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PROFESSIONAL CONDUCT

# Defending Yourself: How Far Can a Criminal Defense Lawyer Go?

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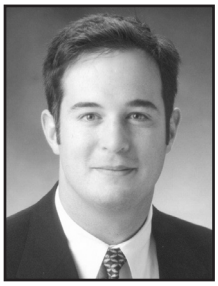
*Special to the Legal*

It's October and while we miss the summer, we're enjoying the turn of the seasons. The blistering heat has abated and the Phillies' slump seems like a distant memory.

But while we were busy fretting over line-up cards and disabled lists, the American Bar Association's Standing Committee on Ethics and Professional Responsibility was hard at work. In fact, the committee issued Formal Opinion 10-456, which considers the issue of whether a criminal defense attorney is permitted to disclose confidential information relating to his or her prior representation of a criminal defendant to assist government lawyers in establishing that the attorney's representation was not ineffective.

The ABA's short answer to this question is that the lawyer may not divulge confidential information outside of the courtroom, beyond the reach and sanction of the judge's supervision. Its analysis of the issue provides a careful parsing of the relevant rules, but to us, as ethics lawyers who also practice in the white-collar area, the ABA's opinion rests on broader principles. While the privilege may be waived by the filing of the former client's motion alleging ineffectiveness, the attorney still has a duty of loyalty and confidentiality to his or her unhappy client.


BROTMAN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Rule of Professional Conduct 1.6 requires us to maintain the confidentiality of both our communications with, and the information we obtain from, our current and former clients. Of course, that duty is not absolute; for example, we are permitted to make disclosures when authorized by our clients in furtherance of the representation. In addition, there is a "self-defense" exception to our confidentiality obligations. Rule 1.6(c)(4) allows us to disclose privileged communications, to the extent we reasonably believe necessary, for one of three reasons: 1) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"; 2) "to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved"; or 3) "to respond to allegations in any proceeding concerning the lawyer's representation of a client."

The traditional protections of attorney-client privilege ordinarily do not apply when an appellant makes an ineffective assistance of counsel claim. In its 1999 decision in *Commonwealth v. Chmiel*, the Pennsylvania Supreme Court held that "the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue." Further, Pennsylvania's Post-Conviction Relief Act expressly provides that "when a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation as to that issue is automatically terminated."

Thus, privilege won't prevent government attorneys from eliciting formal testimony from the appellant's former counsel in response to an ineffective assistance claim, even if the former client does not want his or her former counsel to divulge information about the representation. The ABA's opinion acknowledges this, noting that when a lawyer is called as a witness he may disclose confidential information "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." However, according to the ABA opinion, before the hearing, the defense lawyer cannot submit to an interview by the government attorney, because this disclosure is not supported by the rule.

To explain this distinction, the opinion carefully examines Rule 1.6 to find the justification for the disclosure of client confidences in defense of an ineffectiveness claim. The first two sub-parts of the self-defense exception to Rule 1.6 are found to be inapplicable, as an ineffective assistance of counsel claim does not fall under the exception permitting disclosure to resolve a controversy between the lawyer and client because the controversy in an ineffective assistance claim is not between the client and the lawyer. Nor may a lawyer invoke the self-defense exception to establish a claim or defense to a criminal or civil charge against her because a habeas corpus petition is not a charge or claim that the lawyer is required to defend.

The ABA found that the key is in the language of Rule 1.6(c)(4) itself — that is, the lawyer may respond to such allegations only "to the extent that the lawyer believes reasonably necessary." Disclosure of any confidential client information outside of a judicial proceeding runs the risk that the lawyer might disclose too much information.

A prosecutor's request for information outside the court's supervision squarely implicates such a risk. Consequently, the ABA found that it would 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." Instead, if the lawyer's testimony or evidence is required, the lawyer should provide the evidence only after the court has ruled on relevance and privilege, as those rulings will limit the evidence to that necessary to resolve the habeas claim.

In *Chmiel*, the Pennsylvania Supreme Court broadly construed the scope of information that a former attorney may reveal in response to an ineffectiveness claim. In that capital case, the opinion said, the defendant claimed that trial counsel was ineffective in discouraging him from testifying in his own defense, and in failing to locate alibi witnesses. In response, the attorney testified at an evidentiary hearing on the ineffectiveness claim that the defendant had told him more than one version of the events on the night of the crime, thereby making the search for alibi witnesses more difficult, and risking suborning perjury if he allowed his client to testify. The Supreme Court held that while the attorney "might have been able to explain his dilemma using fewer details, the disclosures that did occur fell within the scope" of the client's waiver of attorney-client privilege by making the ineffectiveness claim.

The attorney's broad, but court-supervised disclosure in *Chmiel* contrasts with the facts detailed in a 2009 South Carolina Supreme Court decision in the capital case of *Binney v. State*. There, after his convicted client made a broad ineffectiveness claim in his state habeas petition, his former counsel privately met with representatives from the attorney general's office to discuss the allegations and provided them with a copy of his entire trial file. The South Carolina Supreme Court held that the attorney's action was proper because the former client's "extremely broad allegations of ineffectiveness" opened the door for disclosure of "any information" the attorney "deems necessary for the defense of his representation."

Under the ABA's opinion, the attorney in *Binney* should have withheld his former client's file from the government until a court evaluated the proper scope of the information reasonably necessary to address the specific ineffectiveness arguments made by the former client. We agree. An ineffectiveness claim is not an attack on the lawyer, but a part of our constitutional process of justice. When we view it as such, we can maintain our duty of loyalty and confidentiality, testifying within the rule, but not aligning ourselves with our former client's adversary.

*Research and writing assistance was contributed by Jennifer E. Canfield and Oleg V. Nudelman, associates with Montgomery McCracken Walker & Rhoads.* •