Protect confidentiality in ineffective assistance claims

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By Kim Alderman and Byron Lichstein


Kim Alderman

Direct appeals in Wisconsin are often premised on Ineffective Assistance of Counsel ("IAC") claims. Such claims can be unpleasant for trial attorneys, who feel they have fought hard for their clients under difficult circumstances and often for very little pay. IAC claims are also unpleasant for post-conviction counsel, who take no pleasure in having to criticize their colleagues.

Most IAC claims stem not from a belief that trial counsel is a low quality lawyer, but rather from the practical reality of post-conviction procedure: IAC is often the only vehicle through which a criminal defendant can raise arguments and evidence on appeal that may otherwise be precluded.

The common misconception of IAC claims as attacks on trial counsel leads some to think that client confidentiality is broken automatically with the filing of an IAC claim. In some IAC cases, the prosecutor will contact trial counsel before a Machner hearing to discuss a joint strategy on how to respond to the IAC claim. In other cases prosecutors and trial counsel communicate in court, before the Machner hearing begins, about trial counsel's perspective on the case. Then, trial counsel will sometimes begin testifying about confidential information before the court has obtained an explicit waiver of confidentiality from the defendant.

A recent ABA opinion makes clear that, prior to the client's express waiver or a court order to break confidentiality, such disclosures of confidential information are not permitted. (ABA Formal Op. 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim.) The ABA Opinion states:

[Trial counsel] 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.

The ABA opinion confirms that an IAC claim does not extinguish the trial lawyer's obligation to "not reveal information relating to the representation of a client unless the client gives informed consent[.]" SCR 20 :1.6. The requirement applies to all information relating to the representation - not just to matters communicated to trial counsel in confidence.

Under the ABA opinion, the filing of an IAC claim does not constitute an immediate waiver of client confidentiality. There is an exception in the confidentiality rule, both in Wisconsin's SCR 20:1.6 and under the Model Rules of Professional Conduct, allowing trial counsel to break confidentiality in order to respond to allegations concerning the lawyer's representation of the client. However, the recent ABA opinion explains that confidentiality should be broken only upon a court directive that trial counsel do so, after the court considers any objections or claims of privilege raised by the defendant.

Disclosure to the prosecutor is also impermissible pursuant to SCR 20:1.9, Duties to Former Clients, which explains that trial counsel "shall not use information relating to the representation to the disadvantage of the former client" until confidentiality is waived or the information has become generally known.

Byron Lichstein

Strategies for post-conviction counsel

There are several things that post-conviction counsel can do to encourage preservation of the confidential relationship between trial counsel and the defendant. The formal remedies to a violation of confidentiality by trial counsel are limited and do not benefit the defendant. The nature of the problem indicates that simply making trial counsel aware of the ongoing obligation of confidentiality is the solution.

Raising awareness of the continuing confidential relationship between defendant and trial counsel can be accomplished by several means. The first is to mention continued confidentiality during the first phone call with trial counsel. The benefit to this approach is that it is casual, and early in the post-conviction process, potentially foreclosing passing conversations with the prosecutor that may disadvantage the defendant. This would entail simply advising trial counsel that the defendant has authorized her to speak only with post-conviction counsel, and otherwise confidentiality persists.

The second is to advise trial counsel in writing that the client wishes to preserve confidentiality, either via a letter or in a client waiver. Post-conviction counsel get waivers from defendants to allow access to the file and conversations with trial counsel. This waiver can be modified to specify its limited nature, and then a copy sent to trial counsel. The disadvantage to this method is that the waiver may be processed by a secretary or paralegal and simply put in the file, never read by the attorney.

A third approach is to explain, in the cover letter accompanying the post-conviction motion (which should be cc'ed to the prosecutor and trial counsel), that the defendant does not waive confidentiality and thus disclosures by trial counsel to the prosecutor are not permitted outside a judicially-supervised hearing.

We note that there is a certain unfairness to the prosecutor in allowing post-conviction counsel exclusive pre-hearing access to trial counsel, who will be the key witness at the Machner hearing. The ABA opinion does not address this complex issue. Although there are several conceivable solutions (which are beyond the scope of this article), at the very least the prosecutor should be allowed some latitude in questioning trial counsel at the Machner hearing.

There is no easy solution to correcting the misconception that an IAC claim serves as an automatic waiver of confidentiality between defendant and trial counsel. The recent ABA Formal Op. 10-456, along with efforts on the part of post-conviction litigators to make trial counsel and the State aware of defendants' right to continued confidentiality despite an IAC claim and until a court orders otherwise, should combat unintentional violations of ethical obligations preceding IAC hearings.

Kim Alderman is a Clinical Assistant Professor in the Criminal Appeals Project at the University of Wisconsin Law School's Frank J. Remington Center. She maintains the Cultural Property & Archaeology Law Blog at http://www.culturalpropertylaw.net.

Byron Lichstein is Deputy Director of UW Law School's Remington Center, a law-in-action program made up of several clinical projects dedicated to teaching, service, and research. He serves as Director of the Criminal Appeals Project and Supervising Attorney for the Wisconsin Innocence Project.

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