Confidentiality and Claims of Ineffective Assistance

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Almost every defense lawyer eventually faces an ineffective assistance of counsel claim from a former client. A common reaction is to be defensive and view the former client as an adversary. Usually, a prosecutor or another government lawyer will contact the defense lawyer to discuss the allegation and attempt to refute the claim. In this context, the defense attorney may consider the prosecutor an ally defending the lawyer's work. But is cooperation by the defense lawyer permitted? If so, how much? May the lawyer turn over the former client's file? Has the client lost the protections afforded by confidentiality and attorney-client privilege by asserting the ineffective assistance of counsel claim? The ABA Standing Committee on Ethics and Professional Responsibility recently addressed these and other questions in Formal Opinion 10-456, available at http://www.abanet.org/cpr/10-456.pdf.

The committee explained that by bringing the claim the client ordinarily waives the attorney-client privilege to some communications, but confidential information is still protected by Model Rule 1.6 unless the client gives informed consent to the disclosure or an exception to Rule 1.6 applies. One exception, found in Rule 1.6(b)(5), states that the lawyer may disclose confidential information if the lawyer "reasonably believes [disclosure] is necessary" for the lawyer's self-defense. The committee cautioned that even if the lawyer reasonably believes that there is need to disclose client information to prevent harm to the lawyer through a finding of ineffective assistance of counsel, "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

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By insisting on court supervision of the defense lawyer's disclosure of information to the prosecution, Formal Opinion 10-456 mandates that the defense lawyer be more protective of client information than Comment 10 to Rule 1.6 requires. Comment 10 states that when there is an allegation involving the lawyer's conduct or representation of a former client, the self-defense exception "does not require the lawyer to await the commencement of an action or proceeding" to respond. In our opinion, the requirement of court supervision of the defense lawyer's disclosure of information to the prosecution is something that many defense lawyers and prosecutors, especially in state courts, will find is contrary to their current practice.

What the defense attorney may disclose, when the attorney may disclose, and under what circumstances are important. A defense lawyer needs to know what to do when the government attorney responding to the ineffective assistance claim requests an interview and seeks access to the client's file. It is also important for the defense lawyer to understand the ethical balance between protecting a former client's rights of confidentiality and the lawyer's interest in avoiding an ineffective assistance of counsel determination by the court.

In this column, we review the key features of the opinion and discuss what a defense lawyer should do when called upon to reveal client information in response to an ineffective assistance of counsel claim. We begin by discussing the scope of the confidentiality obligation and how client confidentiality and attorney-client privilege apply in such matters.

Confidentiality, Attorney-Client Privilege

The committee emphasized the importance of the lawyer's duty to keep client information confidential as the primary basis for its conclusion that the defense lawyer may not disclose any information relating to client representation without court supervision. The committee also discussed the relationship between confidentiality and attorney-client privilege, which is essential to understanding the committee's rationale.

Confidentiality is a cornerstone of legal ethics. Model Rule 1.6 states that "[a] lawyer shall not reveal information relating to the representation of a client" unless the client consents or an exception applies. Comment 3 emphasizes the broad scope

of confidentiality explaining that it "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Confidentiality bars the lawyer from revealing information about a client representation, and Model Rule 1.8(b) additionally prohibits the lawyer from using the information to the client's disadvantage, no matter the source of the information unless the client gives informed consent or an exception exists.

In contrast to confidentiality, which is found in a jurisdiction's ethics rules, the attorney-client privilege is found in a jurisdiction's evidence law. Though the two are often confused, attorney-client privilege is actually much narrower than confidentiality and protects only communications between defense counsel and client made in confidence for the purpose of seeking, obtaining, or providing legal assistance to the client. Attorney-client privilege protects attorney-client communications from forced revelation, such as at a trial, hearing, or deposition. The authority to waive attorney-client privilege belongs to the client and not the lawyer.

Relying on the importance of confidentiality and attorney-client privilege, the committee concluded that if a government lawyer defending against an ineffective assistance of counsel claim contacts the defense lawyer, the lawyer should not provide any information until required to do so at a court hearing.

Duty to Assert Privilege and Confidentiality

The opinion states that to permit defense counsel to disclose information outside the context of a formal proceeding would deny the former client the opportunity to object to the disclosure. Even if the court found that by asserting ineffective assistance of counsel the client had waived attorney-client privilege, requiring court supervision of the disclosure would provide the client with the opportunity to argue that some of the information the prosecution might seek to present is not relevant. In addition, the client could also argue whether some information is beyond the scope of the attorney-client privilege waiver. Without court supervision, the committee observed that disclosure of client information might be more expansive than necessary for the purpose of defending against a claim of ineffective assistance.

When contacted by the prosecution to discuss the ineffective assistance claim, the opinion maintains that the defense lawyer has a duty to protect attorney-client privilege and confidentiality. The lawyer's duty to assert attorney-client privilege is found in the ethics rules.

Comment 13 to Model Rule 1.6 states that "the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by attorney-client privilege or other applicable law."

A prior ethics opinion, Formal Op. 94-385, states that the obligation to assert attorney-client privilege applies to former as well as current clients, and the current opinion, Formal Opinion 10-456, affirms that position. The current opinion identifies several state advisory ethics opinions that have reached the same conclusion. (*See, e.g.*, Connecticut Bar Ass'n Ethics Op. 99-38 (stating that, absent client waiver, a subpoenaed lawyer must assert attorney-client privilege); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (holding that lawyer must assert attorney-client privilege and may only disclose information by court order); Utah State Bar Ethics Advisory Committee Op. 05-01 (notwithstanding prosecutor's subpoena, lawyer may not reveal attorney-client information to prosecution or in court without court order).)

Self-Defense Exception

In reaching its conclusion, the committee considered whether the defense lawyer may make out-of-court disclosures under the self-defense exception of Rule 1.6(b)(5). The "self-defense exception" of Rule 1.6(b)(5) states in pertinent part, "A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the representation of the client." The committee observed that the self-defense exception is premised on fairness, and without such an exception a lawyer accused of wrongdoing would be defenseless against false claims.

The committee acknowledged that an allegation of ineffective assistance of counsel fits the final clause of the self-defense exception, which permits disclosure of client information to respond to allegations concerning the lawyer's representation of the client. The committee stated that this exception is usually used to permit a lawyer to "disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation." The committee stated that this exception appears to apply to allegations of ineffective assistance of counsel "because

the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond."

If a defense lawyer believes that the ineffective assistance of counsel allegation triggers an exception to confidentiality, the committee observed that Comment 14 "cautions lawyers to take steps to limit 'access to information to the tribunal or other persons having a need to know it' and to seek 'appropriate protective orders or other arrangements . . . to the fullest extent possible.'" The committee explained that under the self-defense exception, the lawyer must limit disclosure of information relating to the representation of the client only to what is necessary to respond to the ineffective assistance of counsel claim.

Court-Supervised Disclosure Required

When a defense lawyer determines that disclosure of some confidential information is reasonably necessary and permitted under the self-defense exception, the committee concluded that disclosure of information to the prosecution prior to a court-supervised response will unlikely be justified. The committee observed that many ineffective assistance of counsel claims are dismissed on legal and not factual grounds before the lawyer would be called upon to testify, and the lawyer's self-defense interests are protected without the need for ex parte communication with the prosecution. If testimony is required, the defense lawyer is still able to provide it, and the court will be able to determine whether and when privilege or relevance should limit the disclosure.

By prohibiting discussions of the client representation with the prosecution prior to a court-supervised response, the committee's decision may produce unintended consequences. For example, in some instances the prosecutor will not be able to determine if there is a basis to concede an ineffective assistance of counsel claim prior to the hearing since the prosecutor must wait for the hearing to discuss the case with the defense lawyer. Nor will the prosecutor be able to prepare fully for the hearing, and as a result the time necessary to hold the hearing will likely be longer or the hearing may have to be continued if the prosecutor discovers information that requires additional time to develop for presentation to the court. It is also possible that some defendants may prevail on ineffective assistance claims and be retried because prosecutors defending the claims lacked prior access to information from defense counsel.

While the committee acknowledged some of these possible results, it determined that there was no evidence that resolution of ineffective assistance of counsel claims are prejudiced when prosecutors do not receive client information from defense lawyers outside of hearings. The committee did not discuss the basis for this finding, so anyone reading the opinion must speculate on the basis for this finding. Is it based on the relatively low success rate of ineffective assistance of counsel claims? Is there some other basis? In our opinion, this is a weakness in the opinion.

The committee also presumed lack of prejudice to the defense counsel by requiring disclosure under court supervision without fully exploring the lawyer's interests at stake. A defense lawyer has reputational interests at stake, and also may face negative professional and financial consequences if there is a finding of ineffective assistance of counsel. A court finding of ineffective assistance of counsel is the equivalent of finding less than competent representation by the defense lawyer. Although professional discipline for violating the Model Rule 1.1 duty of competence is rare for defense lawyers, it is possible. It is also possible that subsequent to a finding of ineffective assistance of counsel the defendant may not be reconvicted, and the former client could then bring a legal malpractice action against the lawyer. We believe the opinion should have explored these interests of defense counsel more fully.

Formal Opinion 10-456 provides needed guidance concerning the defense attorney's confidentiality duty when a former client brings an ineffective assistance of counsel claim. While the opinion states that common practice today is not to disclose client confidences to the prosecution outside of court-supervised proceedings, this practice is not uniform and thus the opinion will be of interest to defense lawyers, prosecutors, and judges. The opinion places great emphasis on the importance of client confidentiality, and in doing so calculates that there is little harm to prosecutors defending ineffective assistance of counsel claims and defense lawyers when disclosure occurs only with court supervision. While the standing committee's reasoning that court supervision limits the risk that defense counsel would disclose more than necessary and unsupervised disclosure to the prosecution might lead to information that could prejudice the defendant in the event of a retrial appears sound, we believe that the opinion should have more carefully considered the competing interests of the prosecution and the defense. ■

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456 **July 14, 2010**

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.[1] This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,[2] a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."[4] Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,[5] and commentators have expressed concerns about the practice.[6]

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. *See* Rules 1.6 & 1.9(c). The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[7]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 466 U.S. 668 (1984).

[3] *Id.* at 694.

[4] Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 1485 (2010).

[5] *See, e.g.*, Purkey v. United States, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); State v. Binney, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).

[6] *See, e.g.*, Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); 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.

[7] Rule 1.6 cmt. 3. *See, e.g.*, Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when, under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.[8] Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make non-frivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.[9] For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.[10] A client might agree that the former lawyer may testify in an adjudicative proceeding to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client

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prohibited by the disciplinary rules," *id*. at 265 n.5).

[8] "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

[9] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

[10] *Cf.* Clock v. United States, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id*. at *2.

confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the "self-defense exception" of Rule 1.6(b)(5),[11] which provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." The self-defense exception grows out of agency law and rests on considerations of fairness.[12] Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.[13]

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.[14] For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.[15] Although the scope of the exception has expanded over time,[16] the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.[17] Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences ...."[18]

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not

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[11] Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

[12] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b ("in the absence of the exception . . ., lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group").

[13] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

[14] Rule 1.6 cmt. 10 ("The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

[15] *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer's interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof'l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

[16] Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: "A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct," but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

[17] Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, *see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. *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, 810-11 (1977).

[18] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," because the legal controversy is not between the client and the lawyer.[19] Nor is disclosure justified "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation "to respond to allegations in any proceeding concerning the lawyer's representation of the client." This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer's alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond.[20]

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.[21] It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.[22] The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements … to the fullest extent practicable."[23] Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.[24] These limitations are equally applicable to Rule 1.6(b)(5).[25]

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[19] *See* Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant's claim that lawyer's prior advice was confusing; court stated, "[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."). *But see* Arizona State Bar Op. 93-02 (1993), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=652 (interpreting "controversy" to include a disagreement in the public media).

[20] *Cf.* State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

[21] *See* Rule 1.6(b)(5) (allowing disclosure only "to the extent the lawyer reasonably believes necessary"); Rule 1.6 cmts. 10 & 14.

[22] *See* Rule 1.0(i) ("'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.")

[23] Rule 1.6 cmt. 14 (emphasis added). Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 250 (1943), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED 555, 556 (American Bar Foundation 1967) ("where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights").

[24] For example, in In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Ca. 1988), the district court "reject[ed] the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed," finding that this suggestion was "directly contrary to the reasonable necessity standard." *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 cmt. e ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence."); *cf.* Dixon v. State Bar, 653 P.2d 321, 325 (1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client's motion to enjoin lawyer from harassing her); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) ("In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word 'necessary' in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.").

[25] Courts further recognize that disclosures may be made to defend against a non-client's accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. *Cf.* SEC v. Forma, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor's evidence against lawyer must "pass muster under Fed. R. Civ. P. 11").

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.[26] Disclosure of such information might prejudice the defendant in the event of a retrial.[27] Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.[28] If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.[29]

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[26] *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

[27] Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, Bittaker v. Woodford, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, Fears v. Warden, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

[28] *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

[29] *See* Rule 1.6 cmt. 14.

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 479 **December 15, 2017**

The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

Introduction

Confidentiality is essential to the attorney-client relationship. The duty to protect the confidentiality of client information has been enforced in rules governing lawyers since the Canons of Ethics were adopted in 1908.

The focus of this opinion is a lawyer's duty of confidentiality to former clients under Model Rule of Professional Conduct 1.9(c). More particularly, this opinion explains when information relating to the representation of a former client has become generally known, such that the lawyer may use it to the disadvantage of the former client without violating Model Rule 1.9(c)(1).

The Relevant Model Rules of Professional Conduct

Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b).[1] Model Rule 1.9 extends lawyers' duty of confidentiality to former clients. Model Rules 1.9(a) and (b) govern situations in which a lawyer's knowledge of a former client's confidential information would create a conflict of interest in a subsequent representation. Model Rule 1.9(c) "separately regulates the use and disclosure of confidential information" regardless of "whether or not a subsequent

[1] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2017) [hereinafter MODEL RULES].

representation is involved."[2]

Model Rule 1.9(c)(2) governs the *revelation* of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules "would permit or require with respect to a [current] client." Lawyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.

In contrast, Model Rule 1.9(c)(1) addresses the *use* of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become *generally known*."[3] The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may—but need not—occur at the same time. The generally known exception applies only to the "use" of former client confidential information. This opinion provides guidance on when information is generally known within the meaning of Model Rule 1.9(c)(1).[4]

The Generally Known Exception

The generally known exception to the use of former-client information was introduced in the 1983 Model Rules.[5] The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. A number of courts and other authorities conclude that information is *not* generally known merely because it is publicly available or might qualify as a public record or as a matter of public record.[6] Agreement on when information *is* generally known has been harder to achieve.

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[2] ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 190 (8th ed. 2015).

[3] MODEL RULES R. 1.9(c)(1) (2017) (emphasis added).

[4] *See id.* at cmt. 9 (explaining that "[t]he provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent").

[5] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.9, at 534 (2017–2018) (explaining that the language was originally part of Model Rule 1.9(b), and was moved to Model Rule 1.9(c) in 1989).

[6] *See, e.g.*, Pallon v. Roggio, Civ. A. Nos. 04-3625(JAP), 06-1068(FLW), 2006 WL 2466854, at *7 (D. N.J. Aug. 24, 2006) ("'Generally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information 'generally known' within the meaning of Rule 1.9(c)." (citations omitted)); Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D. N.J. 1995) (in a discussion of Rule 1.9(c)(2), stating that the fact that information is publicly available does not make it 'generally known'); *In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find."); *In re* Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (stating in connection with a discussion of Rule 1.9(c)(2) that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources" (footnote omitted); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (explaining that with respect to the Rule 1.9(c) analysis of

A leading dictionary suggests that information is generally known when it is "popularly" or "widely" known.[7] Commentators have essentially endorsed this understanding of generally known by analogizing to an original comment in New York's version of Rule 1.6(a) governing the protection of a client's confidential information. The original comment distinguished "generally known" from "publicly available."[8] Commentators find this construct "a good and valid guide"[9] to when information is generally known for Rule 1.9(c)(1) purposes:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the

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when information is considered to be generally known, the fact that "the information at issue is generally available does not suffice; the information must be within the basic knowledge and understanding of the public;" protection of the client's information "'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources'") (citations omitted)); Turner v. Commonwealth, 726 S.E.2d 325, 333 (Va. 2012) (Lemons, J., concurring) ("While testimony in a court proceeding may become a matter of public record even in a court denominated as a 'court not of record,' and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1125, 2017 WL 2639716, at *1 (2017) (discussing lawyers' duty of confidentiality and stating that "information is not 'generally known' simply because it is in the public domain or available in a public file" (reference omitted)); Tex. Comm. on Prof'l Ethics Op. 595, 2010 WL 2480777, at *1 (2010) ("Information that is a matter of public record may not be information that is 'generally known.' A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found."); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (stating that Model Rule 1.9 "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also* Dougherty v. Pepper Hamilton LLP, 133 A.3d 792, 800 (Pa. Super. Ct. 2016) (questioning whether an FBI affidavit that was accidentally attached to a document in an unrelated proceeding and was thus publicly available through PACER was "actually 'generally known,'" since "a person interested in the FBI affidavit 'could obtain it only by means of special knowledge'" (citing Restatement (Third) of the Law Governing Lawyers § 59, cmt. d). *But see* State v. Mark, 231 P.3d 478, 511 (Haw. 2010) (treating a former client's criminal conviction as "generally known" when discussing a former client conflict and whether matters were related); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 707 N.E.2d 414, 417 (N.Y. 1998) (applying former DR 5-108(a)(2) and stating that because information regarding the defendant's relationship with its sister companies "was readily available in such public materials as trade periodicals and filings with State and Federal regulators," it was "generally known"); State ex rel. Youngblood v. Sanders, 575 S.E.2d 864, 872 (W. Va. 2002) (stating that because information was contained in police reports it was "generally known" for Rule 1.9 purposes); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) ("Information contained in books or records in public libraries, public-record depositories such as government offices, or publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.").

[7] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 732 (4th ed. 2009).

[8] *See* ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017) (discussing former comment 4A to New York Rule 1.6).

[9] *Id.*

> front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .
>
> [O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."[10]

Similarly, in discussing confidentiality issues under Rules 1.6 and 1.9, the New York State Bar Association's Committee on Professional Ethics ("NYSBA Committee") opined that "information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'"[11] By contrast, "[I]nformation is not 'generally known' simply because it is in the public domain or available in a public file."[12] The Illinois State Bar Association likewise reasoned that information is generally known within the meaning of Rule 1.9 if it constitutes "'common knowledge in the community.'"[13]

As the NYSBA Committee concluded, information should be treated differently if it is widely recognized in a client's industry, trade, or profession even if it is not known to the public at large. For example, under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client."[14] Confidential information, however, does not ordinarily include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[15] Similarly, under New York Rule of Professional Conduct 1.6(a), a lawyer generally cannot "knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person,"[16] but "confidential information" does not include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[17] Returning to Model Rule 1.9(c)(1), allowing information that is generally known in the former client's industry, profession, or trade to be used pursuant to Model Rule 1.9(c)(1) makes sense if, as some scholars have urged, the drafters of the rule contemplated that situation.[18]

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[10] *Id.*

[11] N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 991, at ¶ 20 (2013).

[12] *Id.* at ¶ 17.

[13] Ill. State Bar Ass'n. Advisory Op. 05-01, 2006 WL 4584283, at *3 (2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958)). The Illinois State Bar borrowed this definition from section 395 of the Restatement (Second) of Agency, which excludes such information from confidential information belonging to a principal that an agent may not use "in violation of his duties as agent, in competition with or to the injury of the principal," whether "on his own account or on behalf of another." RESTATEMENT (SECOND) OF AGENCY § 395 & cmt. b (1958).

[14] MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[15] *Id.* at cmt. 3A.

[16] N.Y. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[17] *Id.* at cmt. [4A] ("Information is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not 'generally known' simply because it is in the public domain or available in a public file").

[18] *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 14.16, at 14-48 (2016) (discussing generally known and saying, "It seems likely that both the Kutak Commission and the Ethics 2000 Commission . . .

A Workable Definition of Generally Known under Model Rule 1.9(c)(1)

Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.[19] Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).[20]

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had in mind situations in which a lawyer has worked with a company in various legal contexts, learned considerable information about its products and practices, and later seeks to use this information in connection with [the] representation of an adverse party in an unrelated lawsuit or transaction of some kind").

[19] *See In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may [be] in a case file in the courthouse where anyone could go, find it and read it. It is not 'generally known.' In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. 'Generally known' does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse."); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (holding that a lawyer who learned the information in question during his former clients' representation could not take advantage of his former clients "by retroactively relying on public records of their information for self-dealing"); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (explaining that Model Rule 1.9(c)(1) "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also supra* note 6 (citing additional cases and materials).

[20] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) (stating, *inter alia,* that information is not generally known "when a person interested in knowing the information could obtain it only by means of special knowledge").

Conclusion

A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known.

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 496 **January 13, 2021**

Responding to Online Criticism

Lawyers are regularly targets of online criticism and negative reviews. Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule. As a best practice, lawyers should consider not responding to a negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic. Lawyers may request that the website or search engine host remove the information. Lawyers who choose to respond online must not disclose information that relates to a client matter, or that could reasonably lead to the discovery of confidential information by another, in the response. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible online response would be to indicate that professional considerations preclude a response.[1]

I. Introduction

Lawyers regularly are the target of online (and offline) criticism. Clients, opposing parties, and others are increasingly taking to the internet to express their opinions of lawyers they have encountered. Lawyers are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue. This opinion addresses a lawyer's ethical obligations in responding to negative online reviews.

II. Analysis

The main ethical concern regarding any response a lawyer may make to an online review is maintaining confidentiality of client information. The scope of the attorney-client privilege, as opposed to confidentiality, is a legal question that this Committee will not address in this opinion. As this Committee itself concluded in ABA Formal Ethics Opinion 480 (2018), lawyers cannot blog about information relating to clients' representation without client consent, even if they only

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

use information in the public record, because that information is still confidential. ABA Model Rule of Professional Conduct 1.6 prohibits a lawyer's voluntary disclosure of *any* information that relates to a client's representation, whatever its source, without the client's informed consent, implied authorization to disclose,[2] or application of an exception to the general rule. Model Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

[2] Comment [5] of Rule 1.6 states "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." A client or former client's negative online comments do not create "implied authorization" for the lawyer to disclose confidential information in response to the online criticism because that is not required to carry out the representation.

Only subparagraph (b)(5) is implicated here, and there are three exceptions bundled into that provision, the first two of which are clearly inapplicable to online criticism. First, online criticism is not a "proceeding," in any sense of that word, to allow disclosure under the exception "to respond to allegations in any proceeding concerning the lawyer's representation of the client."[3] Second, responding *online* is not necessary "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." A lawyer may respond directly to a person making such a claim, if necessary, to defend against a criminal charge or civil claim, but making public statements online to defend such a claim is not a permissible response. Thus, the remaining question is whether online criticism rises to the level of a controversy between a lawyer and client and, if so, whether responding online to the criticism is reasonably necessary to defend against it.

The Committee concludes that, alone, a negative online review, because of its informal nature, is not a "controversy between the lawyer and the client" within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client's matter.[4] As stated in New York State Bar Association Ethics Opinion 1032 (2014), "[u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice."

The Committee further concludes that, even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. Comment [16] to Rule 1.6 supports this reading explaining, "Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes stated."

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[3] Definition of "proceeding" from NOLO'S PLAIN-ENGLISH LAW DICTIONARY, https://www.nolo.com/dictionary (last visited Jan. 4, 2021):
1) The ordinary process of a lawsuit or criminal prosecution, from the first filing to the final decision. 2) A procedure through which one seeks redress from a court or agency. 3) A filing, hearing, or other step that is part of a larger action. 4) A particular matter that arises and is dealt with in a bankruptcy case.

[4] *See also* Louima v. City of New York, No. 98 CV 5083 (SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004), *aff'd sub nom.* Roper-Simpson v. Scheck, 163 F. App'x 70 (2d Cir. 2006) ("mere press reports regarding an attorney's conduct do not justify disclosure of a client's confidences and secrets even if the reports are false and the accusations are unfounded"); Lawyer Disciplinary Bd. v. Farber, 488 S.E.2d 460, 462 (1997) (lawyer's disclosure of confidential information in motion to withdraw inappropriate); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 476 (2016) (ABA Model Rule of Professional Conduct 1.6(b)(5) allows lawyer to disclose only such confidential information as is reasonably necessary for the court to make an informed decision on a motion to withdraw); Or. State Bar Formal Op. 2011-85 (2011) (lawyer may not disclose confidential information in motion to withdraw as "[n]either a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due" are considered a controversy triggering the self-defense exception).

There are a number of state ethics opinions that have analyzed this issue.[5] The majority reach the conclusion that, even if the online posting was made by a client, the posting of criticism does not rise to the level of a controversy that would allow a lawyer to disclose confidential information in responding. The Committee notes that Colorado Ethics Opinion 136 (2019) specifically finds that *if* the online criticism rises to the level of a controversy between lawyer and client, the lawyer may ethically disclose limited information, yet urges caution in responding. This Committee disagrees with the Colorado opinion, to the extent it concludes that lawyers may disclose a limited amount of confidential information in a public response; a public posting that discloses confidential information goes beyond a direct response to the accuser allowed by Rule 1.6 and its explanatory Comments. District of Columbia Ethics Opinion 370 (2016) permits disclosure of confidential information in responding to online criticism but is based on a rule that is significantly different than ABA Model Rule 1.6.[6] In addition to the ethics opinions addressing

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[5] *See, e.g.*, Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm. Formal Op. 525 (2012) (lawyer may respond to online criticism only if the lawyer discloses no confidential information, the response does not harm the client, and the response is "proportionate and restrained"); Mo. Bar Informal Op. 2018-08 (2018) (negative online review by former client does not create sufficient controversy to permit lawyer to disclose confidential information in response and any response may not disclose confidential information but may acknowledge the lawyer's professional obligations); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020) (in response to negative online review by client, a lawyer may state that the lawyer disagrees with the facts in the review but may not disclose information that relates to the representation except information that is "generally known" based on New Jersey's rule which permits disclosure of "generally known" information); Bar Ass'n of Nassau County Comm. on Prof'l Ethics Op. 2016-01 (2016) ("A lawyer may not disclose a former client's confidential information solely to respond to criticism of the lawyer posted on the Internet or a website by a relative of the former client or by the former client himself"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014) (lawyer may not disclose confidential information just to respond to online criticism by the client on a rating site because the "self-defense" exception to confidentiality does not apply to informal criticism where there is no actual or threatened proceeding against the lawyer); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014) (lawyer may not give detailed response to online criticism of the lawyer by a client because the self-defense exception is not triggered by a negative online review and may choose to ignore the online criticism); State Bar of Tex. Prof'l Ethics Comm. Op. 662 (2016) (lawyer may not respond to client's negative internet review if the response discloses confidential information, but may "post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct"); W. Va. Ethics Comm. Advisory Op. 2015-02 (2015) (lawyer may respond to positive or negative online reviews, but may not disclose confidential client information while doing so, even in response to a review); San Francisco Ethics Comm. Op. 2014-1 (2014) (lawyer may respond to online review by client if matter has concluded and the lawyer discloses no confidential information in the response; if the client's matter is ongoing, lawyer may not be able to respond at all).

[6] D.C. Bar Op. 370 (2016) concludes that a lawyer may disclose confidential information in responding to any specific allegations in a former client's negative online review, but is based on D.C. Rule 1.6, which states: "A lawyer may use or reveal client confidences or secrets: (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or *to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client*" [emphasis added]. State Bar of Ariz. Formal Op. 93-02 (1993) does not address online criticism but concludes that a lawyer may agree to an interview and disclose confidential information to defend against accusations by a former client that the lawyer was incompetent and involved in a conspiracy against the client made to the author of a proposed book, even though there are no pending or imminent legal proceedings.

the issue, there are also disciplinary cases in which lawyers have been sanctioned for disclosing confidential information online.[7]

III. Best Practices

The Committee therefore offers the following best practices to lawyers who are the subject of negative online reviews.

A lawyer may request that the host of the website or search engine remove the post. This may be particularly effective if the post was made by someone other than a client. If the post was made by someone pretending to be a client, but who is not, the lawyer may inform the host of the website or search engine of that fact. In making a request to remove the post, unless the client consents to disclosure, the lawyer may not disclose any information that relates to a client's representation or that could reasonably lead to the discovery of confidential information by another,[8] but may state that the post is not accurate or that the lawyer has not represented the poster if that is the case.

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[7] Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010) (assistant public defender suspended for 60 days for blogging about her clients' cases, on a website which was open to the public, including providing confidential information, some of which was detrimental to clients and some of which indicated that the lawyer may have knowingly failed to prevent a client from making misrepresentation to the court); Reciprocal discipline of 60-day suspension by Wisconsin in *In re* Peshek, 798 N.W.2d 879 (2011); People v. Isaac, No. 15PDJ099, 2016 WL 6124510 (Colo. O.P.D.J. Sept. 22, 2016) (lawyer suspended 6 months for responding to online reviews of former clients; lawyer revealed criminal charges made against clients, revealed that client wrote check that bounced, and revealed that client committed other unrelated felonies); *In re* Quillinan, 20 DB Rptr. 288 (2006) (Oregon disciplinary board approved a stipulation for discipline for 90-day suspension for lawyer who sent an e-mail disclosing to members of the Oregon State Bar's workers' compensation listserve personal and medical information about a client whom she named, indicating the client wanted a new lawyer); *In re* Skinner, 740 S.E.2d 171 (Ga. 2013) (Supreme Court of Georgia rejected a petition for voluntary discipline seeking a public reprimand for lawyer's violation of the confidentiality rule by disclosing confidential client information on the internet in response to client's negative reviews of lawyer, citing lack of information about the violation in the record and presumably feeling the public reprimand too lenient as it cited to the 60-day suspension in *Peshek* and 90-day suspension in *Quillinan* above); *In re* David J. Steele, No. 49S00-1509-DI-527 (Ind. 2015) (Among other violations, Indiana lawyer disbarred for, by his own description, "actively manipulate[ing his] Avvo reviews by monetarily incentivizing positive reviews, and punishing clients who wr[o]te negative reviews by publicly exposing confidential information about them" and including numerous false statements in the responses to the negative reviews); *In re* Tsamis, Commission No. 2013PR00095 (Ill. 2014) (public reprimand for lawyer who disclosed confidential information beyond that necessary to defend herself on Avvo in response to a client's negative reviews of the lawyer on Avvo: "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about"); *People v. Underhill,* 15PDJ040 (Colo. 2015) (lawyer suspended eighteen months for responding to multiple clients' online criticism by posting confidential and sensitive information about the clients).

[8] MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [4] reads, in part, "Paragraph (a) … also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

Lawyers should give serious consideration to not responding to negative online reviews in all situations.[9] Any response frequently will engender further responses from the original poster. Frequently, the more activity any individual post receives, the higher the post appears in search results online. As a practical matter, no response may cause the post to move down in search result rankings and eventually disappear into the ether. Further exchanges between the lawyer and the original poster could have the opposite effect.

Lawyers may respond with a request to take the conversation offline and to attempt to satisfy the person, if applicable. For example, a lawyer might post in response to a former client (or individual posting on behalf of a former client), "Please contact me by telephone so that we can discuss your concerns." A lawyer whose unhappy former client accepts such a request may offer to refund or reduce the lawyer's fees in the matter. As a practical matter, this approach is not effective unless the lawyer has the intent and ability to try to satisfy the person's concerns. A lawyer who makes such a post but does nothing to attempt to assuage the person's concerns risks additional negative posts.

If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance. However, a lawyer must use caution in responding to posts from nonclients. If the negative commentary is by a former opposing party or opposing counsel, or a former client's friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client's representation without the client or former client's informed consent. Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information. The lawyer is free to seek informed consent of the client or former client to respond, particularly where responding might be in the client or former client's best interests. In doing so, it would be prudent to discuss the proposed content of the response with the client or former client.

If the criticism is by a client or former client, the lawyer may, but is not required to, respond directly to the client or former client. The lawyer may wish to consult with counsel before responding. The lawyer may not respond online, however.

An additional permissible response, including to a negative post by a client or former client, would be to acknowledge that the lawyer's professional obligations do not permit the lawyer to respond. A sample response is: "Professional obligations do not allow me to respond as I would wish." The above examples do not attempt to provide every possible response that a lawyer would

[9] *The Economist Explains What is the Streisand Effect?*, THE ECONOMIST (Apr. 16, 2013), https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect. The social phenomenon known as the Barbara Streisand effect recognizes that efforts to suppress a piece of online information may actually call more attention to its existence.

be permitted to make, but instead provide a framework of analysis that may be of assistance to lawyers faced with this issue.

IV. Conclusion

Lawyers are frequent targets of online criticism and negative reviews. ABA Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements for permissible disclosure under Model Rule 1.6(b)(5) and, even if it did, an online response would exceed any disclosure permitted under the Rule.

Lawyers who are the subject of online criticism may request that the website or search engine host remove the information but may not disclose information relating to any client's representation, or information that could reasonably lead to the discovery of confidential information by others. Lawyers should consider ignoring a negative post or review because responding may draw more attention to it and invite further response from an already unhappy critic. Lawyers who choose to respond online must not disclose information that relates to a client matter or that could reasonably lead to the discovery of confidential information by others. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible response would be to indicate that professional considerations preclude a response. A lawyer may respond directly to a client or former client who has posted criticism of the lawyer online but must not disclose information relating to that client's representation online.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Peter A. Joy and
Kevin C. McMunigal

Counsel or Client—Who's in Charge?

Which decisions in a criminal case does the client get to make? Which does defense counsel make? Although bright lines exist for who calls the shots regarding certain decisions, there are situations in which the division of authority between client and defense counsel is less than clear. In this column we examine the division of authority between client and attorney in a variety of contexts.

We begin with a discussion of the classic lodestars in this area: ends and means. The client determines the objectives, or ends, of the representation while counsel has authority to decide the means used to achieve those goals. Next, we examine how the ethics rules and courts seek to resolve disputes between the client and defense counsel over the means of representation. In the final section, we discuss some opinions in which courts have found that the client's silence or acquiescence in response to counsel's actions or advice constitute a waiver of the right to make a decision. The division of authority between client and counsel can be quite nuanced and defense counsel needs to tread carefully to balance ethical and legal obligations to clients.

Allocation of authority

Rule 1.2 of the Model Rules of Professional Conduct provides that the client makes decisions concerning the objectives of representation. In a criminal case, the objective of representation may be avoiding conviction, pleading guilty to a lesser offense, or receiving probation instead of incarceration or receiving the lowest possible prison sentence. Model Rule 1.2 specifically provides that in criminal cases "the lawyer shall abide by a client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Although the client's decision of what plea to enter easily qualifies as an objective, decisions concerning whether to proceed to trial by jury or to testify expand client decisions beyond the objectives of representation to include decisions over what appear to be strategy or means of representation. Comment [2] to Rule 1.2 extends client decision making further by stating that counsel "usually defer" to the client over questions of expense or concerns for third persons, such as may be presented by a hard cross-examination of a victim.

This ethics rule's allocation of authority to the client is consistent with the Supreme Court's view in *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In *Jones* the Supreme Court stated that whether to plead guilty, waive a jury, testify, or appeal are "fundamental decisions" under the Sixth Amendment that "the accused has the ultimate authority to make." In addition, the Court has recognized that, with some limitations, the defendant has the right to decide to proceed pro se, *Faretta v. California*, 422 U.S. 806 (1977), and to choice of counsel, *U.S. v. Gonzalez-Lopez*, 548 U.S. ___ (2006).

Authority to make decisions regarding the means for achieving the client's goals generally rests with defense counsel. A comment to the rule explains that the client normally defers to the lawyer to make decisions concerning "technical, legal and tactical matters" to accomplish client objectives. (Rule 1.2, cmt. [2].) Indeed, "the more technical the legal rule, the less appropriate it is for the accused to make the choice personally." (*United States v. Boyd*, 86 F.3d 719, 724 (7th Cir. 1996) (holding that decisions about which jurors to challenge are tactical ones that the lawyer makes).) Model Rule 1.2 also provides that the lawyer shall consult with the client as to the means used to pursue the client's objectives.

The ABA Standards for Criminal Justice similarly provide that defense counsel has authority to make strategic and tactical decisions, after consultation with the client. Those decisions include "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced." (ABA CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION Standard 4-5.2.)

Both the Model Rule and the Criminal Justice

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Standards adopt a view of defense counsel expressed by former Chief Justice Warren Burger that once the defendant hires counsel or receives appointed counsel, "the day-to-day conduct of the defense rests with the attorney." (*Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J. concurring).) Burger further stated that decisions about what witnesses to call, defenses to develop, and other aspects of representation are not only decisions that "rest with the attorney" but "must as a practical matter, be made without consulting the client." (*Id.*) Both the Model Rule and the Criminal Justice Standards appear to reject Burger's "go it alone" view of lawyers in deciding tactics and require counsel to consult with the client in framing the means of representation. In practice, defense lawyers simply cannot consult with clients over all tactical decisions. The 2002 amendments to Model Rule 1.2(a) recognized this reality by adding that "[a] lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation." The legislative history of this amendment states that the "impliedly authorized" language was added to avoid the conclusion that the lawyer has to consult with the client over every matter in order to act on the client's behalf.

Courts have found that decisions concerning case scheduling, whether to file a suppression or other pretrial motion, to stipulate to easily provable facts, to strike a prospective juror, and whether to request a mistrial are strategic decisions for counsel to make.

In the following section, we look at how the ethics rules and courts seek to resolve disputes between the client and defense counsel over the means of representation.

Disputes over means

The ethics rules do not provide clear guidance on how disputes between the client and attorney should be resolved. The comment to Model Rule 1.2 encourages the attorney to resolve disputes over means through discussion with the client, which we believe recognizes that most often the attorney will be able to persuade the client to agree to the planned strategy. The comment also states that the ethics rules do not provide how fundamental disputes over means should be resolved if there is an impasse, but that lawyer withdrawal from representation or the client discharging the lawyer are options under Model Rule 1.16. The comment additionally notes that some disputes may be resolved by "other law," which refers to cases defining the client's Sixth Amendment rights to make fundamental decisions concerning the case.

A high-profile case illustrating the difficulty in resolving a fundamental conflict between the client and defense counsel over the means of representation is the Unabomber case, *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2000). Ted Kaczynski's lawyers believed Kaczynski suffered from mental disease and that they were ethically compelled to present evidence of this to the court in an effort to avoid the death penalty. Kaczynski rejected this strategy maintaining that he was sane, and he raised the conflict with the trial court. Kaczynski and his lawyers initially resolved this dispute by agreeing not to assert the insanity defense during the guilt phase of the trial but to present evidence of mental illness during the penalty phase.

After the jury was impaneled, Kaczynski made a motion to proceed pro se in order to avoid his counsel raising the mental illness issue at any part of the trial. The trial court ruled that his request to proceed pro se was too late and that it was made for tactical reasons, such as delay. After the denial of his motion to proceed pro se, Kaczynski entered a guilty plea to consecutive life sentences, avoiding both a continued dispute over the mental illness issue and the death penalty.

Kaczynski later appealed claiming that his guilty plea was involuntary and that he had the right to prevent his lawyers from presenting the mental illness defense at all stages of the trial. The government relied on *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987), for the proposition that "counsel, and not his client, is in charge of the choice of trial tactics and theory of defense" and argued that Kaczynski's lawyers had the authority to present the mental illness defense over their client's objections. The Ninth Circuit Court of Appeals affirmed the trial court's decision that the guilty plea was voluntary and did not reach the issue of who ultimately controlled the right to assert a mental defense short of an insanity defense. (*Id.* at 1118.)

The Unabomber case did not resolve the legal issue of who has authority to decide whether mental illness should be raised. But the defendant's Sixth Amendment right "to make his defense," recognized in *Faretta v. California*, 422 U.S. at 819-20, has been used by some courts as grounds for concluding that the client's right to decide the objectives of representation includes the defenses to be raised and whether mitigation evidence should be introduced.

For example, in *State v. Hedges*, 8 P.3d 1259, 1273-74 (Kan. 2000), the Kansas Supreme Court decided that a defendant competent to stand trial

has the right to determine whether to assert an insanity defense. The California Supreme Court relied on *Faretta* in holding that a capital defendant has the right to offer a diminished capacity defense at the guilt or penalty phase, even if defense counsel disagrees with this defense for strategic reasons. (*People v. Frierson*, 705 P.2d 396, 403-04 (Cal. 1983).) In another capital case, *Pruitt v. State*, 514 S.E.2d 639, 650 (Ga. 1999), the Georgia Supreme Court ruled that the defendant, not defense counsel, has the ultimate authority to decide whether to present mitigation evidence.

These cases reflect a more expansive view of client decision-making authority than the traditional objectives/means dichotomy suggests, and defense counsel should be aware that in criminal cases the allocation of decision-making authority is less clear than the ethics rule suggests. These cases also demonstrate that avoiding impasses with clients over what the lawyer views as a tactic or strategy is important. The lawyer should take the time to explain and educate the client about strategic choices. If the lawyer can convince the client that the lawyer's planned strategy should be pursued, there is no need to confront the issue of who makes the decision.

Acquiescing to counsel's decisions

Even when a client has the right to make a decision, such as the right to testify or to admit to guilt, silence or acquiescence in response to counsel's advice or actions can constitute a waiver of that right.

In *Frey v. Schuetzle*, 151 F.3d 893 (8th Cir. 1998), the state charged Jeffrey Frey with murder and attempted murder stemming from shootings that occurred while Frey and nine other men, including the two victims, were hunting. The night before the shootings, Frey and the others drank heavily and some used drugs. The day of the shootings, Frey and one of the other hunters were situated away from the others when Frey shot and killed the other hunter with him. Frey then shot at an abandoned building and his own pickup truck, and two pellets from Frey's shotgun ricocheted and hit a second victim standing too far away to see who fired the shotgun.

Frey initially signed a sworn statement denying any knowledge of the shootings and told his retained defense counsel that he could not remember what happened that day. The state had a strong circumstantial evidence case, and defense counsel told Frey that the only available defense was self-defense. As the trial neared, Frey told his attorney that the shooting had been in self-defense.

Frey's attorney presented a self-defense theory of the case, but Frey did not testify. Instead, the defense argued that the evidence was more consistent with self-defense than with murder and attempted murder and that the prosecution had not proven its case beyond a reasonable doubt. Frey was convicted.

In a habeas corpus action, Frey argued that he did not knowingly and voluntarily waive his right to testify in his own behalf. Frey claimed that he told his attorney that he wanted to testify, and that his counsel told Frey that he should not. Frey further claimed that he believed that his attorney had the authority to decide whether Frey would testify. Frey's attorney stated that he had informed Frey of his right to testify and that Frey agreed with his advice not to testify. The transcript of the trial demonstrated that Frey was present when the judge stated that Frey had the right to testify if he chose, and that Frey did not object when his counsel rested his case without calling Frey to the stand.

The district court concluded that Frey knowingly and voluntarily waived his right to testify, relying in large part on Frey's failure to object to not being called as a witness. On appeal, the Eighth Circuit affirmed.

A case involving both a client's acquiescence and the blurring of the line between a client's fundamental decision over objectives and a defense lawyer's strategy is *Florida v. Nixon*, 543 U.S. 175 (2004). In *Nixon*, the Supreme Court examined whether defense counsel could concede guilt in the trial phase of a capital case in order to "preserve his [counsel's] credibility" for presenting extensive mitigation evidence of the defendant's mental instability during the penalty phase.

In *Nixon*, the defendant confessed to a brutal kidnapping and killing. The state indicted Nixon for first-degree murder, a capital offense in Florida, and Nixon's public defender investigated the case, including deposing all of the prosecution's witnesses. Defense counsel attempted to plea bargain the matter, but the prosecutor refused to recommend any sentence less than death. Faced with going to trial on the capital charge, counsel concluded that the best strategy would be to concede guilt and then present extensive mitigation evidence during the penalty phase.

Counsel met with Nixon several times to explain the strategy, but Nixon was unresponsive and never verbally approved or rejected the strategy. At trial, Nixon became very disruptive and was absent during much of the trial. In opening statement during the guilt phase of the trial, counsel acknowledged Nixon's guilt and urged the jury to focus on the penalty phase.

During the trial, counsel fully participated, contesting the introduction of some evidence as prejudicial, and cross-examining the state's witnesses. In closing argument, counsel again acknowledged Nixon's guilt. During the penalty phase, counsel argued "that Nixon was not 'an intact human being' and that he had committed the murder while afflicted with multiple mental disabilities." (*Id.* at 183-84.)

After deliberating for three hours, the jury recommended the death sentence and the judge imposed it. On appeal, new counsel argued that the concession of guilt by defense counsel was the functional equivalent of a guilty plea that required Nixon's express consent. Appellate counsel argued that *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), required that a guilty plea be based on express, voluntary affirmations and could not be inferred from silence. The Florida Supreme Court agreed and reversed the conviction holding that, without the defendant's express consent, a concession of guilt was prejudicial ineffective assistance of counsel requiring a new trial.

The Supreme Court reversed, stating that the defense counsel's concession of guilt was not equivalent to a guilty plea in a two-stage capital trial. The Court reasoned that when counsel informs the defendant of a strategy that counsel believes to be in the client's best interests and the client is unresponsive, "counsel's strategic choice . . . [should] not [be] impeded by any blanket rule demanding defendant's explicit consent." (543 U.S. at 192.) Instead, the Court held that such strategic decisions should be analyzed subject to *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to demonstrate both deficient performance by counsel that falls below "an objective standard of reasonableness" and prejudice that "deprive[s] the defendant of a fair trial, a trial whose result is reliable." (*Id.* at 687-68.)

The Court's decision in *Nixon* exemplifies two judicial trends. First, as the Eighth Circuit did in *Frey*, courts tend to interpret a defendant's silence after consultation with defense counsel as acquiescence to defense counsel's advice or action even when the action may waive a defendant's fundamental right. Second, courts give great deference to the strong presumption announced in *Strickland* that defense counsel's conduct " 'might be considered sound trial strategy' " and courts should be "highly deferential." (466 U.S. at 689.)

Conclusion

Division of authority between the client and attorney in criminal cases is not simply an ends/means analysis. The ethics rules explicitly recognize that clients in criminal cases will decide much more than the plea to enter by extending client decisions to the arguably strategic issues of whether to waive a jury or to testify, and by requiring counsel to consult with the client over other means to achieve the client's objectives. A client's Sixth Amendment right to make a defense has been used by courts to extend client decision making further into areas that could be considered the means of representation, such as raising a mental incapacity defense or presenting mitigation evidence. At the same time, courts have also found that the client can waive the right to decide by remaining silent or failing to object to a particular course of action at trial. Finally, courts often defer to counsel decisions and there is strong presumption that many of the day-to-day decisions are strategic ones that counsel has the authority to make. ■

CONVICTING THE INNOCENT

A Symposium Presented by the Texas Tech Law Review

Friday, April 4, 2008

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Panel I: Why do we convict as many innocent people as we do?
Panelists: Ronald Allen, Samuel Gross, Judge Patrick Higginbotham, Donald Sorochan, and Fred Whitehurst. *Moderated by Sandra Thompson*

Luncheon Speakers: Steve Bindman & Jeff Blackburn

Panel II: Can we reduce the amount of innocent convictions without unjust acquittals?
Panelists: Christine Mumma, Erik Lillquist, George Thomas, and Dan Simon. *Moderated by Virginia Hench*

Panel III: We know we wrongfully convict people. What does that say about our society regarding the death penalty?
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July 20, 2021 **ETHICS**

Ethical Responsibilities of Standby Counsel

Peter A. Joy and Kevin C. McMunigal

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Evidence shows an increasing number of defendants are exercising their Sixth Amendment right to represent themselves, as established in *Faretta v. California*, 422 U.S. 806, 832 (1975). While *Faretta* recognized the accused's right to self-representation, the Supreme Court explained that proceeding *pro se* does not excuse lack of compliance with "relevant rules of procedural and substantive law." *Id.* at 834 n.46. Recognizing that a typical *pro se* defendant is not familiar with such rules, the Supreme Court stated that a trial judge may "even over objection of the accused —appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* Just as the number of defendants proceeding *pro se* has increased, so has the number of standby counsel in state and federal courts.

Standby counsel may assist a defendant in the process of entering a guilty plea or in trial. It is important that standby counsel be available to advise a *pro se* defendant in the guilty plea context about things such as a plea agreement, forfeited rights, and sentencing issues. Standby counsel is likely to be even more important in cases headed to trial. Trials require a *pro se* defendant to deal with many more legal issues than a guilty plea, such as jury selection, rules of evidence, and jury instructions. *Pro se* defendants are much more likely to go to trial than represented defendants. In federal court, 66 percent of *pro se* defendants go to trial, more than 17 times the percentage of represented defendants who do so. This high trial rate underscores the importance of judges and defense lawyers knowing the ethical obligations of standby counsel.

Unfortunately, there is considerable confusion among both judges and defense counsel concerning the ethical obligations of and limitations on standby counsel. Does appointment as standby counsel create an attorney-client relationship? If not, how should the relationship between standby counsel and a *pro se* defendant be characterized? What ethical obligations do standby counsel owe the *pro se* defendant? How active may standby counsel be in shaping the defense? Does the *pro se* defendant or standby counsel "call the shots" on trial strategy? What guidance should the trial judge provide to standby counsel and the accused concerning the relationship between standby counsel and the *pro se* defendant? This column examines the ethical obligations of and limitations on standby counsel.

The Law Regarding Standby Counsel

Nine years after the Supreme Court in *Faretta* recognized the right of self-representation, the Court in *McKaskle v. Wiggins*, 465 U.S. 168 (1984), further defined the role of standby counsel. In *McKaskle*, the trial court appointed two lawyers as standby counsel in Carl Wiggins's state robbery case. During trial, Wiggins at times objected to their

presence, but at other times consulted with them. After Wiggins was convicted and sentenced to life imprisonment as a recidivist, he filed a habeas petition alleging that the lawyers' conduct deprived him of his right to present his own defense. The district court denied the petition, but the court of appeals reversed, holding that "Wiggins' Sixth Amendment right to self-representation was violated by the unsolicited participation of overzealous standby counsel." *Id.* at 173. The court of appeals stated that "standby counsel is 'to be seen, but not heard.' . . . his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." *Id.* (quoting *Wiggins v. Estelle*, 681 F.2d 266, 273 (5th Cir. 1982). The Supreme Court reversed, holding that standby counsel's intrusions during the trial "were simply not substantial or frequent enough to have seriously undermined Wiggins' appearance before the jury in the status of one representing himself." *Id.* at 187.

In *McKaskle*, the Court explained that the right of self-representation places limits on unsolicited participation by standby counsel. A *pro se* defendant has the right to control the defense and the right to have the jury perceive that the defendant is conducting his or her own defense. The Court explained: "If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded." *Id.* at 178.

The usual division of authority between client and counsel is that the client decides the *ends* of the representation, such as whether to go to trial or enter a guilty plea, and the attorney decides the *means*, such as the trial strategy, which witnesses to call, and how to question the witnesses. The *pro se* defendant decides both the ends and the means. As a result, standby counsel has a much more limited role—standby counsel may only express disagreement with the *pro se* defendant outside the presence of the jury. Otherwise, the accused's right to self-representation will be violated.

State courts have also addressed the role of standby counsel. Courts view standby counsel as a legal advisor, not as an assistant. For example, *State v. Silva*, 27 P.3d 663, 677–78 (Wash Ct. App. 2011), cited to several authorities for the proposition that standby counsel's role as an advisor to the accused does not require performing research errands for the accused, unless ordered by the court. Similarly, in *State v. Fernandez*, 758 A.2d 842, 852–53 (Conn. 2000), the court concluded that "standby counsel serves as a legal resource to *pro se* defendants . . . [but] standby counsel does not, however, have any obligation to perform legal research for the defendant."

The Ethics of Standby Counsel

The American Bar Association (ABA) Criminal Justice Standards, Defense Function Standard 4-3.9 explains that standby counsel "should permit the accused to make the final decisions on all matters, including strategic and tactical matters" but "may bring to the attention of the accused matters beneficial to him or her." Standard 4-3.9 further explains that standby counsel should "assist a *pro se* accused only when the accused requests assistance" and "should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court." The ABA and some state bar associations have also issued advisory opinions that help answer many questions about standby counsel's ethical obligations to a *pro se* defendant.

ABA Ethics Opinion. In ABA Formal Opinion 07-448 (2007), the ABA Standing Committee on Ethics and Professional Responsibility stated that between a *pro se* defendant and standby counsel, "there is no client-lawyer relationship unless and until the defendant accepts representation." If and when the *pro se* defendant requests assistance, then all of the duties a lawyer owes a client are triggered, including the duties of competency under Model Rule 1.1, diligence under Model Rule 1.3, communication under Model Rule 1.4, and exercising independent professional judgment under Model Rule 2.1. If the *pro se* defendant does not request assistance, the Committee reasoned that standby counsel's ethical duties to the *pro se* defendant are limited to the same obligations a lawyer owes to persons other than a client under ABA Rules of Professional Conduct.

New York State Bar Ethics Opinion. The New York State Bar Association Committee on Professional Ethics

provided additional guidance in Opinion 949 (2012). It is much more enlightening than the ABA opinion. The New York Committee explained the duties of standby counsel using a spectrum with "inactive" and an "active" ends.

The New York Committee placed a *pro se* defendant who has not asked standby counsel for advice or assistance at the inactive end of the spectrum and viewed such a defendant as the equivalent of a "prospective client" to whom counsel owes ethical duties under New York's version of Model Rule 1.18(b). Even if not activated, standby counsel has a duty of confidentiality under Model Rule 1.18(b) not to reveal information learned from the *pro se* defendant except as Model Rule 1.9 would permit with respect to a former client. Additionally, the Committee found that the concurrent conflict of interest rule, New York's equivalent of Model Rule 1.7, would prohibit standby counsel from simultaneously representing a party whose interests differ from those of the *pro se* defendant.

The New York Committee placed in the "middle" of the standby spectrum a situation in which standby counsel assumes specific responsibilities for the *pro se* defendant. In these situation, the New York Committee stated that New York's equivalent of Model Rule 1.2(c), which permits a lawyer to limit the scope of representation, comes into play. Model Rule 1.2(c) requires standby counsel to communicate counsel's understanding of the specific duties requested and explain any changes in the scope of counsel's involvement to the client if standby counsel's duties evolve during the course of the litigation.

Finally, the New York Committee explained that the active, or "full representation," end of the standby spectrum would occur if the defendant requests standby counsel to assume full representation or to take on substantially all representational responsibilities. When full representation occurs, the New York Committee explained that standby counsel becomes "standby" in name only, and all ethical obligations apply.

Other Ethics Opinions. Other state ethics opinions reach conclusions similar to the ABA and New York opinions. For example, New Hampshire Bar Association Ethics Committee Advisory Opinion 2015-16/09 (2016) cautions that standby counsel must "serve as a passive source of information, answering questions of law from the defendant when he or she chooses to ask such questions." The New Hampshire Committee also advised standby counsel to seek instructions from the court to define standby counsel's responsibilities and for the trial judge to explain standby counsel's responsibilities to the *pro se* defendant.

Judge's Role in Appointing Standby Counsel

A judge appointing standby counsel for a *pro se* defendant plays an important role in protecting the accused's right of self-representation. ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-3.7(c) explains that when standby counsel is appointed to provide assistance only when requested, "the trial judge must ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court." If the judge appoints standby counsel to actively assist the accused, the judge "should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case."

Conclusion

Judges appointing and lawyers acting as standby counsel need to bear in mind several important points to ensure protection of the accused's right to self-representation: (1) there should be a court order that clearly states what is expected of standby counsel and the limits to standby counsel's role; (2) the judge should explain the role of standby counsel to the accused in an understandable way; (3) standby counsel must treat the *pro se* defendant as a client for conflict of interest purposes in case the client seeks the assistance of standby counsel; (4) for confidentiality purposes, standby counsel should treat the *pro se* defendant as a prospective client; and (5) standby counsel must do sufficient preparation to be ready to provide competent advice and assistance, even to take over the defense if requested by the accused or ordered by the court. Finally, standby counsel also must attend all stages of the proceedings.

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