disclosures point in different directions in the postconviction context.").

meet the standard of reasonably effective assistance set forth in *Strickland*."[265]

Siegel is the only commentator who specifically examines the self-defense exception to the confidentiality rule as justification for responding to ineffectiveness claims. The few commentators who have made even fleeting acknowledgements to a lawyer's ability to defend against ineffectiveness claims agree that a lawyer should resist the urge to protect his reputation and remain loyal to his former client.[266] As John Wesley Hall, Jr. explains, being accused of being ineffective is a reality of the profession, and lawyers should not take such allegations personally.[267] He urges trial counsel to be candid with the court and be honest during proceedings if the lawyer believes he rendered ineffective assistance, even if it means admitting to incompetent conduct.[268] A lawyer may be somewhat embarassed, provided his peers read about the court's decision, but otherwise, an ineffectiveness claim poses little threat to a lawyer's career.[269]

2. Finding a Duty To Assist the Defense in the Duty To Protect Former Clients' Interests

Commentators who discuss a lawyer's postconviction duties agree that a lawyer should assist successor counsel in asserting ineffective assistance of counsel claims.[270] Under this view, the ethical rules "impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client" with successor counsel, even if doing so would disclose that trial counsel rendered ineffective assistance.[271] This may be achieved by maintaining records of the case in a way that will "inform successor counsel of all significant developments relevant to the litigation," giving successor counsel full access to the client's files, "sharing potential

265. *Id.* at 111.

266. *See, e.g.*, Siegel, *supra* note 30, at 95–108 (arguing that a lawyer's ethical duties limit his ability to respond to ineffectiveness claims); Voigts, *supra* note 58, at 1131–32 (mentioning a lawyer's duty to remain loyal to his former client by assisting habeas counsel).

267. *See* HALL, *supra* note 31, § 10.1 n.7 ("We chose this line of work, and we need to accept the risks that come with it. Therefore, defense lawyers should not take [ineffectiveness claims] personally."); *see also* Judge Anthony K. Black & Susan S. Matthey, *Advice to the Criminal Bar: Preparing Effectively for Allegations of Ineffectiveness*, FLA. B.J., May 2008, at 49, 50 (warning that postconviction ineffectiveness allegations are "nearly inevitable" for criminal defense attorneys).

268. *See* HALL, *supra* note 31, § 10.68.

269. Koniak, *supra* note 17, at 10 (noting that a lawyer who is found to be ineffective suffers very few consequences as a result because of the collateral estoppel rule and a lack of discipline for attorneys who are found to be ineffective).

270. *See* Siegel, *supra* note 30, at 108 (urging trial counsel to "fully, openly, and without reservation cooperate with postconviction counsel"); Siegel, *supra* note 172, at 14; Voigts, *supra* note 58, at 1131. *See generally* Fox, *supra* note 200.

271. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 127 (1992), *available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=FxYHJ4sE3Ws%3d&tabid=839 (discussing trial counsel's postconviction duties).

further areas of legal and factual research with successor counsel," and cooperating with successor counsel's legal strategies.[272]

Those who believe trial counsel must assist successor counsel base this conclusion in part on the continuing obligation to protect former clients' interests.[273] A lawyer who represents a defendant in a collateral proceeding has the responsibility to explore all possible grounds for relief.[274] Providing full assistance to successor counsel will allow successor counsel to make a thorough investigation of potential ineffectiveness claims.[275] Failure to do so may result in meritless habeas proceedings because a legitimate ineffectiveness claim is unfounded.[276] Thus, the trial lawyer who refuses to cooperate harms the client's potential for relief, and by harming the client, counsel violates the duty to protect a client's interests that persists even after the attorney-client relationship terminates.[277]

Some find the duty to assist successor counsel in the duty to give a former client access to files relating to representation[278] includes not only giving copies of the files that exist, but also filling in any informational gaps that exist in the files.[279] This means that former counsel must "spend all the time that is necessary to bring habeas counsel up to speed."[280] This theory is based on the idea that both the lawyers' opinions and strategies are work product that belongs to the client.[281]

Some commentators interpret this duty as a duty to volunteer thoughts about strategy relating to representation as well.[282] The California State Bar has said that, where successor counsel needs information that has not been put into writing, trial counsel must provide this information to his former client and successor counsel.[283] The California State Bar's Standing Committee on Professional Responsibility and Conduct (California Committee) addressed the precise issue of the extent to which a criminal defense trial counsel should cooperate with successor counsel in the context

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272. Siegel, *supra* note 172, at 20.

273. *See* Siegel, *supra* note 30, at 95–96; Voigts, *supra* note 58, at 1130–31.

274. *See* Siegel, *supra* note 30, at 96 ("[S]trict new rules on the availability of successive collateral proceedings impose rigid requirements on the lawyer who represents the defendant in the collateral action to raise every potential ground for relief.").

275. *See id.* at 106–07; Voigts, *supra* note 58, at 1131.

276. *See* Voigts, *supra* note 58, at 1130–31.

277. *See id.* at 1131; *see also* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 127 (1992), *available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=FxYHJ4sE3Ws%3d&tabid=839 (interpreting an ethics rule requiring an attorney to release all client papers and property to client upon termination to include all impressions, conclusions, opinions, research, etc.).

278. *See supra* notes 169–82 and accompanying discussion.

279. *See* Fox, *supra* note 200, at 1190–91; Siegel, *supra* note 30, at 112–13; Siegel, *supra* note 172, at 20.

280. Fox, *supra* note 200, at 1191.

281. *See supra* notes 174–78 (discussing a lawyer's duty to allow a former client to access his entire file).

282. *See* Fox, *supra* note 200, at 1191–92; Siegel, *supra* note 30, at 114; Siegel, *supra* note 172, at 20.

283. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 127 (1992) *available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=FxYHJ4sE3Ws%3d&tabid=839.

of the duty to return property upon termination.[284] The California Committee concluded that, not only must trial counsel turn over to the client written materials generated throughout the duration of their relationship, but he must also provide the client with "other information not reduced to writing" if failing to provide such information would prejudice the client.[285] A lawyer's "impressions, conclusions, opinions, legal research, and legal theories prepared in the client's underlying case ordinarily are 'reasonably necessary to the client's representation,'" and must be provided to the former client.[286]

III. THE PROPER RESPONSE: PROTECTING CONFIDENTIALITY

Even though courts consistently permit trial defense counsel to disclose confidential information to refute ineffectiveness claims,[287] these courts disregard the importance of preserving confidentiality to serve judicial efficiency. Thus, lawyers and courts alike should acknowledge that a lawyer's ethical obligations require that he keep confidences and refrain from defending against ineffective assistance of counsel claims. Part III.A argues that, in the ineffective assistance of counsel context, a lawyer or court may not use the self-defense exception to justify trial counsel's assisting the prosecution to respond to ineffective assistance of counsel attacks. Part III.B argues that, not only should trial counsel refrain from cooperating with the prosecution, but he must also provide a limited degree of assistance to successor defense counsel.

A. Trial Counsel Should Not Assist the Prosecution

Courts that permit defense counsel to provide substantial assistance to the prosecution, either because they apply the self-defense exception[288] or because they find ineffectiveness claims waive the attorney-client privilege and conflate the privilege with the rule,[289] fail to perform a thorough analysis of ethical duties. They do not base these decisions on actual ethical considerations; rather, they subordinate these considerations to address prosecutorial and judicial convenience. This section argues that, because the self-defense exception is meant to apply in very limited situations, and because the collateral impact of ineffectiveness claims on defense counsel is minimal, the self-defense exception should never be used to justify disclosures in response to ineffective assistance of counsel claims. This section also argues that, although ineffectiveness claims may waive the attorney-client privilege,[290] they do not waive the confidentiality duty, so trial counsel should not disclose confidential information outside of an

284. *See generally id.* (answering the question, "To what extent must a criminal defense attorney, having been relieved by successor counsel, cooperate with new counsel?").
285. *Id.*
286. *Id.*
287. *See supra* Part II.A and accompanying text.
288. *See supra* Part II.A.1 and accompanying text.
289. *See supra* Part II.A.2 and accompanying text.
290. *See supra* notes 111–17 and accompanying text.

evidentiary hearing. Lastly, this section argues that permitting outside cooperation with the prosecution undermines policy considerations that underlie the ethical duty of confidentiality.

1. The Self-Defense Exception Should Not Apply to Ineffectiveness Claims

No matter how much an attack on his work offends a lawyer, it is improper for him to invoke the self-defense exception to justify responding to ineffective assistance of counsel claims. The self-defense exception[291] permits a lawyer to disclose confidential information "to establish a claim or defense . . . in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding."[292] It is intended to mitigate the substantial negative effects that keeping confidences may have on the lawyer's interests.[293] In instances when the self-defense exception is meant to apply, such as in response to a disciplinary charge,[294] in response to a civil malpractice claim,[295] or in an action to collect a fee,[296] the potential harms to the lawyer are significant (disbarment, financial loss, etc.). In contrast, the harms a lawyer seeks to avert by defending against ineffective assistance of counsel claims are minimal.[297] Therefore, ineffectiveness claims are not a controversy for which a lawyer should invoke the exception.[298]

Ineffective assistance of counsel claims raise three collateral concerns for lawyers. The first concern is the prospect of a civil malpractice suit; the second is the prospect of a disciplinary hearing; and the third is the potential for reputational harm.[299] None of these concerns is realistic or serious enough to warrant the self-defense exception. First, there is no threat of a civil malpractice claim because of the collateral estoppel rule, which bars a defendant whose ineffectiveness claim fails from suing his former lawyer for malpractice.[300] Second, while some states require that all findings on ineffective assistance of counsel be reported to the state ethics board, lawyers are rarely disciplined for being ineffective.[301] Therefore, the only threat an ineffective assistance claim poses to the accused lawyer is a damaged reputation.[302] Any reputational injury only occurs if others read

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291. *See supra* Part I.B.1.d.

292. *See supra* note 128 and accompanying text (citing MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2009)).

293. *See supra* notes 128–39 and accompanying text.

294. *See supra* note 137 and accompanying text.

295. *See supra* note 135 and accompanying text.

296. *See supra* note 136 and accompanying text.

297. *See supra* notes 57–58 and accompanying text.

298. The ABA has recently issued an opinion adopting a similar position. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 456 (2010).

299. *See supra* notes 57–58 and accompanying text (addressing possible collateral effects of ineffectiveness claims).

300. *See supra* note 57 and accompanying text.

301. *See supra* note 58 and accompanying text.

302. *See supra* note 269 and accompanying text.

the court opinion vacating the defendant's sentence.[303] Even if other lawyers and future clients do gain access to such an opinion, the opinion is still unlikely to be taken seriously enough to cause serious reputational harm. Ineffectiveness claims are common in habeas petitions, particularly among those filed by capital defendants.[304] As such, an ineffectiveness claim is an accepted risk associated with becoming a criminal defense attorney,[305] so there is little stigma attached to being the target of such claims.

An important example of where a lawyer tried to use the self-defense exception to protect his reputation is the *Louima* case discussed in Part I.[306] In that case, the lawyers who had revealed confidential information claimed that they did so to protect their reputations after being publicly accused of misconduct.[307] However, the court found that, even though the lawyers responded to very public allegations, the threat to their reputation was insufficient to overcome their duty of confidentiality to their former client.[308] Generally, allegations of ineffectiveness are not nearly as public as the newspaper articles in *Louima*.[309] Therefore, the self-defense exception should not justify revealing confidential information in response to potential humiliation.

To further understand why the self-defense exception does not apply in response to ineffective assistance of counsel claims, it is useful to compare an ineffectiveness claim to an action to recover a fee. As discussed in Part I, the Restatement's guidelines for disclosure in a fee dispute are more lax than those for disclosure when defending against charges of wrongful conduct.[310] In a suit to recover a fee, a lawyer may divulge information to the extent reasonably necessary to establish his claim.[311] For other situations in which the self-defense exception may arise, a lawyer may reveal information only if he believes it is necessary to do so and that belief is objectively reasonable, and he may not reveal information to respond to casual charges not likely to be taken seriously by others.[312] Before deciding to reveal confidential client information, the lawyer must reasonably believe that he has exhausted his other options, that those other options will be unavailing, or that invoking them would substantially prejudice the lawyer's position in the matter.[313] Thus, making disclosures to defend oneself should be a last resort response to an imminent charge and not to a commonplace claim of ineffectiveness.

303. *See supra* note 269 and accompanying text.
304. *See supra* notes 28, 267, and accompanying text.
305. *See supra* note 267 and accompanying text.
306. *See supra* notes 141–49 and accompanying text.
307. *See supra* text accompanying note 145.
308. *See supra* text accompanying note 148.
309. *See supra* text accompanying note 144.
310. *See supra* notes 150–55 and accompanying text.
311. *Seee supra* note 152 and accompanying text.
312. *See supra* notes 154–55 and accompanying text.
313. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (2000).

2. Ineffective Assistance of Counsel Claims Waive the Testimonial Privilege, But Do Not Discharge the Ethical Duty

It is a well-accepted principle that an ineffective assistance of counsel claim that puts the attorney's conversations with his client at issue impliedly waives the attorney-client privilege with respect to those communications.[314] However, some courts have interpreted that waiver to extend not only to communications between the lawyer and the client, but to other information relating to representation.[315] Courts that allow or require lawyers to have ex parte meetings with the prosecution or submit affidavits or entire files,[316] justifying the decision with a theory of waiver, mistakenly conflate the attorney-client privilege and the duty of confidentiality. This practice is improper because there are critical distinctions between the attorney-client privilege and the ethical duty of confidentiality[317] that courts (and all parties, for that matter) should not ignore. The attorney-client privilege only applies in very limited circumstances, protecting attorney-client communications during a judicial proceeding.[318] The ethical duty of confidentiality is much broader; it protects all information relating to representation at all times.[319] Therefore, attorneys should not volunteer, nor should courts order them to turn over, entire files on the theory that ineffectiveness claims waive the attorney-client privilege.[320] Entire folders are distinctly different from information about select conversations between a defendant and his lawyer, which courts and lawyers should acknowledge.

3. Policy Implications of the Defense Cooperating with the Prosecution

Under either the self-defense exception or the theory of waiver, allowing a lawyer to provide information to the prosecution outside of an evidentiary hearing[321] poses a great danger that the lawyer will overdisclose confidential information. This undermines the policy interests that the confidentiality rule seeks to advance.[322] When a lawyer hands over a file or agrees to an ex parte meeting with the prosecution,[323] the lawyer risks disclosing far more information than necessary because he does not know precisely what information the reviewing judge will need to decide the case. Therefore, it would be unacceptable for trial counsel to voluntarily disclose information to the prosecution without being compelled to do so by a court order.

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314. *See supra* notes 113, 116–18, 221–23 and accompanying text.
315. *See supra* Part II.A.2.
316. *See supra* notes 224–25 and accompanying text.
317. *See supra* notes 104–06 and accompanying text.
318. *See supra* notes104–06 and accompanying text.
319. *See supra* Part I.B.1.a.
320. *See supra* Part II.A.2.
321. *See supra* notes 53–56 and accompanying text.
322. *See supra* notes 99–101 and accompanying text.
323. *See supra* Part II.A.

Even in instances where courts do seek to limit disclosure to the prosecution by requiring *in camera* review of trial counsel's files, affidavits, and other statements,[324] this practice does little to guard against overdisclosure when the revelations are initially made to the judge. Where a lawyer turns his entire file over to a judge for in camera review, a breach of confidentiality occurs at the moment the lawyer reveals his file to the judge, regardless of whether the prosecution eventually views it. If a judge is to determine what information he needs to decide an ineffectiveness claim, then a lawyer has no way of knowing precisely what information he should disclose to the court for *in camera* review. Therefore, the lawyer will inevitably disclose more information than is reasonably necessary to defend himself.

Because of the dangers of overdisclosure through less formal means of providing the court with evidence, a lawyer should not provide the prosecution with information relating to representation of his former client until the court orders an evidentiary hearing.[325] As the Pennsylvania Committee found, an evidentiary hearing will give the government ample opportunity to elicit and present evidence by cross-examining trial counsel with close judicial oversight to limit such information to what is necessary for the judge to rule on the petition.[326] Trial counsel must always take care to protect what is confidential and err on the side of nondisclosure, even in situations where a court orders him to make disclosures.[327] This is the best way to ensure confidential information is protected.

If judges and lawyers disregard the defense lawyer's duty to keep from assisting the prosecution outside of an evidentiary hearing, that disregard will have detrimental effects on the attorney-client relationship and the trust that confidentiality protections foster.[328] Whenever a court permits a defense lawyer to assist the prosecution, it perpetuates the feelings of mistrust and skepticism many defendants have towards their attorneys.[329] When a defendant petitioning for relief learns that his former lawyer disclosed confidential information not only to the judge, but to the prosecution, without his consent, he will trust his collateral counsel less. More generally, a policy that would permit a lawyer to do so would further discourage criminal defendants from confiding in their lawyers[330] if they know there exists a practice of revealing confidences in response to ineffectiveness claims.[331] This erosion of confidentiality and client trust would undermine truth-seeking and the integrity of the adversarial process.

One may argue that keeping information from the prosecution would unfairly prejudice the government.[332] However, as mentioned earlier, the

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324. *See supra* notes 227–37 and accompanying text.
325. *See supra* notes 53–56 and accompanying text.
326. *See supra* text accompanying note 260.
327. *See supra* note 56 and accompanying text.
328. *See supra* notes 99–101 and accompanying text.
329. *See supra* notes 99–101 and accompanying text.
330. *See supra* notes 99–101, 109–10, and accompanying text.
331. *See supra* note 123 and accompanying text.
332. *See supra* note 242 and accompanying text.

government (and the judge) may obtain all of the information it needs to answer a habeas petition during an evidentiary hearing.[333]

B. Trial Counsel Should Assist Successor Defense Counsel

Not only does trial counsel have the duty to diligently protect the confidences of his former client and refrain from assisting the prosecution,[334] he must also provide at least some assistance to successor defense counsel.[335] This duty, which is not a choice but a requirement, is apparent in the duties to protect a former client's interests, even after representation has ended.[336]

Trial counsel should take care not to harm his former client and should provide information that would be useful in asserting ineffectiveness claims.[337] Successor counsel has a duty to investigate fully the claims a defendant wishes to make and to advocate zealously for the defendant's interests, just as any lawyer has with respect to any current client.[338] The effectiveness of successor counsel depends on trial counsel's willingness to assist.[339] The trial lawyer who refuses to assist his former client risks harming the defendant's interests by hindering successor counsel's investigation of possible claims.[340] By providing information to successor counsel, a lawyer will facilitate the fact-finding process and ensure that a habeas petition does not contain any frivolous, unfounded claims.[341]

However, this duty to provide information that will help substantiate claims is governed by a lawyer's interpretation of the duty to turn over the client file when the attorney-client relationship ends.[342] As the commentators point out, the duty to assist successor counsel is also found in the duty to turn over property to the client upon termination.[343] The Model Rules and Restatement require a lawyer to provide at least some assistance to his former client by providing the client with files and documents relating to representation.[344] A lawyer may only retain such information if there are substantial grounds for refusing to do so.[345] An ineffective assistance allegation is hardly substantial grounds for refusing to turn over documents because, as already discussed, these claims, unlike an unpaid fee, do not significantly threaten a lawyer's interests.

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333. *See supra* notes 53–56, 260, and accompanying text.
334. *See supra* Part III.A.
335. *See supra* Part II.B (discussing commentator support for the duty to assist successor defense counsel).
336. *See supra* Parts I.B.2, II.B.
337. *See supra* notes 273–77.
338. *See supra* note 274 and accompanying text.
339. *See supra* note 17 and accompanying text.
340. *See supra* notes 270–77 and accompanying text.
341. *See supra* note 276 and accompanying text.
342. *See supra* Part I.B.2.
343. *See supra* Part II.B.2.
344. *See supra* notes 167–73 and accompanying text.
345. *See supra* notes 172–73 and accompanying text.

Some believe this duty to provide information to the former client includes strategizing with successor defense counsel and volunteering any gaps in information that exist in the defendant's file.[346] However, the bounds of the applicable ethical rules are not clear. Commentators overstate the duty to assist successor counsel in interpreting that duty as an absolute duty to strategize with and be prepared as a witness by the defendant's new lawyer. Trial counsel is not required to sit down and strategize with successor counsel; rather, if he so chooses, he may only provide successor counsel with files and documents relating to representation, limiting that information to written work product.

CONCLUSION

Lawyers ought to be aware of their ethical duties to their former clients, even in the face of attacks on their work. For many defendants, ineffective assistance of counsel claims are a last chance for relief. While it may be tempting for trial counsel to defend against ineffectiveness claims, especially those he feels lack merit, his ability to do so is limited by the ethical duties he owes to his former client. As this Note explained, a lawyer must protect confidential information and refrain from viewing the self-defense exception as justifying cooperation with the prosecution, despite various courts finding otherwise. Furthermore, a lawyer must continue to zealously protect his former client's interests by providing successor defense counsel with at least a minimal degree of assistance to adequately protect his former client's interests.

346. *See supra* notes 271–72, 278–86 and accompanying text.