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Article

MY REPUTATION OR YOUR LIBERTY (OR YOUR LIFE): THE ETHICAL OBLIGATIONS OF CRIMINAL DEFENSE COUNSEL IN POSTCONVICTION PROCEEDINGS

David M. Siegel [\[FNa1\]](#)

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I. Introduction

You are a criminal defense lawyer. You represented Defendant at trial, and despite a creative and probing defense, Defendant was convicted. You appealed Defendant's conviction upon several novel issues, and were unsuccessful. You sought discretionary review in the court of last resort without success. You did the best possible job imaginable and have exhausted avenues of appeal. Sometime later, you receive a call from New Lawyer, who explains that she has been hired by Defendant to obtain post-conviction relief. New Lawyer would like Defendant's files, your notes and materials from the case and an opportunity to discuss your handling of the case. New Lawyer is particularly interested in anything that was unsuccessful in the case, anything in retrospect you would have done differently and any areas of practice you believe you could improve. Do you a) comply fully with these requests, b) deliver copies of the files, notes and materials with a polite letter explaining that you no longer represent Defendant or c) tell New Lawyer to try, appeal, and seek discretionary review in Defendant's case, and see if she cannot figure out the answers to these questions?

What are the criminal defense lawyer's ethical obligations when a client has been convicted at trial and later challenges the effectiveness of the lawyer's representation? [\[FN1\]](#) The lawyer is, by definition, no longer representing the former client, whose claim places him somewhat in opposition to the lawyer. [\[FN2\]](#) The lawyer is now a witness rather than a participant in a matter, albeit in a different proceeding, in which the lawyer had substantial prior involvement. [\[FN3\]](#) This almost unavoid-

ably causes some impairment of the lawyer's independent professional judgment. [FN4] The lawyer becomes a witness concerning the alleged ineffective assistance, and like all witnesses has both legal obligations based upon the criminal law of perjury and ethical obligations based upon the operative ethical rules [FN5] to be truthful in testimony. The lawyer, as an officer of the court with a duty of candor to the tribunal, [FN6] also has an independent duty to be truthful. [FN7]

Yet the lawyer is not simply a witness. The lawyer is often the most significant and potentially valuable witness the former client may have to demonstrate ineffective assistance, [FN8] and the lawyer's cooperation may dramatically assist the former client's claim. [FN9] While acting as anything but a neutral or impartial witness may appear to conflict with the lawyer's obligation as a witness, acting as nothing more may violate the lawyer's continuing ethical obligations to the former client. Moreover, the lawyer also has a systemic role in this context, as does a judge who conducts a thorough plea colloquy with a defendant before allowing the plea to be entered [FN10] or a prosecutor who fully discloses all exculpatory evidence before trial. [FN11] The lawyer is assisting in ensuring not just the finality of an adjudication but its constitutional legitimacy as well. My thesis is that existing ethical rules demand that zealous criminal defense lawyers whose clients have been convicted at trial turn their advocacy efforts towards the setting aside of that conviction, [FN12] even at the expense of their own professional reputation. [FN13]

The role of criminal defense lawyers in postconviction proceedings [FN14] involving their former clients has always been important, if rarely examined. [FN15] It will likely be much more important in the near future for several reasons. First, new federal statutory restrictions on the availability of habeas corpus relief, [FN16] in terms of the time in which to bring a petition [FN17] and the rules regarding successive petitions, [FN18] will very likely expedite the postconviction fact-finding process. The role of the trial lawyer will be examined sooner and, because of the limitations upon successive petitions, [FN19] with much more dramatic consequences. This is of particular consequence for capital cases, since virtually all capital cases in which there is a sentence of death end in postconviction proceedings.

Second, an emerging conflict between the organized representatives of the bar and state and national legislators concerning the quality of representation in capital cases, and what should be done about it, will soon force capital trial lawyers into making hard ethical choices. [FN20] While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims. Thus, if an ethical obligation for lawyers whose former clients raise a postconviction challenge exists anywhere, it will be here. [FN21] Very real ethical obligations will thus be imposed sooner on trial lawyers in capital cases, and they will be required to be crucial witnesses to the quality of representation in a system which the established bar has condemned as providing inadequate representation. [FN22] Third, claims of ineffective assistance have grown in importance as the availability of other claims in collateral proceedings has been reduced through doctrines of non-retroactivity [FN23] and a heightened harmless error standard for so called "trial errors." [FN24]

Together, these developments in Supreme Court jurisprudence dramatically heighten the effect of mistakes by trial counsel, which are procedural bars to postconviction relief, and make the quality of the trial and initial appeal preeminent in the collateral process. [FN25] The greater the scope of issues subject to the rules regarding waiver and procedural default, the more important the quality of representation at trial becomes. [FN26] The position of a lawyer whose work at trial for a former client is questioned will thus become a critical, and for capital litigators lethal, issue sooner and with more devastatingly final consequences than it has been in the past.

This Article has three parts. First, it examines several peculiar aspects of the relationship between criminal defense lawyers and their former clients who bring a postconviction challenge based upon ineffective assistance. Second, the Article identifies several existing ethical obligations in current ethical codes, and shows how satisfying each in the case of a former client who brings a postconviction challenge is affected by the peculiar aspects of the relationship noted in Part II. Finally, based upon these obligations, it outlines several obligatory practices which all criminal defense counsel should follow in order to adequately discharge their ethical obligations to former clients.

II. An Ethical Framework for Considering the Responsibilities of Criminal Defense Lawyers to their Former Clients: Some Peculiar Aspects of the Problem

Many criminal trials end in convictions, [\[FN27\]](#) and virtually all trials for serious felonies which end in convictions are appealed. [\[FN28\]](#) After direct appeal, virtually all convictions resulting in lengthy periods of incarceration in either state or federal prison are challenged in some form of collateral attack. Virtually all convictions resulting in sentences of death are so challenged. In almost all such collateral proceedings one, if not the principal issue raised, is the effectiveness of trial counsel. [\[FN29\]](#) Considerable attention has been paid to the obligations of lawyers who represent defendants in collateral actions to vigorously examine, investigate, and litigate the effectiveness of trial counsel. [\[FN30\]](#) Many states have created and funded entities to coordinate or actually litigate these issues on behalf of persons sentenced to death and/or lengthy periods of incarceration. [\[FN31\]](#) In these proceedings, the central witness is often the trial counsel. Although the defendant has a constitutional right to effective assistance at trial (and on direct appeal), [\[FN32\]](#) and one of the few issues still cognizable in a collateral proceeding is the effectiveness of trial counsel, scant attention has been given to the ethical obligations of trial counsel when his or her effectiveness is the central issue in a collateral proceeding.

There are several peculiar aspects of the lawyer's role in the postconviction proceeding. First, the lawyer is a witness rather than an advocate, which raises certain traditional conflicts. The lawyer is a witness in a matter in which she had substantial prior involvement, although the involvement was in a different proceeding. Second, this matter concerns a former client, thus the involvement ostensibly presents a conflict between the lawyer's obligations to the former client and to the tribunal. Third, the lawyer-witness has a critical role in a proceeding whose core function is not just truth-finding but maintaining the integrity of the system of justice. Thus the lawyer, because of the systemic role postconviction proceedings have in the process of criminal adjudication, has an obligation to the administration of justice. Finally, the lawyer-witness is a criminal defense lawyer, and the standard conception of the criminal defense lawyer encompasses other societal purposes beyond those reflected in formal ethical obligations.

A. The Lawyer-Witness Problem

The lawyer-witness problem contemplated by the existing ethical standards does not precisely fit the postconviction situation. The postconviction proceeding is not a trial per se, and the lawyer who previously represented the client is not acting as an "advocate." [\[FN33\]](#) Nevertheless, the traditional remedy for the lawyer witness-problem, disqualification, would clearly be inapposite and would unquestionably "work substantial hardship" on the former client. [\[FN34\]](#)

Witnesses, even in a criminal trial, do not "belong" to one side or the other; they simply advance the truth-finding process through their testimony. Yet, because of the natural conflict between the partisan goal of advocacy and the neutral goal of candor and truthfulness, there is a traditional prohibition on lawyers participating as advocates in matters in which they reasonably expect to become witnesses. [\[FN35\]](#) According to the commentary to Model Rule 3.7, "(c)ombining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client." [\[FN36\]](#)

Lawyers who testify as witnesses to legal phenomena also raise another problem: they may be lay witnesses who nevertheless have had specialized training about their subject. If they have had prior involvement in the matter as counsel, they also have personal knowledge for their testimony, which a lawyer without previous involvement in the matter lacks. A witness with specialized training, whose testimony is based upon personal knowledge, naturally is a critical witness in a fact-finding, particularly one in which there may be no other disinterested witness to certain key events. This role heightens the conflict for the lawyer-witness, since the former counsel now becomes a key witness for the former client and a key witness for the government.

B. The Former Client Problem

Lawyers have certain duties and obligations to former clients, and criminal defense lawyers have even greater duties to former clients than do other lawyers. [\[FN37\]](#) Their obligations, though defined in part by the relevant disciplinary rules, also sound in the Constitution [\[FN38\]](#) and several disciplinary rules recognize these as continuing obligations even to former cli-

ents. [\[FN39\]](#) A few state disciplinary boards have suggested that some of these obligations, in combination with the constitutional right to effective assistance held by the criminal defendant, prohibit the lawyer's taking steps while representing the client which would preclude the client's later vindication of her constitutional rights after the lawyer's representation was complete. One such board has opined that this prohibition on limiting later avenues to vindicate rights exists even at the expense of the lawyer's own professional reputation. [\[FN40\]](#)

It is not only the ethical obligations to the former client which suggest this continuing duty beyond the extent of the formal representation, but also the specialized nature of the collateral inquiry. Certain issues concerning the basis for decisions taken by trial counsel are uniquely within the province of the lawyer. [\[FN41\]](#) The dramatic consequences in collateral proceedings of a lawyer having decided to do nothing or take a particular route of non-action, as opposed to having never considered an issue, mean that the strategic thinking of the trial counsel is critical to the lawyer who represents the defendant in the collateral proceeding. Particularly strict new rules on the availability of successive collateral proceedings impose rigid requirements on the lawyer who represents the defendant in the collateral action to raise every potential ground for relief. This cannot be done without the free and open access to the trial counsel's strategic thinking. The client may thus not be formally represented by the lawyer, but the former client has a considerable interest in the relationship with the former counsel.

C. Systemic Role of the Post-Conviction Proceeding

The postconviction proceeding is a challenge to the lawyer's performance, and so bears certain similarities to a civil action against the lawyer for malpractice, yet it is also a proceeding to enforce the constitutional rights of the lawyer's former client. [\[FN42\]](#) The scope of the proceeding also affects other systemic concerns besides the enforcement of constitutional rights. It affects the finality of criminal convictions and, in the federal system when the challenge is to a state conviction, considerations of federalism and comity. These systemic aspects of the proceeding mean that it has not only a significant impact on operation of the criminal justice system but also on the integrity of the system. As one judge has explained:

(T)o give effect to (Strickland v. Washington, the defendant) had a right to pursue his Sixth Amendment guarantee of competent counsel during trial and appeal in his state habeas corpus proceeding with the assistance of competent counsel. Although a prisoner is not constitutionally entitled to counsel in a collateral proceeding, the exception to this general rule, which (defendant) seeks, is in reality a direct attack on the competency of his trial and appellate counsel in the only forum available to him--a habeas corpus proceeding. For this limited purpose (defendant) is entitled to the assistance of competent counsel. [\[FN43\]](#)

Imposing an obligation on lawyers to assist former clients in undermining the consequences of the lawyer's own work naturally affects the finality and conclusiveness of the judgment, and one principal objection to the expansion of postconviction remedies--at least at the federal level--has been its deleterious impact on the principal of finality of (particularly) state court convictions. [\[FN44\]](#) Finality presumes, however, a full and fair adjudication on the merits, which requires an adequate counsel to present one's case. [\[FN45\]](#)

D. The Special Case of the Criminal Defense Lawyer

The ethical constraints which operate upon the criminal defense lawyer, it has been argued, [\[FN46\]](#) are fundamentally different than those which operate upon other lawyers, because criminal defense lawyers have a fundamentally different role in the legal system and society at large than do other lawyers. [\[FN47\]](#) The traditional conception of the role of the criminal defense lawyer includes the aggressive, vigorous defense of any accused person, guilty or not, savory or not, and socially beneficial or not, because such advocacy-- despite incidentally frustrating the truth-finding process, indirectly aiding the undertaking of illegal acts, and directly undermining the prestige of important social institutions--works to prevent abuse of state power, to preserve a democratically healthy balance between the individual and the government and to maintain the dignity of the individual in the face of potentially oppressive public institutions and concentrations of power. [\[FN48\]](#) This special role for the criminal defense lawyer is said to justify a greater degree of partisanship on her part, i.e., a more aggressive form of advocacy.

Whether the standard conception is true, as an empirical matter, and whether it is logically or morally coherent as an intellectual matter, however, is beyond the scope of this analysis. It is the standard conception, insofar as several important procedural and systemic distinctions make the role of the criminal defense lawyer substantively different from that of civil practitioners. [FN49] Among the more obvious distinctions are that the opponent of the criminal defense lawyer is always the government. While civil lawyers sometimes oppose the state as well, the criminal defense lawyer is always representing an individual against the organized representative of the polity. Criminal defense lawyers are often representing those for whom there is minimal public sympathy, and against whom there is often considerable public outrage. The systemic advantages enjoyed by the government (resources and legal presumptions after the conviction), the lack of public sympathy and the presence of public outrage are often greater in the postconviction context than they were at the initial trial. In short, the impetus for partisanship in criminal defense advocacy is magnified for most postconviction petitioners.

III. Current Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings

Despite these constitutional and procedural reasons that trial counsel's thoughts and recollections are of critical importance to the lawyer handling the collateral proceeding, subtle and not so subtle personal complications arise in assisting with an attack on the quality of one's professional product. The powerful traditional restrictions on the lawyer acting as a witness can impede the cooperation trial lawyers may be willing to provide to lawyers representing their former clients on collateral proceedings because of a misconception of the lawyer's role at this point in the process. [FN50] Institutional forces, through the court and the prosecutor, can also make lawyers inclined not to second guess the quality of their own decisions. Personal pride too, in the quality of one's work, can make anyone defensive about attacks on his or her efforts. [FN51] But a lawyer's obligation to the constitution and to a former client, and the particularly demanding procedural requirements of collateral proceedings, require that they do otherwise.

In the postconviction context, unlike the original trial or direct appeal, the challenge is explicitly to the integrity of the process. The postconviction petitioner is alleging that the process in his case was inadequate, thus the former lawyer for the petitioner—who as trial counsel was part of that process—has an added responsibility beyond loyalty to the former client. “The issue in ineffectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights.” [FN52] The lawyer's obligation to the integrity of the judicial process, as an officer of the court, is an obligation independent of that to the former client to thoroughly present any procedural inadequacies of the process. [FN53]

Several ethical rules may affect a criminal trial lawyer whose former client brings a collateral proceeding challenging the effectiveness of his or her performance at trial. These include obligations to the client of loyalty, [FN54] competent representation, [FN55] confidentiality, [FN56] and diligence or zeal. [FN57]

A. The Duty to Competently Represent the Client

The duty to represent a client competently [FN58] is perhaps the ethical obligation most nearly paralleling the constitutional right of the client to effective assistance of counsel. Satisfying this obligation has been held equivalent to rendering effective assistance. [FN59] While ineffective assistance is usually conceived of as being a requirement during the formal representation itself, the guarantee of effective representation is the ability to challenge its absence. Thus, competent representation includes representation which does not impair a client's ability to ensure, after the fact, that the counsel he has received was effective. Current ethical rules limit a lawyer's ability to restrict his own liability to a client for malpractice, [FN60] but do not address claims of ineffective assistance. [FN61]

While lawyers might not fear personal liability from having rendered ineffective assistance, the analogous limitation of the right to bring a postconviction action has been examined in the context of plea agreements. The ethics bodies of three states have examined prohibitions in plea agreements on a client's ability after the fact to evaluate and challenge the effectiveness of representation. Two (both interpreting versions of the Model Code) have held that a lawyer fails to competently represent a client when he or she negotiates a plea agreement which includes a waiver of the client's right to pursue a later postconviction action based upon the ineffective assistance received in entering the plea agreement. [FN62] In Tennessee

Advisory Ethics Opinion 94-A-549, for example, the Board of Professional Responsibility opined that, pursuant to DR 6-102(A), “neither a prosecutor or (sic) defense counsel can ethically include a provision in a plea agreement which waives the defendant’s right to allege ineffective assistance of counsel or prosecutorial misconduct.” [\[FN63\]](#) The North Carolina State Bar has similarly held that plea agreements may be made waiving a defendant’s appellate and postconviction rights except with regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. [\[FN64\]](#) Its opinion is based on the lawyer’s obligations to represent a client competently and zealously, on the special rules regarding the conduct of prosecutors, as well as on the prohibition against limiting liability to a client for malpractice. According to the North Carolina State Bar, “(i)n the context of a criminal case, a logical and appropriate interpretation of the rules is a prohibition against agreements waiving the client’s right to complain about an attorney’s incompetent representation or misconduct.” [\[FN65\]](#)

One state ethics body, the Arizona State Bar Committee on the Rules of Professional Conduct, in a divided opinion interpreting the reach of the Rule 1.8(h) of the Model Rules, has upheld such plea agreements on the theory that a waiver of postconviction or collateral rights is not the same as a waiver of rights to sue for malpractice. [\[FN66\]](#) Specifically, the Committee noted that “(t)he government, not the defense lawyer, is requiring the waiver.” [\[FN67\]](#) Moreover, the Committee noted that it was not addressing the constitutionality of such waivers. [\[FN68\]](#) A strong dissent criticized the majority’s “crabbed reading” of ER 1.8(h), its disagreement with the Tennessee and North Carolina opinions and its regime which “single(s) out (criminal defendants) for disparate treatment simply because they usually seek habeas corpus relief rather than malpractice damage awards.” [\[FN69\]](#)

The Arizona opinion analogized the waiver to a civil settlement, in which a lawyer counsels a client to accept a settlement involving a provision to release all claims relating to the litigation. This type of agreement would not run afoul of Rule 1.8(h), the Committee reasoned, because it is not specifically an agreement to limit malpractice actions against the lawyer. [\[FN70\]](#) The difference between a civil settlement involving a release of all claims (which might be interpreted to mean claims of malpractice against the lawyer) and a plea agreement in a criminal case including a provision waiving postconviction remedies is that such a settlement does not involve the release of anything constitutionally guaranteed to any of the parties, and it does not involve the validity of the settlement process itself. A more apt analogy would be a civil settlement which was made based on the representation that the client had no right to a jury trial on his claim, entered specifically because the client believed his claim would fail unless presented to a jury. If the settlement involved a release of all claims, and this were interpreted to preclude an action for malpractice, the client would have settled the case based on a patently incorrect representation concerning the client’s constitutional rights. Again, the agreement would not have specifically precluded a suit for malpractice, but it would have so fundamentally failed to provide the client accurate information that it could hardly be said to have involved his valid consent. Moreover, it would have worked a deprivation of his constitutional rights.

Plea bargains including prohibitions of postconviction remedies for ineffective assistance frustrate the systemic purpose of the postconviction proceeding: to ensure the legitimacy of the process. Under the opinions of the Tennessee and North Carolina ethics committees, waivers of postconviction remedies based on ineffective assistance are unethical. If obtaining these waivers is unethical, it is clearly not competent representation. If it is not competent representation to negotiate a plea agreement which so limits a former client’s ability to pursue such relief, it cannot be competent representation to after-the-fact frustrate the same efforts by the former client to vindicate the rights which could not ethically be bargained away. Thus, the duty of competent representation, in the context of a proceeding whose purpose is to ensure the legitimacy of the process, requires assisting the former client to probe the quality of that assistance.

B. The Duty of Loyalty to the Client

A lawyer’s duty of loyalty to the client extends beyond the time of the representation itself, and survives even the death of the client. [\[FN71\]](#) The duty imposes a continuing fiduciary relationship toward the former client, regardless of who terminated the relationship, why it was terminated or who currently represents the client. [\[FN72\]](#) Termination of the attorney-client relationship itself imposes obligations on the lawyer to ensure that his or her withdrawal does not prejudice the client. [\[FN73\]](#) Failure to do so can result in disciplinary action or liability for malpractice. [\[FN74\]](#)

The duty toward the former client imposes an obligation to assist the former client by providing records generated in the

course of the representation [\[FN75\]](#) and generally forwarding information to the client's new counsel. [\[FN76\]](#) Whether a lawyer rendered effective assistance of counsel often depends as much on what was not done at trial as upon what was done, and the former client's new counsel needs information from the lawyer to determine what could or should have been done at trial. [\[FN77\]](#) This need, combined with the continuing duty of loyalty to former clients, creates an obligation to disclose and even volunteer things which are not in the record so that collateral counsel can be effective. [\[FN78\]](#) One jurisdiction has specifically held that:

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

We believe that the Rules of Professional Conduct impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client. [\[FN79\]](#)

The obligation to volunteer information to the former client's new counsel is a critically different responsibility than the responsibility to just be an honest, candid, or wholly truthful witness. The absence of evidence in the record of trial counsel's performance could indicate a strategic decision to not pursue an area (which, if reasonable though ultimately unsuccessful, would not be ineffective), or it could indicate a mistake or the failure to recognize an area, which could be a possible ground of ineffectiveness. The inability of postconviction counsel to determine which of these was the basis for the silent record creates an obligation to identify areas in which, after the fact, counsel's judgment would indicate a different approach might have been preferred. Whether this decision actually could provide such a ground is not for counsel to determine; that is a question for postconviction counsel, the client's present lawyer.

The American Bar Association Standards for Criminal Justice lend further support to this reasoning. [\[FN80\]](#) According to the ABA Standards, collateral counsel should pursue relief without hesitation for those who are determined to have not received effective assistance of counsel, and defense counsel should withdraw if they realize that they failed to render effective assistance of counsel in an earlier phase. [\[FN81\]](#) As the commentary explains,

Since counsel must zealously represent his or her client's interests at all times, where appellate counsel was also trial counsel, such posttrial representation should also include scrutiny of counsel's own representation of the client at trial. Where counsel concludes that his or her prior representation was ineffective, in the interests both of effective representation and avoidance of conflicts of interest, counsel should explain this conclusion to the client and seek permission from the court to withdraw from further representation on this basis. [\[FN82\]](#)

This effect of the duty of loyalty to the former client is a function of both the lawyer-witness problem and the former client problem. The lawyer has personal knowledge of information which may not be in the file (because he alone decided not to pursue an area of inquiry, and thus knows its significance but did not record it). The lawyer, while no longer representing the client, has a dramatic impact on the former client's prospects in the postconviction proceeding. Together, these obligations mean that lawyers must fully, openly, and without reservation cooperate with postconviction counsel to discharge their duty of loyalty.

C. The Duty of Confidentiality to the Client

An allegation by a former client concerning trial counsel's performance necessarily constitutes a waiver of the attorney-client privilege with respect to the matters under challenge, and a waiver of the duty of confidentiality. Like the waiver of the privilege, the waiver of the duty is limited in scope. [\[FN83\]](#) The principles underlying the duty of confidentiality, however,

do not provide a uniform answer to the question of waivers of the duty of confidentiality in a postconviction setting.

Confidentiality is thought to advance two different goals: client autonomy and systemic operation. Client autonomy is advanced through the increase in control over individual actions which comes from being able to use the lawyer to advance one's interest; confiding in the lawyer enables one to take benefit of the legal system to advance one's interests. Systemic operation is advanced by enabling the lawyer to learn the facts of a client's claim or defense, and so present them as effectively as possible, thereby securing the systemic goals of truth finding, dispute resolution and adherence to principles. These goals point in different directions in the postconviction context. Client autonomy is advanced through maintaining confidentiality, even in a postconviction setting, because the client's individual interest is the setting aside of the conviction. Systemic operation, in the sense that the "system" includes the final adjudication of criminal matters, is frustrated by confidentiality.

The Model Rules provide a much broader definition of information subject to the duty of confidentiality than does the Model Code, [FN84] and specifically authorize disclosure "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client." [FN85] Unfortunately, the concerns which the Model Rules address regarding disclosures point in different directions in the postconviction context.

Part of this confusion arises because the Comments to Rule 1.6 outline several independent situations possibly giving rise to a waiver issue, several of which necessarily arise together in the postconviction context. The comments address separately "Disclosures Adverse to the Client," [FN86] disclosures involving a "Dispute Concerning Lawyer's Conduct," [FN87] and "Former Client." [FN88] Many disclosures in a postconviction context may be adverse to the client, so they "should be no greater than the lawyer reasonably believes necessary to the purpose." [FN89] Nevertheless, to the extent that they involve disputes concerning the lawyer's conduct, "the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense," although the

disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate (the lawyer's) innocence, (and) the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. [FN90]

Of course, the lawyer is also reminded that the "duty of confidentiality continues after the client-lawyer relationship has terminated." [FN91]

Consider, for example, a former client who has alleged ineffective assistance in the failure to engage in pretrial litigation. This clearly means that the duty of confidentiality has been waived with respect to testifying about the lawyer's decision-making process with regard to pretrial litigation. [FN92] Does it also mean a waiver with regard to the lawyer's decision-making process in jury selection, or argument or sentencing? To some extent, the answer depends upon the purpose of the revelation. [FN93] If the revelation is to the government, and the purpose is to show that, notwithstanding some arguably deficient representation in pretrial litigation, this deficiency would have made no difference to the outcome (and so does not satisfy the prejudice prong of the ineffective assistance standard), then the disclosure conflicts with the duty of loyalty to the former client. It might be argued that such additional disclosures are permissible because the determination of the prejudice from substandard performance is part of the determination of the effectiveness of the assistance. This confuses, however, the determination of substandard performance and constitutionally ineffective performance. Allegations of substandard performance, whether in a postconviction action or a malpractice suit, are disputes concerning a lawyer's conduct and thus raise questions about the lawyer's ability to defend herself. Allegations that the performance did not affect the outcome of the litigation, however, involve questions about the proper scope of postconviction relief, concerns of finality, and whether counsel's performance rendered the "trial unreliable or the proceeding fundamentally unfair" [FN94]--which are independent of the concerns of the lawyer whose work is challenged, because in theory her performance has already been found substandard.

The conflict with the duty of loyalty to the client is actually more pronounced than this theoretical assessment suggests. Because the Supreme Court in *Strickland v. Washington* [FN95] permitted courts to review the prejudice prong before determining the quality of the performance, a determination of the quality of representation is often never actually made. [FN96] This means that offering information which supports the government's claim that the defendant suffered no prejudice

from counsel's poor performance is not just antagonistic to the defendant's claim, it is often fatal to it.

One simple way of clarifying the position of the lawyer who is the subject of a postconviction action would be an addition to the comments making clear that confidentiality may be considered waived only for responding to the allegations of inadequate performance, not the prejudice or lack thereof of this performance. For example, the following sentence could be added to paragraph 21 of the Comments to Rule 1.6:

While the duty may be waived in an action challenging the lawyer's conduct or performance (other than a civil, criminal or professional disciplinary proceeding to which the lawyer is a party), this waiver is limited to the extent necessary to meet the standard of reasonably effective assistance set forth in *Strickland v. Washington*.

D. The Duty to Represent a Client Zealously

The duty to represent a client zealously [FN97] includes an obligation not to “prejudice or damage (the) client during the course of the professional relationship.” [FN98] Although the professional relationship has ended when a lawyer no longer represents a client, the attorney-client privilege, the duty to maintain confidences and secrets and the obligation not to prejudice a client survive the termination of the professional relationship. [FN99] Thus, the obligations of the lawyer to the former client, which arise because of the duties to competently represent the client and to preserve the client's confidences, continue even when the lawyer is the subject of a postconviction petition for ineffective assistance.

IV. Obligatory Practices

So what should New Lawyer be given? Existing ethical rules explicitly make clear that she should be given the files concerning the former client's case. [FN100] Given the scope of the duty of confidentiality embodied in the Model Rules, and the purposes behind providing these papers to the former client, files or “papers” must be understood in their broadest possible sense. Beyond that, should New Lawyer be told of things absent from the files? The failure to voluntarily disclose the absence of items in files will preclude the client from obtaining effective assistance of counsel in the postconviction proceeding, and conflicts with the continuing duty of loyalty to the former client. Should New Lawyer be directed to areas of inquiry, made aware of shortcomings in the representation that in retrospect the lawyer now sees? The failure to do so, to not cooperate in creating the best possible case against the quality of one's own work, precludes the most searching inquiry into the legitimacy of the system of justice possible. These principles suggest several obligatory practices, based upon a full reading of existing ethical rules, for lawyers who are the subject of postconviction actions.

A. Disclosure of Files and Notes

Current ethical rules make clear that the files concerning a former client belong to the client, not the lawyer. This is the case even if the former client is alleging ineffective assistance on the part of the lawyer. Both the Model Rules and the Model Code dictate return of a former client's “papers,” and to fully satisfy the ethical obligations of loyalty, this should include any document or item obtained for or generated in connection with the representation, whether it was actually used in the representation or not. [FN101]

B. Volunteering the Absences in the Record

The duty of loyalty to the former client means at least not hindering the former client's postconviction efforts. These include making the best possible case for the original lawyers' ineffective assistance, and the case for ineffective assistance is often made through what was not done as what was done. Insufficient investigation, use of witnesses, and pretrial litigation have all been the basis for findings of ineffective assistance, [FN102] yet the decision to not do something is necessarily almost never noted in the files. Absent such evidence, even the most searching postconviction counsel cannot know what was not done. Thorough investigation in the postconviction process may identify some steps not taken, but even the best investigation (often years after the fact) will not be likely to discover a possible line of inquiry which counsel chose not to pursue.

Thus, volunteering what was not in the record, what was not investigated, examined, researched, considered or asked, is an ethical obligation of the lawyer whose former counsel brings a postconviction action.

C. Volunteering of Strategic Thinking

Whether something was done by counsel in the course of representation is important for two reasons. First, most obviously, the failure to do something may have rendered the representation not reasonably effective. Second, even if the representation was not reasonably effective, the failure to do something is important in order to show prejudice, a requirement for relief under Strickland. Why something was not done, however, is often as important in determining prejudice as what was not done. The failure to litigate an issue because it was not recognized, for example, could certainly be a basis for ineffective assistance. The failure to litigate an issue based on a strategic decision to not present otherwise damaging, admissible information to the government in the course of litigating the issue would not be ineffective. The key to this distinction is the strategic thinking of the lawyer, and learning this strategic thinking is absolutely critical to the thorough presentation of a postconviction claim. It should be routinely and openly presented to the postconviction counsel.

V. Conclusion

This Article has outlined three basic steps which a lawyer should take whose former client brings a postconviction action in order to ethically respond to the situation. These include the disclosure to the postconviction counsel of files and notes from the representation, the volunteering of absences in the record and the volunteering of counsel's strategic thinking in the case. The failure to do these things, given the peculiar aspects of the role of counsel whose former client brings a postconviction action, violates counsel's ethical obligations. Counsel, of course, have ethical obligations and constitutional responsibilities to be effective, and a list of potential ethical violations may be of minimal concern to those who would knowingly be ineffective anyway. It is hoped, however, that the vast majority of lawyers, who would not seek to be ineffective, would take these basic steps as benchmarks by which their representation will be measured in the future, and will consider them in developing effective representation in the first instance.

[\[FNa1\]](#). Assistant Professor of Law, New England School of Law. The author wishes to thank Donald E. Dawson for raising these issues, and Davalene Cooper for helpful comments on earlier drafts of this Article. The research for this Article was made possible by the generous support of the Trustees of the New England School of Law.

[\[FN1\]](#). This Article focuses on the obligations of a criminal defense lawyer whose former client brings a postconviction action after the former client's conviction at trial rather than after a guilty plea. The standards for evaluating a claim of ineffective assistance upon a plea are the same as those which apply after a conviction at trial, [Hill v. Lockhart](#), 474 U.S. 52 (1985), and many of the same analytical points apply. See also [Steven Zeidman, To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling](#), 39 B.C. L. Rev. 841 (1998) (suggesting constitutional obligation for counsel to persuade client to accept favorable plea bargain in order to be effective).

[\[FN2\]](#). See James S. Liebman & Randy Hertz, Federal Habeas Corpus Prac. and Proc. § 11.2b n.21 (2d ed. 1994) (hereinafter Liebman) (“If (Postconviction) counsel is not careful, adversarial relationships may develop based upon the prior attorney's fear that his performance in the case warrants or will beget an ineffective assistance claim.”). For a stark example of this, see [Harrelson v. United States](#), 967 F. Supp. 909 (W.D. Tex. 1997) (denying lawyer standing to intervene in a former client's postconviction proceeding alleging ineffective assistance with a motion for sanctions under [Fed. R. Civ. P. 11](#) against the former client's new lawyers, because “(a)s movant's former counsel, (the lawyer) is neither a party to this post-sentence criminal proceeding nor attorney of record for movant.”). While the postconviction claim is somewhat akin to a suit for malpractice, this appears in fact to be a concern of minimal significance for criminal defense lawyers, assuming that the defendant is factually guilty. See [Ronald E. Mallen, Legal Malpractice and the Criminal Defense Lawyer](#), 9 Crim. Just. 2 (1994) (“No published decision has awarded compensation to a person actually guilty of a crime on the grounds that the lawyer could have avoided the conviction.”). But see [Erika E. Pederson, You Only Get What You Can Pay For: Dziubak v. Mott and Its Warning to the Indigent Defendant](#), 44 DePaul L. Rev. 999 (1995) (arguing that public defenders and appointed defense

counsel should not have immunity from civil actions for malpractice).

[FN3]. The quasi-civil petition for habeas corpus or postconviction relief based on ineffective assistance seems “substantially related” to the underlying criminal trial, as that terminology is used in the Model Rules of Professional Conduct Rule 1.9 (1995). This naturally precludes the lawyer from representing the government in defending the conviction, as does the prohibition on representation where one expects to become a witness, in Model Rules of Professional Conduct Rule 3.7 (1995). Similarly, prior involvement would presumably preclude the lawyer from representing the former client in a challenge to the effectiveness of the lawyer's own work. See [Murphy v. People, 863 P.2d 301 \(Colo. 1993\)](#) (public defender's conflict of interest precluded his being appointed to represent former client challenging validity of guilty plea in a collateral action, when same public defender had represented former client in entering the plea); [Deutscher v. Angelone, 16 F.3d 981, 984 \(9th Cir. 1994\)](#) (“We are faced with the unusual situation in which ineffective counsel represented a defendant not merely at trial and appeal, but also during collateral attack. In a proper situation, this condition should not be duplicated.”).

[FN4]. Model Code of Professional Responsibility EC 5-9, 5-12; DR 5-101(B); 5-102(A), (B) (1983); Model Rules of Professional Conduct Rule 1.7(b), 3.7 (1995).

[FN5]. Model Code of Professional Responsibility EC 5-9 (1983) (“(t)he function . . . of a witness is to state the facts objectively.”).

[FN6]. Model Rules of Professional Conduct Rule 3.3 (1995); Model Code of Professional Responsibility DR 7-102(A)(2-5) (1983).

[FN7]. [Jones v. District Court, 617 P.2d 803, 808 \(Colo. 1980\)](#) (citing [Holloway v. Arkansas, 435 U.S. 475, 486 \(1978\)](#)) (“Attorneys are officers of the court and ‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.”).

[FN8]. A stark example of this situation is [Bellamy v. Cogdell, 974 F.2d 302 \(2d Cir. 1992\)](#), in which a lawyer representing a man charged with murder was held to have provided effective assistance of counsel notwithstanding 1) his suffering from a serious neurological condition at the time of the trial which made concentration difficult and 2) the fact that he was simultaneously responding to a bar disciplinary complaint with the argument that he was “not mentally capable of preparing for the hearing” on that matter. [Id. at 303](#). As the dissent from the en banc ruling which found no per se denial of effective assistance noted, only the lawyer could answer the crucial questions concerning his strategic plan, his goals and his expectations in the case. [Id. at 313](#). Nevertheless, the assistance was found effective even though no testimony by the trial counsel was offered. See *id.*

[FN9]. Liebman, *supra* note 2, § 11.2b, n.21. See also [Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong Rights We Find There, 9 Geo. J. Legal Ethics 1, 7 \(1995\)](#) (“As a practical matter, an ineffective assistance of counsel claim is unlikely to succeed if the criminal defense lawyer vigorously contests the allegations of ineffectiveness. Conversely, the cooperation of the criminal defense lawyer greatly increases the chances that such a claim will succeed.”).

[FN10]. [Fed. R. Crim. P. 11\(f\)](#).

[FN11]. Model Rules of Professional Conduct Rule 3.8(d) (1995); Model Code of Professional Responsibility DR 7-103(b) (1983).

[FN12]. Some have noted this point in passing without elaborating a particular basis in existing ethical rules for it. See Liebman, *supra* note 2, § 11.2b n.21 (“Of course, if former counsel was ineffective, it is his responsibility to the client and the profession to cooperate in redressing the violation.”).

[FN13]. There are rare reported examples of lawyers who have done just this. E.g., [Deutscher v. Angelone, 16 F.3d 981, 984](#)

[\(9th Cir. 1994\)](#) (postconviction counsel submitted declaration that he had filed postconviction petition without first notifying client or seeking authorization); [Rachel v. Bordenkircher, 590 F.2d 200, 203 \(6th Cir. 1978\)](#) (both of defendant's trial counsel submitted affidavits in defendant's habeas corpus proceeding detailing that their failure to make timely objections to improper prosecutorial arguments were due to inexperience, inattention or lack of knowledge of the law, and were not tactical decisions. For a particularly noteworthy recent example of this, see Matthew Breilis, Acknowledgment of Error is the Key, Boston Globe, May 10, 1997, at A1 (defense lawyers' affidavits that their failure to object to a seating arrangement for child witnesses in a molestation case was neither strategic nor tactical decision critical to a finding of ineffective assistance).

[\[FN14\]](#). I use the term “postconviction proceedings” to generally denote those collateral actions in which a claim of ineffective assistance of counsel can be raised, whether they are formally called postconviction proceedings or petitions for writs of habeas corpus. An issue of ineffective assistance can arise during trial or on direct appeal as well, of course, but the ethical situations are somewhat different in that the lawyer still represents the client and has a direct and present obligation, based on the duty to provide competent representation to a present client, to remedy the situation.

[\[FN15\]](#). One attempt to examine the philosophical consequences of the work of capital defense lawyers, with respect to the interpretive representations of their clients they create for the jury, and the tension between these representations and some real or essential nature of the client, is in James M. Doyle, The [Lawyers' Art: “Representation” in Capital Cases, 8 Yale J.L. & Human. 417 \(1996\)](#). Numerous texts have addressed the substantive obligations at trial and on appeal to render effective assistance. See, e.g., ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993).

[\[FN16\]](#). Antiterrorism and Effective Death Penalty Act of 1996, [Pub. L. No. 104-132, 110 Stat. 1214](#) (codified as amended in scattered sections of 28 U.S.C.) (hereinafter AEDPA). While the ethical aspects of a lawyer's obligations to former clients are certainly not limited to former clients in capital cases, these cases raise these issues in their starkest forms.

[\[FN17\]](#). The statute of limitation for bringing a habeas corpus petition is now one year. [28 U.S.C. § 2244\(d\)\(1\)\(A\), \(D\) \(1996\)](#). See Liebman, *supra* note 2, at § 2.7a (2d ed. 1994 & Supp. 1996).

[\[FN18\]](#). Subsections 106(b)(1) and 106(b)(2) of Title I of AEDPA, *supra* note 16, preclude the bringing of successive federal habeas corpus petitions challenging state court convictions unless the petition presents a new claim which relies upon a new rule of constitutional law, previously unavailable, which the U.S. Supreme Court has made retroactive to cases on collateral review, [28 U.S.C. § 2244\(b\)\(2\)\(A\) \(1996\)](#), or which relies upon a newly discovered factual predicate which could not have been discovered through due diligence and which is “sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” [28 U.S.C. § 2254\(e\)\(2\)\(B\) \(1996\)](#) (as amended Apr. 24, 1996, [P.L. 104-132, Title I, § 104](#), 110 Stat. 1218). These provisions have been held constitutional in [Felker v. Turpin, 518 U.S. 651 \(1996\)](#).

[\[FN19\]](#). For an example of the strictness with which the rules concerning abuse of the writ and successive petitions have been interpreted, see [Angelone v. Bennett, 117 S. Ct. 381 \(1996\)](#) (granting State's application to vacate stay of execution granted by appellate court to permit petitioner time in which to file petition for certiorari of denial of first federal habeas petition) (Justice Stevens and Justice Ginsburg would grant the application for stay of execution). See also [McCleskey v. Zant, 499 U.S. 467 \(1991\)](#) (limitation on successive petitions which amount to “abuse of the writ.”).

[\[FN20\]](#). The American Bar Association, the largest bar organization in the country, recently approved a motion calling for a moratorium on executions until adequate procedures are implemented to ensure the quality of representation in capital cases. Less than a year before, Congress removed funding from the defender organizations which provided postconviction representation to capital defendants. See Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (1989) (report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States, Chaired by Justice Lewis F. Powell, Jr.) (hereinafter The Powell Report); Roscoe C. Howard, Jr., The [Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. Va. L. Rev. 863 \(1996\)](#).

[FN21]. For one judge's view of the ethical issues already raised by the current system of imposing and providing appellate review of sentences of death, see Joseph W. Bellacosa, [Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession](#), 14 *Pace L. Rev.* 1 (1994). For other ethical issues confronting capital and non-capital lawyers as a result of the extremely low rate of compensation in appointed cases, see Laura LaFay, *Indigent Defense in Virginia: Poorest in Nation*, 22 *The Champion* No. 4, 10 (May 1998) (detailing cases in which defense lawyers argued that they had a conflict of interest representing defendants whose cases would require far more than the maximum allowable compensation under Virginia law).

[FN22]. While capital cases actually represent a rather small proportion of federal postconviction cases, they attract a disproportionate amount of political attention. A 1995 U.S. Department of Justice Study of federal habeas corpus petitions challenging state criminal convictions in eighteen federal courts, which represented about half of the nation's total federal habeas corpus petitions, found that about one percent involved petitions by defendants under a sentence of death.

The one assumption common to both sides is that numerous habeas petitions from death-penalty cases take a disproportionate amount of time to resolve, consuming the preponderance of the attention that the Federal courts devote to habeas corpus litigation, seemingly to the detriment of noncapital habeas petitions. The data call that viewpoint into question. It is difficult to conceive how 1% of the habeas caseload, 100 out of 10,000 cases, can dominate the entire processing of Federal habeas corpus. U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review Challenging State Court Crim. Convictions* 13 (1995).

[FN23]. [Teague v. Lane](#), 489 U.S. 288 (1989) ("new" constitutional rules will not be applied retroactively in collateral proceedings to cases which had become "final" before the new rule was announced, with the exception of those fundamental to the concept of ordered liberty, such as a denial of the right to counsel).

[FN24]. See, e.g., [Brecht v. Abrahamson](#), 507 U.S. 619, 629 (1993) ("trial error" of commenting on defendant's silence after Miranda warnings warranted habeas relief only if it "had a 'substantial and injurious effect or influence in determining the jury's verdict,'" as opposed to "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards . . . (such as) deprivation of the right to counsel . . ."); [Lockhart v. Nelson](#), 488 U.S. 33, 40-41 (1988) (re-trial after erroneous use in habitual offender proceeding of conviction for which defendant had been pardoned, without which there were insufficient prior convictions proven to satisfy habitual offender classification, did not offend Double Jeopardy prohibition because this was "trial error").

[FN25]. See, e.g., [Smith v. Murray](#), 477 U.S. 527, 533-35 (1986) (death sentence affirmed notwithstanding constitutional violation because of procedural default in appellate counsel's failure to raise claim in state supreme court, despite that court having previously rejected such claims); [Mackall v. Angelone](#), 131 F.3d 442 (4th Cir. 1997) (death-sentenced petitioner's federal habeas claim that he received ineffective assistance at trial and on appeal rejected because state supreme court had found a similar claim procedurally defaulted, notwithstanding defendant's claim of ineffective assistance in his state habeas petition, because constitutionally effective assistance in state postconviction proceedings not guaranteed).

[FN26]. This critical nature of the trial counsel's decisionmaking, and the concomitant need for cooperation from the trial counsel in bringing a successful postconviction action, is magnified because the trial counsel's ineffectiveness can be insulated from review by ineffective assistance on appeal. If the trial counsel was ineffective, but the appellate counsel failed to raise that ineffectiveness as a ground of appeal, the ineffectiveness of the trial counsel can never be remedied unless the appellate counsel's failure to raise the issue is also found to be ineffective. See, e.g., [Roche v. State](#), 690 N.E.2d 1115, 1120 (Ind. 1997) ("(W)here the claim is that appellate counsel was ineffective for failing to claim on direct appeal the ineffective assistance of trial counsel, the petitioner must establish both deficient performance and resulting prejudice on the part of both trial counsel and appellate counsel.").

[FN27]. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* 1996 448 (1997) (Table 5.27 shows that 77.6% of federal defendants in 1994 who went to trial were convicted).

[FN28]. *Id.* at 448, 483. There are more appeals each year than convictions due to the time difference between conviction and appeal.

[FN29]. See Bureau of Justice Statistics, *supra* note 22, at 14. A 1995 Department of Justice Study found that fully twenty-five percent of federal habeas corpus cases in the eighteen federal districts sampled involved claims of ineffective assistance. This was by far the largest single type of issue raised in such claims.

[FN30]. Some have even suggested litigating these issues prior to a conviction. See [Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242, 293-94 \(1997\)](#).

[FN31]. See AEDPA, *supra* note 16. There is now an explicit, statutory incentive to do so, and thus become an “opt-in” state, entitling the jurisdiction to have federal courts give the rulings of its courts favorable consideration.

[FN32]. Whether there is a federal constitutional right to have counsel provided indigent defendants for state postconviction proceedings is in some dispute. See generally Liebman, *supra* note 2, at § 7.2a (concluding that, despite “negative answers to these questions that the Court has given, at least in dicta, . . . its treatment of the matter to date is not legally conclusive of a right to counsel under all potentially applicable provisions of the United States Constitution.”).

[FN33]. Model Rules of Professional Conduct Rule 3.7(a) (1995) (“A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . .”).

[FN34]. *Id.* at Rule 3.7(a)(3). This consideration in the Model Rules addresses disqualification working a substantial hardship on the “client,” and the postconviction petitioner is not the client. The lawyer, however, owes continuing obligations to the former client, which makes the concerns underlying Rule 3.7(a)(3) relevant.

[FN35]. Model Rules of Professional Conduct Rule 3.7 (1995); Model Code of Professional Responsibility DR 5-102(A) (1983).

[FN36]. Model Rules of Professional Conduct Rule 3.7 cmt. 1 (1995).

[FN37]. Courts considering claims of ineffective assistance have noted this. [United States v. Gerrity, 804 F.2d 1330, 1331 \(7th Cir. 1986\)](#). Only criminal practitioners have particularized standards of practice beyond those in the model rules or codes of ethics. See ABA Standards for Criminal Justice (1980).

[FN38]. [Timothy J. Lucey, *Bellamy v. Cogdell: The Ethical Implications of Claims of Ineffective Assistance of Counsel*, 6 Geo. J. Legal Ethics 549 \(1993\)](#) (arguing that ethical breaches by criminal defense lawyers should constitute per se violations of the Sixth Amendment's guarantee of effective assistance of counsel when the duty breached “intersects” with an existing common law category, but should be violations subject to the actual prejudice standard of Strickland otherwise).

[FN39]. See Model Rules of Professional Conduct Rule 1.9 (1995); Model Rules of Professional Conduct Rule 1.8(h) (1995); Model Rules of Professional Conduct Rule 1.6 cmt. 18 (1995).

[FN40]. See *infra* part III.B, note 78.

[FN41]. Liebman, *supra* note 2, at § 11.2b n.21 (“Trial counsel often is as important a source of information as the client about various types of (postconviction) claims that are not obvious from the record.”).

[FN42]. One critical difference between a postconviction proceeding and a malpractice action is that the lawyer is not a party to the postconviction proceeding.

[FN43]. [Mackall v. Angelone, 131 F.3d 442, 451-52 \(4th Cir. 1997\)](#) (Butzner, J., dissenting).

[FN44]. See, e.g., [Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 \(1963\)](#).

[FN45]. [Case v. Nebraska, 381 U.S. 336, 337-47 \(1965\)](#) (Brennan and Clark, JJ., concurring); [Young v. Ragen, 337 U.S. 235 \(1949\)](#). Professor Bator noted as much in his famous article, although in the pre-Gideon era. According to Professor Bator, “(d)epriation of counsel in cases where the demands of fairness embodied in the due process clause call for representation by counsel is, I submit, precisely the kind of error which should deprive a state litigation of sanctity.” Bator, *supra* note 44, at 458.

[FN46]. The preeminent expositor of this viewpoint is Professor Monroe Freedman. See generally Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). For a critique of this viewpoint, see [William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703 \(June 1993\)](#) (arguing that the reasons advanced for such a distinction are not persuasive, although another, less commonly asserted basis--nullification--may justify more aggressive tactics for criminal defense lawyers than would be acceptable elsewhere in the profession); Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. Contemp. Legal Issues 165 (1996) (questioning assumptions underlying criminal-civil distinctions in ethics).

[FN47]. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* 63 (1988).

The political argument for zealous criminal defense does not claim that the adversary system is the best way of obtaining justice. It claims just the opposite, that this process is the best way of impeding justice in the name of more fundamental political ends, namely keeping the government's hands off people. Nothing, of course, is wrong with that . . . (m)y point is merely that criminal defense is an exceptional part of the legal system, one that aims at the people's protection from the state rather than at accurate outcomes.

[FN48]. 2 Simon H. Rifkind, *The lawyer's Role and Responsibility in Modern Society* 515-530 (1986).

[FN49]. The ethical rules recognize this distinction too. See, e.g., Model Rules of Professional Conduct Rule 3.3, cmts. 7-10 (1995) (suggesting greater flexibility for criminal defense counsel who learn their clients will or have committed perjury, because of the constitutional protections for criminal defendants, than for other lawyers).

[FN50]. For example, the duty of candor toward the tribunal, reflected in Rule 3.3 of the Model Rules of Professional Responsibility, can include an obligation to make a disclosure because failure to do so would effectively be an affirmative misrepresentation. Failure of trial counsel to disclose, for example, that he had investigated a defense of which there was no record in the files could be construed as a misrepresentation to the court of ineffectiveness. The obligations of Rule 3.3, however, only extend to the conclusion “of the proceeding,” see Rule 3.3(b), which would be long before the postconviction action began. Moreover, these obligations only apply when necessary to avoid assisting a fraudulent act “by the client,” see Rule 3.3(a)(2), and the former client is of course no longer a “client.”

[FN51]. Apart from pride, basic aspects of human nature often preclude recognizing potential alternatives after the fact. “Psychological research suggests that human beings tend to underestimate the contingency of past events.” Donald A. Dripps, [Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard](#), 88 J. Crim. L. & Criminology 242, 280 (1997).

[FN52]. [United States v. DeCoster, 487 F.2d 1197, 1202 n.21 \(D.C. Cir. 1973\)](#).

[FN53]. “The primary characteristic of the lawyer's role as an officer of the court is the duty to subordinate the interests of the client and the interests of the lawyer to the interests of the judicial system and the public.” Note, [What's a Lawyer to Do?: The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct](#), 21 Am. J. Trial Advoc. 357, 359 (1997).

[FN54]. See Model Rules of Professional Conduct Rule 1.7, cmt. 1 (1995) (“Loyalty is an essential element in the lawyer’s relationship to a client.”). See also Model Rules of Professional Conduct Rule 1.16(d) (1995) (“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests”); Model Code of Professional Responsibility EC 5-1 (1983):

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of (the lawyer’s) client and free of compromising influences and loyalties. Neither (the lawyer’s) personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute (the lawyer’s) loyalty to (the) client. See also Model Code of Professional Responsibility DR 5-101(A) (1983).

[FN55]. See Model Rules of Professional Conduct Rule 1.1 (1995) (“A lawyer shall provide competent representation to a client.”). See also Model Code of Professional Responsibility Canon 6 (1983) (“A lawyer should represent a client competently.”) This obligation is specifically set forth in Disciplinary Rule 6-101 (A): (“A lawyer shall not: (1) Handle a legal matter which (the lawyer) knows or should know that (the lawyer) is not competent to handle, without associating with (the lawyer) a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to (the lawyer).”). Further, Model Rule 1.9(a) precludes a lawyer from representation of another in a substantially related matter in which their interests are materially adverse to those of the former client. What the lawyer is precluded from doing by way of representation should inform what the lawyer can do as a witness.

[FN56]. See Model Rules of Professional Conduct Rules 1.6(a), 1.8(b) (1995); Model Code of Professional Responsibility EC 4-5 (1983) (“A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client”).

[FN57]. Model Rules of Professional Conduct Rules 1.2(a), 1.3 cmt. 1 (1995) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); Model Code of Professional Responsibility DR 7-101 (1983).

[FN58]. Model Rules of Professional Conduct Rule 1.1 (1995) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); Model Code of Professional Responsibility DR 6-101(A)(1) (1983) (“A lawyer shall not: (1) Handle a legal matter which (the lawyer) knows or should know that (the lawyer) is not competent to handle without associating with (the lawyer) a lawyer who is competent to handle it.”).

[FN59]. [Nix v. Whiteside, 475 U.S. 157, 175 \(1986\)](#) (“Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the Strickland standard.”).

[FN60]. See Model Rules of Professional Conduct Rule 1.8(h) (1995) (prohibiting such agreements before a claim arises unless client is independently represented by counsel and settlements of such claims after they have arisen without providing written advice that independent counsel is appropriate); see also Model Code of Professional Responsibility DR 6-102(A) (1983) (similar prohibition).

[FN61]. At least one court has suggested that a malpractice action may lie whenever a court has found ineffective assistance of counsel. [Walker v. Kruse, 484 F.2d 802, 804 \(7th Cir. 1973\)](#).

[FN62]. See Tennessee Board of Professional Responsibility, Advisory Op. 94-A-549 (1994) (ethical prohibition on plea agreements which include defendant waiving appellate or post-conviction rights, based on restriction of lawyer’s ability to limit liability for malpractice); North Carolina State Bar Comm., Ethics Op. RPC 129 (1992) (approving of plea agreements waiving appellate and Postconviction rights except with regard to allegations of ineffective assistance of counsel or prosecutorial misconduct, based on lawyer’s obligations to represent client competently and zealously, and special rules regarding conduct of prosecutors, as well as prohibition on limiting liability to client for malpractice).

[FN63]. Tennessee Board of Professional Responsibility, Advisory Op. 94-A-549 (1994).

[FN64]. See North Carolina State Bar Ethics Comm., Formal Op. RPC 129 (1992).

[FN65]. Id.

[FN66]. See Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 95-08 (1995) (upholding ethical propriety of such plea agreements in federal court in Arizona which require defendants to waive post-conviction or habeas remedy on the ground that a suit for malpractice is not analogous to a claim of ineffective assistance).

[FN67]. Id.

[FN68]. Id.

[FN69]. Id.

[FN70]. Id.

[FN71]. Model Code of Professional Responsibility EC 4-6 (1983) (“The obligation of a lawyer to preserve the confidences and secrets of (the) client continues after the termination of () employment.”). See also Model Code of Professional Responsibility DR 4-101(B)(1983) (“Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of (the) client.”). See also [Swidler, Berlin & Hamilton v. United States, 524 U.S. 399 \(1998\)](#) (holding attorney-client privilege survives death of client).

[FN72]. John Wesley Hall, Jr., Professional Responsibility of the Criminal Defense Lawyer § 4:6 (2d ed. 1996) (footnotes omitted):

The relationship between an attorney and client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of loyalty and good faith. This fiduciary relationship exists as a matter of law between an attorney and client; this requires all transactions between them growing out of such relationship to be subject to the closest scrutiny and involving the highest degree of personal trust and confidence.

[FN73]. Model Rules of Professional Conduct Rule 1.16(a)(2) (1995); Model Code of Professional Responsibility DR 2-110(A)(2) (1983).

[FN74]. [People v. Urceolate, 638 P.2d 255 \(Colo. 1981\)](#) (lawyer who took retainers from clients and took no action on their behalf violated rule prohibiting withdrawal from employment without taking steps to avoid prejudice to client's rights). See generally Wendy E. Lehmann, Annotation, [Legal Malpractice in Connection with Attorney's Withdrawal as Counsel, 6 A.L.R. 4th 342 \(1981\)](#).

[FN75]. Model Code of Professional Responsibility DR 2-110(A)(2) (1983) (“(D)elivering to the client all papers and property to which the client is entitled . . .”).

[FN76]. John Wesley Hall, Jr., Professional Responsibility of the Criminal Defense Lawyer § 4:8 (2d ed. 1996) (“An attorney may not withhold from the client information acquired in his capacity as an attorney . . .”). See also California State Bar Comm. on Professional Responsibility, Formal Op. 1992-127 (“This Constitutional right to effective assistance of counsel includes the right to effective assistance of counsel on appeal. Trial counsel should not undermine that right by refusing to cooperate with appellate counsel.”) (footnote omitted).

[FN77]. See Liebman, *supra* note 2.

[FN78]. Tennessee Supreme Court Rule 28, for example, requires that postconviction counsel certify that they have been

effective and made the petitioner aware of the consequences of the failure to raise an issue in the petition. This rule also requires that capital postconviction counsel make the following certification as an additional reason that trial counsel must cooperate with collateral counsel: "I have raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has." Certification in good faith cannot be made without such cooperation.

[FN79]. California State Bar Comm. on Professional Responsibility, Op. 1992-127 (1992) (citations omitted).

[FN80]. ABA Standards for Criminal Justice Prosecution Function and Defense Function, 4-8.6, cmt. (3d ed. 1993).

[FN81]. *Id.* at Standard 4-8.6(a) and 4-8.6(c).

[FN82]. *Id.* at Standard 4-8.6, cmt. (footnote omitted).

[FN83]. See Model Rules of Professional Conduct Rule 1.6 cmt. 13 (1995) ("In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose."); *id.* at cmt. 18 ("In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."); *id.* at cmt. 19 ("(T)he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.").

[FN84]. See Model Rules of Professional Conduct Rule 1.6, Model Code Comparison (1995) (expanding confidential material to that gained before or after representation, regardless of client instructions concerning its confidentiality, "relating to" the representation of the client, rather than that privileged or "gained in" the representation).

[FN85]. Model Rules of Professional Conduct Rule 1.6(b)(2) (1995). While this would appear to cover postconviction proceedings, the comments to this section only describe "disciplinary proceedings." *Id.* at cmt. 19.

[FN86]. Model Rules of Professional Conduct Rule 1.6 cmts. 9-14 (1995).

[FN87]. *Id.* at cmts. 18-19.

[FN88]. *Id.* at cmt. 22.

[FN89]. *Id.* at cmt. 14.

[FN90]. *Id.* at cmt. 18.

[FN91]. Model Rules of Professional Conduct Rule 1.6 cmt. 22 (1995).

[FN92]. It is not clear that the privilege has necessarily been waived with respect to discussion with the lawyer for the government opposing the petition. See Model Code of Professional Responsibility EC 4-5 (1980) ("A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for (the lawyer's) own purposes.").

[FN93]. If the revelation is to the former client's new lawyer, obviously the purpose of the revelation does not matter, because the new lawyer has the same duty of confidentiality with regard to the client.

[FN94]. [Lockhart v. Fretwell, 506 U.S. 364, 372 \(1993\).](#)

[FN95]. 466 U.S. 688 (1984).

[FN96]. [Wayne R. LaFave & Jerold H. Israel, Criminal Procedure, § 11.10 \(2d ed. 1992\)](#) (“(I)n case after case alleging that counsel’s factual investigation was inadequate, the standard response is that there has been no showing of prejudice because defendant has failed to establish exactly what further evidence existed for counsel to discover if he had investigated more thoroughly.”).

[FN97]. Model Rules of Professional Conduct Rules 1.2(a), 1.3, 3.2, 3.5(c), 4.4 (1995); Model Code of Professional Responsibility DR 7-101 (1980).

[FN98]. Model Code of Professional Responsibility DR 7-101(3) (1980).

[FN99]. See *id.* at EC 4-6 (“The obligation of a lawyer to preserve the confidences and secrets of (the) client continues after the termination of (the lawyer’s) employment.”).

[FN100]. Model Rules of Professional Conduct Rule 1.16(d) (1995); Model Code of Professional Responsibility DR 2-110(A)(2) (1980).

[FN101]. This is consistent with the broader definition of things which are covered by the duty of confidentiality in the Model Rules, and reflects the general goal of minimizing harm to the former client from the termination of the representation. See, e.g., Model Rules of Professional Conduct Rule 1.16(d) (1995) (“Upon termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests”); *id.* at cmt. 9 (“Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.”).

[FN102]. See Liebman, *supra* note 2, at § 11.2c.

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