

NO. 42377-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

LARRY MOOREHEAD

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

The Honorable John P. Wulle

REPLY BRIEF OF PETITIONER

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A. ARGUMENT

1. MR. MOOREHEAD'S DEFENSE COUNSEL WAS INEFFECTIVE.

a. A.N.J. is one of multiple cases setting forth the legal standard by which defense counsel's performance is to be measured. The Respondent tells this court that

Moorehead cites no authority, beyond the factually inapplicable State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010), for the contention that an attorney *must* retain an expert before he can be deemed to have provided effective assistance of counsel at a SSOSA revocation hearing.

Response to Personal Restraint Petition ("RPRP") at 27. But A.N.J. was cited by the Petitioner for its legal holding and a Supreme Court holding concerning the law does not apply only to factually identical cases. Indeed, the A.N.J. Court began its decision by recognizing the fundamental right that clearly applies equally to Mr. Moorehead's case and to A.N.J.:

The right of effective assistance of counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.... The Bill of Rights is part of our founding compact. It promises *everyone* certain fundamental rights, including the right not to be put in jeopardy of the loss of life or liberty without due process of law, not to be subject to unreasonable searches and seizures, not to be induced to self-incrimination, and not to be put twice in jeopardy for the same offense. Without an attorney, these fundamental rights are often just words on paper.

(Emphasis added. Citations omitted.) 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). A.N.J. also based its relevant legal holding on the same:

We further hold that depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.

168 Wn.2d at 112.

Neither is the A.N.J. decision a fluke, or a lone voice for the proposition for which it was cited. Courts will not hesitate to find ineffective assistance of counsel when a trial attorney should have presented expert testimony but failed to do so. In United States v. Tarricone, the Court found a plausible claim of ineffective assistance which supported an evidentiary hearing when counsel failed to consult a handwriting expert to disprove that defendant's handwriting was on a pertinent document. 996 F.2d 1414 (2d Cir. 1993). Similarly, in Sims v. Livesay, the Court held that trial counsel was ineffective for failing to have bullet-hole evidence examined by an expert. 970 F.2d 1575, 1580 (6th Cir. 1992). The 9th Circuit, and the Washington Supreme Court have also held that to be constitutionally adequate, counsel "must, at a minimum, conduct a reasonable investigation enabling ... informed decisions

about how best to represent [the] client.” In re Pers. Restraint of Brett, 142 Wash.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (alteration in original) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994)); State v. Zhao, 157 Wn.2d 188, 204-05, 137 P.3d 835 (2006).

A.N.J., and all of the above-referenced cases demonstrate that competent representation entails investigating potential defenses and presenting the fact-finder with the evidence necessary to refute the State’s arguments. Here, Mr. Barrar failed to conduct meaningful investigation and consult with someone who had the expertise to help the defense understand and evaluate the numerous viable challenges to the opinions and testimony of the State’s primary witness. As a result the defense did not present the Court with available facts and arguments that would have refuted the State’s case and provided the Court with meaningful alternatives to revocation.

b. Effective assistance requires counsel to investigate all of the potential defenses so that an informed decision about strategy can be made. The Respondent repeatedly argues that Mr. Moorehead has not made a claim of ineffective assistance of counsel because he has not shown that the strategy Mr. Barrar

chose was "not legitimate." RPRP at 16, 18, 29. In fact, the

Respondent tells this Court:

Here, Mr. Barrar made *the best argument available to him*, which was that Ms. Chimenti's primary motivation in terminating Moorehead's treatment was that she had grown tired of chasing him down each month to pay his bill. *If this was her primary motivation in terminating treatment*, and the Court had been convinced that the remainder of the allegations had been trumped up, the Court would have been compelled to deny the State's motion to revoke.

(Emphasis added.) RPRP at 28. This statement demonstrates a misunderstanding of the nature of Mr. Barrar's obligation and the argument made by the Petitioner. It is contrary to the position taken by the Petitioner in the trial court¹ and is not supported by the record.

Mr. Moorehead does not suggest that Mr. Barrar provided ineffective assistance just because he argued that Mr. Moorehead could not be revoked for financial reasons. Instead, it was that he made that argument about finances *to the exclusion of other viable and better defenses*. He did not even investigate other defenses.

In A.N.J., the Court did not say "well, the defense did argue *something*, so it wasn't ineffective for him to ignore other arguments." Instead the Court held that counsel cannot properly

¹ There the Petitioner argued "This isn't about money. He hasn't been able to reduce his risk factors." Appendix E to Brief of Petitioner at 192.

advise his client about the merits of certain strategies, and cannot make a strategic choice between them, without first investigating and obtaining the expert assistance necessary to help him understand what they are. 168 Wn.2d at 109, 110.

In doing so, the A.N.J. Court was in good company. The 9th Circuit has held that a client has a right to expect that his

lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf.

Frazer v. United States, 18 F.3d 778, 785, (9th Cir. 1994), citing Thomas v. Municipal Court, 878 F.2d 285, 289 (9th Cir. 1989).

Other Federal Courts concur, explaining that while it is well settled that Strickland does not require counsel to raise every possible non-frivolous argument in representing a criminal defendant, counsel's conduct may be found constitutionally deficient in instances when counsel pursued "clearly and significantly weaker" issues in lieu of "significant and obvious" issues. Percan v. United States, 294 F.Supp.2d 505, 513-14 (S.D.N.Y. 2003).²

² See e.g., Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001); Clark v. Stinson, 214 F.3d 315, 321-22 (2d Cir. 2000); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994).

Mr. Moorehead's Petition establishes significant and important issues that would have been obvious to counsel after conducting minimal investigation (i.e., talking to the client and reviewing the treatment records maintained by the State's primary witness) and basic consultation with an expert that would have been fully funded by the Clark County Indigent Defense Coordinator. (Appendix M to Brief of Petitioner.) Mr. Barrar made the best argument he could make in the absence of minimal investigation or consultation with an expert, but far better, non-frivolous arguments would have been apparent if he performed these tasks.

Neither did Mr. Barrar make the best argument available to him. Even a perfunctory review of Ms. Chimenti's Confidential Termination Report (which was in Mr. Barrar's file and therefore easily available to him)³ shows that finances were not amongst the primary reasons for termination. Ms. Chimenti begins her Termination Report, summarizing the reasons for termination, and finances are not mentioned.⁴ Ms. Chimenti continues, explaining

³ See Appendix D to Brief of Petitioner at 48-50.

⁴ Ms. Chimenti's report begins:

the reasons for termination, and finances are not mentioned.⁵

Although Ms. Chimenti does mention finances in her timeline, she actually documents that Mr. Moorehead made a number of

The purpose of this report is to notify you that Mr. Moorehead has been terminated from our program ... Mr. Moorehead has been given significant and sufficient opportunity to benefit from sex offender specific treatment over the past 4 ½ years. He continues to engage in resistant and negative behavior demonstrated by refusal to participate in group discussions, open hostility toward group members and therapists, and a pattern that reflects negligible responsibility for his own progress both in and out of the treatment setting. While these behaviors are typical and even anticipated when a person begins treatment, it is expected that during the course of treatment, a client will be able to progress to a point that he is able to explore his issues and intimacy defects to the point where he begins to shift his interactions with members of his group, his CCO, therapist, employers, co-workers, friends and family to a place of personal responsibility and pro-social attitudes and behaviors. At this point in Mr. Moorehead's treatment, it is certainly expected that his life would reflect this shift by him having a broader support system, positive activities, goals for the future, and a mostly positive attitude in his interactions with people in his life. This is not the case. Mr. Moorehead has instead maintained a stance of blaming others for his situation, lack of progress, hostility and social isolation. He continually expresses issues from a victim stance.

Appendix D to Brief of Petitioner at 48.

⁵ Ms. Chimenti continues:

After considerable energy and efforts by this writer and program, it has become clear that Mr. Moorehead does not intend to make the positive changes necessary to fulfill the competency aspects of our program. It is well known in our agency that ours is not merely a checklist of assignments to be completed but that clients will use the information they've received, insight they've gained and greater sense of awareness of their own struggles and strengths to improve their own lives. Mr. Moorehead has been able to express much information about issues and himself through the course of his assignments and routinely presented well thought out material. However, he has demonstrated that he is either unable to unwilling to use this information to change his relationships, attitudes, and life situation. Below is a timeline of recent action that has been taken as a last attempt by this writer, our program and Clark County Corrections to provide Mr. Moorehead another opportunity to change his attitudes and become focused on helping himself become a healthy, offense free member of his community.

Appendix D to Brief of Petitioner at 48.

payments and only owed \$120 at the time of termination.

Appendix D to Brief of Petitioner at 50. She concludes by again summarizes the reasons for termination, and *does not include finances*.⁶ Finally, Ms. Chimenti even says what is “most important” to her, and it was not, as the Respondent suggests, finances:

Additionally and most importantly, it is hoped that he will make the adjustments necessary that will allow him to properly and fully participate in his own personal growth and improve the quality of his life while remaining offense free.

Appendix D to Brief of Petitioner at 50.

Had Mr. Barrar performed minimal investigation and consulted with an expert, he would have credible, admissible evidence to challenge the conclusions on which Ms. Chimenti did rely. Had he done so, Mr. Barrar would have been able to present the Court with an alternative to revocation, but he did not. Instead he pursued a clearly and significantly weaker issue that was easily overcome by the State. Given these facts, his representation was constitutionally deficient.

⁶ Ms. Chimenti states:

Mr. Moorehead is being terminated from sex offender specific treatment as it has become apparent that he cannot or will not appropriately engage and is currently unable to gain any benefit from our program. Over the course of his time in treatment, he has not mitigated any risk factors for re-offense. Should he decide to become motivated to make meaningful and significant changes in his life, it is recommended that he attend a treatment program to once again be given the opportunity to make these modifications.

c. The Respondent has provided no contrary expert testimony. The Respondent attempts to undermine the significance of the Declaration prepared by Amy Muth. RPRP at 27-28. Yet, as her Declaration indicates, Ms. Muth was independently retained to provide expert testimony, due to her considerable expertise and experience handling cases involving allegations of sexual misconduct, not to serve as an advocate for Mr. Moorehead. Appendix I to Brief of Petitioner at 1-6. Her opinions were based on legal analysis, legal training, applicable legal authority, review of the record, and understanding of the evidence presented by Petitioner. Ultimately, she based her conclusions on what a reasonably competent attorney would do, not just on how she personally would have handled the case.

Importantly, the Respondent has provided no evidence to the contrary or to rebut the opinions and conclusions offered by Ms. Muth. The Respondent has not challenged Ms. Muth's competence or expertise. Ms. Muth's evidence is uncontradicted.

2. MR. MOOREHEAD WAS PREJUDICED BY MR. BARRAR'S DEFICIENT PERFORMANCE.

Appendix D to Brief of Petitioner at 50.

The State called two witnesses at Mr. Moorehead's revocation hearing: Ms. Chimenti and Mr. Moorehead's CCO. Mr. Moorehead's CCO painted a positive picture of Mr. Moorehead and testified that he would have been okay with Mr. Moorehead, but for his termination from treatment. Appendix E to Brief of Petitioner at 167. Accordingly, revocation was based primarily and overwhelmingly on the testimony offered by Ms. Chimenti.

But Mr. Moorehead's SSOSA evaluation contained substantial evidence that would have called into question virtually of Ms. Chimenti's factual conclusions and opinions.⁷ Ms. Chimenti's treatment file contained evidence that contradicted Ms. Chimenti's testimony, analysis, subjective conclusions, and expert opinions.⁸ A publicly-funded expert available to Mr. Barrar would have bolstered the challenges to Ms. Chimenti that were already apparent from review of the SSOSA evaluation and treatment file,

⁷ See Brief of Petitioner at 11.

⁸ See Brief of Petitioner at 12-19. Additionally, the Respondent suggests that the only evidence supporting the argument that Ms. Chimenti did not perform the tests that she claimed or did not have records in her, comes from inadmissible evidence. But the Petitioner also provided Ms. Chimenti's file – he provided every page of this otherwise sensitive and confidential document for the Court to consider. These records are not in there. Additionally, despite the fact that Ms. Chimenti was previously the State's witness, the Respondent does not provide a declaration or any other evidence to rebut the argument that this admissible evidence presents.

provided overwhelmingly different conclusions and opinions, and given the Court an alternative to revocation.⁹

The Respondent counters:

What Mr. Moorehead's argument entirely ignores is that he must demonstrate trial court likely would have kept him on SSOSA *after four and a half years of very little progress and repeated violations of his conditions*, simply by finding a new treatment provider willing to take him as a client.

...

The transcript of the hearing demonstrates that it is *extremely unlikely, if not totally out of the realm of possibility*, this would have occurred. The trial court noted that defendants who are awarded the privilege of SSOSA are *typically afforded no tolerance* for violations.

(Emphasis added.) RPRP at 28. This again misstates the law and the Petitioner's argument.

The Court, at Mr. Moorehead's revocation hearing, had total discretion to either impose sanctions or revoke.¹⁰ If, as the Respondent suggests, the Court would have refused to exercise its discretion and instead adopted a "no tolerance" policy, this would have been an abuse of discretion in and of itself, and therefore subject to challenge. An abuse of discretion occurs when the Court fails or refuses to exercise its discretion. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); State v. Garcia-

⁹ See Brief of Petitioner at 19-25.

¹⁰ RCW 9.94A.670(11); State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972).

Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997); James v. Jacobsen, 6 F.3d 233, 239 (4th Cir. 1993). The Petitioner only needed to show that there was a reasonable probability that, but for counsels errors, the result would likely have been different. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). A “reasonable probability” need only be sufficient to “undermine confidence in the outcome.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Mr. Moorehead has met his burden.

3. THIS COURT SHOULD NOT DECLINE TO CONSIDER MR. MOOREHEAD’S DECLARATION.

The State’s description of the facts relevant to its argument for dismissal of Mr. Moorehead’s Personal Restraint Petition is incomplete and inaccurate. The State told this Court:

In preparation of his petition, Mr. Moorehead executed a declaration. See Defendant’s Appendix K. ...

In response to Moorehead’s petition, which relies in part on claims made by Moorehead in his declaration, the State asked attorney Jeff Barrar if he would be willing to review the declaration and provide a declaration confirming or denying the claims made by Moorehead. He agreed that he would do so. At that time the State moved for an extension of time to file its response so that Mr. Barrar would have an opportunity to provide a declaration. On February 14, 2012 Kim Gordon sent a letter to Mr. Barrar and the State claiming that Mr. Barrar’s proposed declaration, even though it would be specifically limited to the “matters asserted in the PRP,” would violated ABA Formal Opinion 10-456. See State’s Appendix B. Gordon...counsel for the State

nevertheless emailed Gordon on February 14, 2012 asking if her client would be willing to execute a limited waiver so that Mr. Barrar could answer the claims made in the petition. The State agreed to stipulate that the declaration by Mr. Barrar would be released only to her initially and then, after a period of five days, she would either have to release the declaration to the State or file a formal objection to the declaration and ask this Court to conduct an in-camera review to determine whether the information should be disclosed to the State. Gordon and Moorehead said "no."

RPRP at 12. The State attaches one e-mail to corroborate its claim. See Appendix B to Response to Personal Restraint Petition.

As the defense avers in the Declaration of Counsel, attached to this Reply as Appendix A, this e-mail was sent to counsel for the Respondent, and to Jeff Barrar. However, this was one of *eight* e-mails discussing the matter. Those the e-mails are also included in Appendix A. In these e-mails, the defense twice explained that it was not just the ABA's Model Rules that placed limits on a lawyer's disclosure of confidential or privileged communications. Instead, Washington's Rules of Professional Conduct seem to match, if not exceed the ABA's restrictions. The defense discussed, in detail, how the Rules of Appellate Procedures applicable to Personal Restraint Petitions provided for discovery. Finally, the defense repeatedly offered that, if the State followed a process (either now or after such time as an evidentiary

hearing is granted) that provided the protections contemplated in the RPC's, a declaration from his former attorney would be appropriate and unobjectionable. The State never attempted to obtain a Court order, but is instead arguing that Mr. Moorehead's Personal Restraint Petition should be dismissed because he did not assume the burden of helping the Respondent investigate its case.

a. When do the Rules of Appellate Procedure permit parties to a personal restraint petition to compel discovery? This case highlights a frustration long faced by parties to Personal Restraint Petitions: How to compel discovery?

As the Washington State Supreme Court explained:

Gentry [the defendant] claims to have a constitutional right to discovery, apparently tied to his rights to counsel and to due process. He is mistaken on both counts. ... From a due process standpoint, prisoners seeking post-conviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief. ... As the Ninth Circuit recently held, "there simply is not federal right, constitutional or otherwise, to discovery in habeas proceedings as a general matter. ...

There is currently no rule for discovery at the appellate court level, however, either to further support the allegations in a PRP as filed or to obtain evidence to support new claims. ...

(Citations omitted.) In re Personal Restraint of Gentry, 137 Wn.2d 378, 389-91, 972 P.2d 1250 (1999)

Granted, RAP 16.26, adopted after Mr. Gentry's Personal Restraint Petition was filed, gives both parties to *capital cases* the means to compel discovery – the defense is able to seek compelled discovery before a personal restraint petition is filed and the state is able to seek compelled discovery after filing. See Gentry, 137 Wn.2d at note 5. However, even in cases involving the ultimate penalty, the Courts have carefully limited the parties' ability to compel discovery. RAP 16.26 was specifically limited to capital cases.

Similarly, the legislature has given prisoners a means, post-conviction, to compel DNA testing. RCW 10.73.170 (A copy of this statute is attached as Appendix B.) However, access to this evidence is also carefully limited so that this statute is not a mechanism by which parties may obtain discovery post-conviction.

In non-capital cases, such as the instant case, the Court has expressly provided for discovery after a case is remanded for an evidentiary hearing, and not before. At that time, RAP 16.2 provides in relevant part:

If the appellate court transfers the petition to a superior court, the transfer will be to the superior court for the county in which the decision was made resulting in the restraint of petitioner ... The parties, on motion and for good cause shown, will be granted reasonable pretrial discovery.

Until a case is remanded for an evidentiary hearing, the Court of Appeals has only three options: (1) if the issues presented are frivolous, the Chief Judge will dismiss the petition; (2) if the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits; (3) if the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. RAP 16.11(b).

This case is different from many post-conviction cases because the Respondent is most frustrated by the limitations placed upon compelling discovery. Many Petitioners would appreciate and make good use of the opportunity to compel evidence post-conviction and prior to an evidentiary hearing (from former jurors, witnesses, attorneys, experts, crime laboratories, law-enforcement agencies, and prosecutor offices among others.) Should this Court wish to revisit the set limits on post-conviction discovery, the Petitioner happily urges expansion of its availability.

But until such time, the Court should not penalize the Petitioner for the Respondent's frustration with available processes.

b. When do the Rules of Professional Conduct permit defense counsel to disclose client confidences? At issue in this PRP is whether the filing of a claim of ineffective assistance of counsel, without more, necessarily waives the confidentiality of communication with former counsel. The State has argued:

Moorehead's claim that Barrar may not answer the specific questions made by Moorehead absent a waiver by him is absurd on its face.

RPRP at 19.

Even though the ABA Model Rules do not control in Washington, it is helpful to begin analysis of this issue by reviewing them for two reasons: (1) the ABA recently issued a formal opinion on the matter,¹¹ and (2) Washington authorities governing attorney-client privilege and confidential communications appear to provide *more* protection for clients than the ABA Model Rules.¹²

¹¹ A copy of the ABA Formal Opinion was provided to the State and attached in Appendix B to the RPRP and for convenience is attached as Appendix C. Otherwise, it would be quoted extensively herein.

¹² The Preamble and Scope of the Rules of Professional Conduct for Washington explains in pertinent part:

Attorneys licensed to practice in the State of Washington must be cognizant of the protections afforded attorney-client communications by RCW 5.60.060. RCW 5.60.06 provides in pertinent part:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

In discussing this statute, Karl Tegland explains that by its terms, the statute restricts the ability to question an attorney about communications with a client. 5A Karl Tegland, Courtroom Handbook on Washington Evidence at 277 (2008-09 Edition). He also explains:

[23] The structure of these Rules generally parallels the structure of the American Bar Association's Model Rules of Professional Conduct. The exceptions to this approach are Rule 1.15A, which varies substantially from Model Rule 1.15, and Rules 1.15B and 5.8, neither of which is found in the Model Rules. In other cases, when a provision has been wholly deleted from the counterpart Model Rule, the deletion is signaled by the phrase "Reserved." When a provision has been added, it is generally appended at the end of the Rule or the paragraph in which the variation appears. **Whenever the text of a Comment varies materially from the text of its counterpart in the Model Rules, the alteration is signaled by the phrase "Washington revision."** Comments that have no counterpart in the Model Rules are compiled at the end of each Comment section under the heading "Additional Washington Comment(s)" and are consecutively numbered. As used herein, the term "former Washington RPC" refers to Washington's Rules of Professional Conduct (adopted effective September 1, 1985, with amendments through September 1, 2003). The term "Model Rule(s)" refers to the 2004 Edition of the American Bar Association's Model Rules of Professional Conduct.

(Emphasis added.)

the privilege may be asserted when the attorney or client is called as a nonparty witness, or when privileged communications are sought by means of discovery in an action involving other parties.

Id., at 278.

RPC 1.6 provides “considerably” broader protections than the statute. Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 534, 688 P.2d 506 (1984).¹³ This is especially true after the RPC’s were modified in 2006.

Prior to 2006, RPC 1.6 prohibited lawyers from revealing “confidences or secrets relating to representation of a client” The term “confidences” did not provide protections beyond that afforded by RCW 5.60.060 because that term was defined as “information protected by the attorney-client privilege under applicable law.” State v. Sheppard, 52 Wn. App. 707, 714, 763 P.2d 1232 (1988). But “secrets” were defined as

other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Sheppard, 52 Wn. App. at 714.

¹³ RPC 1.9 also restricts attorneys use of client confidences as it provides that lawyers for former clients must not “use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require” RPC 1.9(c)(1).

After the Sheppard decision, the rule materially changed, so that RPC 1.6(a) now provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implied authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

The phrase "information relating to the representation of a client" is substantially similar to the phrase found in the definition of "secrets" ("information gained in the professional relationship") under former RPC 1.6. Accordingly, questions about RPC 1.6's protections no longer turn on an analysis of whether the information is a "confidence." Neither does the rule now require that the information is "gained in the professional relationship" and that either the client has asked for confidentiality or that disclosure would be embarrassing or detrimental. Rather, the sole question is whether the information "relates to the representation of a client."

Paragraph (b) to RPC 1.6 lists seven exceptions to the limitations on lawyers revealing information relating to the representation of a client. These include the prevention of "reasonably certain death or substantial bodily harm", prevention of commission of a crime by the client, mitigation of "substantial injury to the financial interests or property of another", securing legal advice about lawyer's compliance with the Rules, and revealing a

breach of fiduciary responsibility. RPC 1.6(b) (1-4, 7). None of these exceptions apply here. The sixth exception: “compliance with a court order” is one contemplated by the RAP’s governing Personal Restraint Petitions, as RAP 16.12 permits a court, following remand for an evidentiary hearing, to issue orders governing discovery. Mr. Moorehead’s case has not yet been remanded and the Respondent did not attempt to seek any order from this Court. An appropriate order, however, would have given the Respondent access to the evidence it desires.

The final exception is found in RPC 1.6(b)(5) which provides:

A lawyer, to the extent the lawyer reasonably believes necessary: ... (5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, **or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.**

(Emphasis added.) This exception is discussed in Comment 13 to RPC 1.6 with language strikingly similar to that used by the ABA discussion:

A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client

about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

Comment 23 similarly provides:

The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A 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 to make other arrangements minimizing the risk of avoidable disclosure.

Even where our RPC's differ from the ABA, they do so in a way that seems to provide *more* protection for clients, not less. As

Comment 24 to RPC 1.6 explains:

Washington has not adopted that portion of Model Rule 1.69(b) permitting a lawyer to reveal information to the presentation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. *Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court.*

(Emphasis added.)

As a Washington lawyer, Mr. Barrar was obliged to comply with the RCW's and RPC's governing confidences and privileged information. When faced with a request to provide confidential information he was required to decline to provide it in the absence of a court order, assert non-frivolous objections to any order received, and ensure that a court would make the determination about the necessity of revealing confidences.

c. Is it proper to give the Respondent the benefit of a "missing witness" type of inference? There are numerous problems with the Respondent's argument that:

This Court needn't give any consideration to Moorehead's self-serving declaration because the logical inference is that the claims he makes are untrue. Under the "missing witness" or "empty chair" doctrine, where the defense fails to produce a logical witness it is proper to draw the inference that the witness would have provided testimony that is unfavorable to him. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); quoting *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1986); *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 346, 109 P.2d 542 (1941). Mr. Barrar is unquestionably within the sole control of Moorehead (see Respondent's Appendices B and C.)

RPRP at 20-21. The first problem with the argument was that the Respondent does not cite any authority for the proposition that an inference, analogous to the "missing witness instruction" is applicable to this post-conviction civil case. All of the cases cited

by the Respondent discuss trial-level instructions to the jury. The State seeks an unprecedented inference in an incomparable circumstance.

The next three problems all relate directly to the language of WPIC 5.20, which sets forth the requirements for the “missing witness instruction”:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person’s testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

1. The witness is within the control of, or peculiarly available to, that party;
2. The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
3. As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
4. There is no satisfactory explanation of why the party did not call the person as a witness; and
5. The inference is reasonable in light of all of the circumstances.

WPIC 5.20. The Washington Supreme Court has found that it is error to give this instruction unless there is evidence supporting each of these five factors. See *e.g.*, State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). Accordingly, the NOTE ON USE that accompanies WPIC 5.20 provides in pertinent part:

This instruction should be used sparingly. It should be given only when the circumstances meet the requirements outlined in the Comment to this instruction.

i. Problem 1. A “missing witness” inference is not appropriate because Mr. Barrar is not within Mr. Moorehead’s sole control and is not “peculiarly available” to the defense. As indicated in the attached Declaration of Counsel, Mr. Barrar did not talk to the Petitioner about the circumstances of the case either. Neither did he ask for authority to disclose any information to the Respondent. Mr. Moorehead knows what he recalls about the conversation, but he has no idea what Mr. Barrar will offer. And confidentiality under the RPC’s does not turn on whether the information is objectively helpful or harmful to the client. Moreover, the State could have sought an order to get access to Mr. Barrar, as that would have satisfied RPC 1.6(b)(5). It chooses not to and is instead blaming the Petitioner.¹⁴

¹⁴ Indeed, if Mr. Moorehead completely waived privilege by filing his own Declaration, then surely the Court would have given the Respondent what it wanted – an Order giving it access to Mr. Barrar.

The Respondent tells this Court that Mr. Barrar was “intimidated,”¹⁵ the Respondent was “actively thwarted” by “Moorehead”, and “Mr. Barrar has provided *no facts*, thanks to the obstruction of Mr. Moorehead.” RPRP at 12, 19, 21. This invective is the unwarranted result of Respondent now shifting the burden by demanding that the Petitioner also do its work, or face serious consequences. This attack is also misguided in that it ignores the demands of the RPC. The Rules governing our conduct as lawyers placed limits on the Respondent’s access to Mr. Barrar, not “obstruction” by the Petitioner. Mr. Barrar’s obligation was to require a court’s order, assert all non frivolous claims that the information sought is protected, and even discuss the possibility of appeal with the client.¹⁶

ii. Problem 2. The proponent of the “instruction” (herein the Respondent) has not shown that it is naturally within Mr.

¹⁵ Black’s Law Dictionary defines “Intimidation” as “[u]nlawful coercion; extortion; duress; putting in fear.” Black’s Law Dictionary, Abridged Sixth Edition, at 569 (West Publishing, 1992). This was an e-mail quoting from applicable authority, discussing rules applicable to all Washington attorneys, and sent to both Mr. Barrar and counsel for the Respondent. This was in no way an attempt at intimidation. Neither does the Respondent provide evidence of intimidation or even fear. At most, Mr. Barrar’s voicemail, transcribed and attached as Appendix C to the Response to Personal Restraint Petition, evidences his agreement that the RPC’s impose upon him the limits described in this brief.

¹⁶ If anything, the reminder was prudent, as RPC 8.3 also encourages lawyers to self-regulate by reporting one another to the “appropriate professional authority.”

Moorehead's interest to call Mr. Barrar at this stage of the proceeding. Indeed, Mr. Moorehead does not know what Mr. Barrar would say at this stage either.

iii. Problem 3. There is a satisfactory explanation as to why Mr. Barrar is not available. If "some privilege applies so that the witness's testimony is protected, then the inference is not proper." State v. Blair, 117 Wn.2d, 479, 489, 816 P.2d 718 (1991); State v. Charlton, 80 Wn.2d 657, 585 P.2d 142 (1978); State v. Torres, 16 Wn. App. 254, 259-61, 554 P.2d 1069 (1976); United States v. Sea, 859 F.2d 1067 (2nd Cir. 1988), *cert. denied.*, 489 U.S. 1089, 109 S.Ct. 1555, 103 L.Ed.2d 858 (1989). As the Washington Supreme Court further explained:

The prosecutor was unquestionably aware of this statutory privilege since it is an elementary rule of evidence. Presumably, he, like most prosecutors, was acquainted with existing and long-standing case law in which we have criticized various practices by which the jury's attention is focused upon the fact that the defendant is exercising the marital privilege. The reasoning which sustains both the prohibition against comment upon the constitutional privilege, as well as this statutory privilege, is that the state cannot and will not be permitted to put forward and inference of guilt, which necessarily flows from an imputation that the accused has suppressed or is withholding evidence, when by statute or constitution he simply is not compelled to produce the evidence.

Charlton, 90 Wash.2d at 661-62, citing State v. Tanner, supra, 54 Wash.2d 535, 538, 341 P.2d 869 (1959).

B. CONCLUSION

For the foregoing reasons, this Court either remand for an evidentiary hearing or reverse the trial court's order revoking his SSOSA, and remand the matter to the Superior Court for resentencing.

Respectfully submitted this 26th day of April, 2011.

A handwritten signature in black ink, appearing to read "Kimberly N. Gordon". The signature is written in a cursive style with a horizontal line underneath.

Kimberly N. Gordon – WSBA #25401
Attorney for Petitioner Larry Moorehead

APPENDIX A

1 Opinion 10-456. See State's Appendix B. Gordon...counsel for the State
2 nevertheless emailed Gordon on February 14, 2012 asking if her client would
3 be willing to execute a limited waiver so that Mr. Barrar could answer the
4 claims made in the petition. The State agreed to stipulate that the declaration
5 by Mr. Barrar would be released only to her initially and then, after a period
6 of five days, she would either have to release the declaration to the State or
7 file a formal objection to the declaration and ask this Court to conduct an in-
8 camera review to determine whether the information should be disclosed to
9 the State. Gordon and Moorehead said "no."

10 Response to Personal Restraint Petition at 12.

- 11 3. Neither Mr. Moorehead nor I said "no" as the Respondent quotes. I provided a
12 detailed explanation of the applicable rules, procedures and difficulties associated
13 with the Respondent's request. I declare that the attached eight emails are true and
14 correct and complete to the best of my information and belief. These are the best
15 record of my communications with the Respondent and Mr. Barrar.
- 16 4. The Respondent also suggests that Mr. Moorehead or I somehow knew what Mr.
17 Barrar would say at this stage of the proceedings. Mr. Moorehead and I know what
18 he recalls about his conversations with Mr. Barrar. Neither of us know what
19 information he would provided at this date. This is because Mr. Barrar did not agree
20 to give us his information either.
- 21 5. I contacted Mr. Barrar on June 22, 2011, to let him know that I was representing Mr.
22 Moorehead and was requesting a copy of his file. Mr. Barrar indicated that the
23 revocation hearing was never transcribed and that there "was not much in the file."
24 However, he agreed to provide his file to me. He did. Because Mr. Moorehead was
25 then able to make an informed decision about the extent information being released,
26 obtained consent for release of that confidential information and provided that file to
the Court and Respondent.

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6. After then reviewing Mr. Barrar's record, conducting basic and minimal investigation into the issues and consulting with an expert, I did wish to talk to Mr. Barrar again to find out what he would have to say about the points I was raising.

7. I left a voicemail message for Mr. Barrar on October 11, 2011. I did not receive a call back.

8. I called Mr. Barrar and reached him on October 12, 2011. He indicated he would pull the file and call me back. He did not.

9. I included Mr. Barrar and the Respondent on the e-mails that are attached to this Declaration.

10. Mr. Barrar was also sent the Respondent's e-mails, in which she casts aspersions on the Petitioner's motive and praises Mr. Barrar.

11. I did not receive any response from Mr. Barrar.

12. As the Response indicates, Mr. Barrar's only contact, at that point, was with the Respondent.

I declare under penalty of perjury that the foregoing is true and correct and signed this 26th day of April, 2012; signed at Seattle, Washington.


KIMBERLY GORDON, WSBA #25401

Kimberly Gordon

From: Kimberly N. Gordon [kim@gordonsaunderslaw.com]
Sent: Tuesday, March 13, 2012 9:54 AM
To: 'Cruser, Anne'
Cc: 'Ian Saling'; 'Casey, Jennifer'; 'jeff@vancouverdefenders.com'
Subject: RE: Larry Moorehead PRP

Ms. Cruser,

I was finally able to speak to Mr. Moorehead this morning. Apparently, he was transferred to another facility and that delayed his receipt of my correspondence and his ability to contact me. I did want to confirm that he is declining to waive his rights to confidential and privileged communications with Mr. Berrar until and unless it becomes necessary for those rights to be relinquished. He does agree with my analysis it would be necessary if the Court of Appeals determines that his PRP is not frivolous and cannot be decided solely on the record or on undisputed facts. At that time he would be willing to cooperate with the appropriate procedures in order to make that happen.

Very Truly Yours,

Kim Gordon
Counsel for Mr. Moorehead

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From: Kimberly N. Gordon [mailto:kim@gordonsaunderslaw.com]
Sent: Wednesday, February 15, 2012 1:28 PM
To: 'Cruser, Anne'; 'Casey, Jennifer'; 'jeff@vancouverdefenders.com'
Cc: 'Ian Saling'
Subject: RE: Larry Moorehead PRP

I took some time last night to look again that the Rules of Appellate Procedure governing PRP's and cannot find any authority for what you propose. In fact, my reading of the Rules suggests that you are trying to accomplish something that is specifically not provided for at this stage of the proceedings.

Rap 16.7 requires a Petitioner to include a "Statement of (i) facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations." No comparable rule requires or even asks the Respondent to provide evidence beyond what is found in the record below. Indeed, RAP 16.9 governs the State's Response and says that you must respond to the allegations, state the authority justifying Mr. Moorehead's restraint, and include a copy of any writing justifying the restraint. The RAP says that "[i]f an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those

parts of the record that are relevant.” (Emphasis added.) The RAP also says that you should “identify in the response all material disputed questions of fact.” But the Rules don’t contemplate that you should or would need to do anything further. And I am not aware of any case involving a claim of ineffective assistance of counsel where the Petitioner has prevailed based solely on the appellate court pleadings where the State disputed facts but did not include evidence from trial counsel in the Response. Likewise, in reviewing the Court’s instructions to the State as the Respondent in this PRP, it clearly does not require or even suggest that the State provide information beyond what may be contained within a proceeding that has already occurred.

After the PRP is filed and briefed, the appellate court has three options: (1) decide the issues presented are frivolous and dismiss the petition; (2) decide the issues are not frivolous and can be determined solely on the record and then refer the petition to a panel of judges for a decision on the merits; or (3) if the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determine on the merits or for a reference hearing. RAP 16.11(b). Clearly you think that this process is inefficient, but it is the process that has been established by the Court and not me.

The RAP’s also specifically provide for the exchange of discovery – but it is after a case is remanded for an evidentiary hearing and not before. At that juncture, “[t]he parties, on motion and for good cause shown, will be granted reasonable pretrial discovery. Each party has the right to subpoena witnesses.” RAP 16.12. Again, perhaps it is more efficient to have an evidentiary hearing in the Court of Appeals, but the RAP’s have not provided for it. Moreover, conducting a fact-finding on disputed facts by way of battling Declarations results in a PRP process that would violate my client’s right to be present and confront witnesses – something that is specifically provided for in RAP 16.12. As a result I think that the RAP’s provide for this process in part to specifically comply with the requirements of Due Process.

I want to make it clear that Mr. Moorehead understands that, because he has alleged ineffective assistance of counsel, that those claims will result in a waiver of the attorney client privilege if the Court of Appeals decides that any of his claims have sufficient merit to warrant an evidentiary hearing. He is not being uncooperative by failing to agree to a process that subverts the RPCS, RAPs and the Court of Appeal’s Order in this case. He is not being uncooperative by maintaining his right to confidential and privileged communications with his trial counsel until such time as it becomes necessary for those rights to be relinquished. Rather, he is specifically saying that I will cooperate and understand this evidence will be necessary if there is an evidentiary hearing.

Neither am I persuaded by the threat to argue that you should be granted something akin to a Missing Witness Instruction. Such an argument is analogous to you saying in trial “Well, I didn’t subpoena the witness but they didn’t voluntarily come so please give me the inference.” The Missing Witness Instruction is applicable when a witness is in the control of or peculiarly available to the party. Mr. Barrar will be available to you at the appropriate time and Mr. Moorehead does not intend to do anything to stop that.

I cannot now give you a definitive answer to your request as Mr. Moorehead is in custody and I have to wait until I have an opportunity to talk to him about what you propose. But I did want to share my thoughts with you so that you understand what I will be advising him before he makes a decision.

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From: Cruser, Anne [mailto:Anne.Cruser@clark.wa.gov]
Sent: Tuesday, February 14, 2012 3:40 PM
To: Kimberly N. Gordon; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: Ian Saling
Subject: RE: Larry Moorehead PRP

I reiterate the question I proposed: Are you willing to have your client sign a limited waiver so that Mr. Barrar can answer the assertions made in the petition? Mr. Barrar has a copy of the petition so there is no question about what information he would be addressing. As an officer of the court, it seems he can be trusted to provide only the information allowed by the waiver.

If you would like to receive that information prior to disclosure to the State, I have no objection to that. I would agree to a stipulation whereby you would have five days to either release it to me or file a formal objection to the declaration in the Court of Appeals and ask that the Court of Appeals conduct an in-camera review to determine whether the information should be disclosed to the State.

Absent your cooperation, I will argue the missing witness inference and ask the Court to assume that Mr. Barrar's response would have been unfavorable to your client. A reference hearing does not constitute cooperation, in my view. A reference hearing is not a small deal, and would waste valuable judicial resources. I would not stipulate to a reference hearing. I would, however, stipulate to the procedure outlined in paragraph 2, above.

Please advise the manner in which you plan to assist the Court in providing relevant information.

Anne M. Cruser
Deputy Prosecuting Attorney
Appeal Division
Clark County Prosecuting Attorney's Office

From: Kimberly N. Gordon [mailto:kim@gordonsaunderslaw.com]
Sent: Tuesday, February 14, 2012 3:31 PM
To: Cruser, Anne; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: 'Ian Saling'
Subject: RE: Larry Moorehead PRP

Comment 13 to Washington's RPC 1.6 advises that attorneys should resist requests to provide confidential or privileged information unless ordered to do so by the Court. Comment 14 says "If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or

other persons having a need to know and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." Comment 24 also emphasizes the need for judicial resolution.

The ABA Opinion is helpful because much of the RPC 1.6 language is similar to the Model Rules. You are right in that the Model Rules don't apply here, but since the rules are similar and since the comments to Washington's RPC's suggest to me that the rules applicable to this circumstance are even more stringent than the Model Rules, I thought it would be useful to see what the ABA suggests – as a floor and not a ceiling. In that regard, I found the ABA Opinion seems helpful in suggesting how such situations are handled.

Reviewing all of these, I concluded that this meant that Washington attorneys are not permitted to disclose confidential information absent a Court order. That order should be limited to permitting disclosure of only those communications that are relevant and necessary to resolution of the specific allegations raised in the PRP. Then the question is – what is and what is not necessary? Reasonable minds might disagree. It seems to me that there are two ways to handle this. One would be to have an evidentiary hearing in which questions can be asked and objections made prior to answers being provided. If there is any question about whether the answer includes information that is not relevant or necessary, the answers could also be provided *in camera* prior to the Court making a ruling. A second way would be to have Mr. Barrar provide his proposed declaration to the Petitioner before release to any other party. It could very well be that the Petitioner agrees with Mr. Barrar's determination about what is relevant and necessary. It could be that the Petitioner disagrees, in which case he could let Mr. Barrar know about his concerns or raise objections with the Court (*in camera*) and the Court can decide. Given this, perhaps it is possible to get this done while the case is in the Court of Appeals. Otherwise, if Mr. Barrar's information is really pertinent to a decision on the merits of the PRP (and it may be), then it seems to me that this is why Courts order evidentiary hearings on PRPs.

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From: Cruser, Anne [mailto:Anne.Cruser@clark.wa.gov]
Sent: Tuesday, February 14, 2012 2:49 PM
To: Kimberly N. Gordon; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: Ian Saling
Subject: RE: Larry Moorehead PRP

Ms. Gordon:

What "procedure" by "other prosecutors" are you referring to? Please be specific. Do you mean that other prosecutors simply stipulate to the truth of the defendant's claims without question? If so, I have trouble believing this. In any event, this is, in fact, for Mr. Barrar to decide. The ABA opinion is not binding on him, and you well know that. The purpose of your email was to subtly (or not so subtly) suggest to him that your client will file a bar complaint against him if he provides any relevant information in this PRP.

If you have a "procedure" to propose, then propose it. If you don't have a proposal, then my comment below stands: Your email is improper.

Anne M. Cruser
Deputy Prosecuting Attorney
Appeal Division
Clark County Prosecuting Attorney's Office

From: Kimberly N. Gordon [mailto:kim@gordonsaunderslaw.com]
Sent: Tuesday, February 14, 2012 2:43 PM
To: Cruser, Anne; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: 'Ian Saling'
Subject: RE: Larry Moorehead PRP

To the contrary. What the ABA and the RPC's say is that it is not the attorney's place to decide. I'm not opposed to the idea of him giving information and I made that clear in my e-mail. Rather, I think that there are procedures that we have to follow in order to make that happen. These are procedures that are already followed by other prosecutors and cases still get litigated. It should be no different here.

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From: Cruser, Anne [mailto:Anne.Cruser@clark.wa.gov]
Sent: Tuesday, February 14, 2012 2:38 PM
To: Kimberly N. Gordon; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: Ian Saling
Subject: RE: Larry Moorehead PRP

Ms. Gordon:

This email seems highly inappropriate. Mr. Barrar is a licensed attorney with nearly 24 years of experience. He is capable of determining, for himself, the degree to which he can offer information relevant to this personal restraint petition. Your email attempts to coerce him from any involvement. This is not a proper function for you to perform as counsel in this personal restraint petition. I will respect any decision Mr. Barrar makes regarding his involvement.

Anne M. Cruser
Deputy Prosecuting Attorney
Appeal Division
Clark County Prosecuting Attorney's Office

From: Kimberly N. Gordon [mailto:kim@gordonsaunderslaw.com]
Sent: Tuesday, February 14, 2012 2:01 PM
To: Cruser, Anne; Casey, Jennifer; jeff@vancouverdefenders.com
Cc: 'Ian Saling'
Subject: Larry Moorehead PRP

Dear counsel;

As you know, I am the attorney representing Mr. Moorehead in his Personal Restraint Petition, and the Personal Restraint Petition includes a claim of ineffective representation of counsel. It is my understanding that the prosecution is seeking a Declaration from Mr. Barrar about matters asserted in the PRP. However, neither Mr. Moorehead nor I have received requests, by Mr. Barrar, to consent to his release of any privileged or confidential information. Accordingly, I am writing to express my understanding of the current state of the law and the Rules of Professional Conduct, as they relate to such a request. I expect that if other counsel (other than those cc'd on this correspondence) is participating in seeking confidential or privileged information, that this correspondence will be shared with them. Certainly, it is not my intent to interfere with the Court's ability to litigate Mr. Moorehead's PRP or to obtain relevant and necessary evidence. Rather, it is incumbent upon all of us to make sure that Mr. Moorehead's PRP is litigated in a manner that is procedurally appropriate and consistent with our ethical responsibilities.

In that regard, please consider that requests such as that which Mr. Barrar is considering, were considered in July of 2010 by the American Bar Association and in a Formal Opinion. In doing so, the ABA concluded:

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

I have enclosed a copy of the ABA Opinion, so that it is convenient for you to review.

The Opinion further explains:

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

(Emphasis added).

The Opinion also addresses whether disclosure would be justified "to establish a defense to a criminal charge or civil claim against the lawyer" and concluded that a "defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend."

The Opinion cautions lawyers to “take steps to limit ‘access to the information to the tribunal or other persons having a need to know it’ and to seek ‘appropriate protective orders or other arrangements ... to the fullest extent practicable.’”

Finally, the Opinion concludes: “If the lawyer’s evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant’s claim.”

Washington’s Rules of Professional Conduct seem to be in accord with the analysis discussed by the ABA Opinion. For instance, one comment provides:

The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation “should not be carelessly invoked.” *In re Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A 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 to make other arrangements minimizing the risk of avoidable disclosure.

Even where our RPC’s differ, they do so in way that seems to provide more protection for clients, not less, as comment 24 to RPC 1.6 explains:

Washington has not adopted that portion of Model Rule 1.6(b) permitting a lawyer to reveal information related to the presentation to comply with “other law.” Washington’s omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by “other law,” even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client’s lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client’s interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court.

Please feel free to contact me if you would like to discuss this matter further. Once again, it is not my intent to prevent the Court from receiving relevant facts necessary to a resolution of legal facts being litigated in Mr. Moorehead’s PRP. However, I am concerned about making sure that this is accomplished in a way that is consistent with our obligations as lawyers.

Very Truly Yours,

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APPENDIX B

RCW 10.73.170
DNA testing requests.

(1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall:

(a) State that:

(i) The court ruled that DNA testing did not meet acceptable scientific standards; or

(ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and

(c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

[2005 c 5 § 1; 2003 c 100 § 1; 2001 c 301 § 1; 2000 c 92 § 1.]

Notes:

Effective date -- 2005 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 9, 2005]." [2005 c 5 § 2.]

Construction -- 2001 c 301: "Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision." [2001 c 301 § 2.]

Report on DNA testing -- 2000 c 92: "By December 1, 2001, the office of public defense shall prepare a report detailing the following: (1) The number of postconviction DNA test requests approved by the respective prosecutor; (2) the number of postconviction DNA test requests denied by the respective prosecutor and a summary of the basis for the denials; (3) the number of appeals for postconviction DNA testing approved by the attorney general's office; (4) the number of appeals for postconviction DNA testing denied by the attorney general's office and a summary of the basis for the denials; and (5) a summary of the results of the postconviction DNA tests conducted pursuant to RCW 10.73.170 (2) and (3). The report shall also provide an estimate of the number of persons convicted of crimes where DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or where DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [2000 c 92 § 2.]

Intent -- 2000 c 92: "Nothing in chapter 92, Laws of 2000 is intended to create a legal right or cause of action. Nothing in chapter 92, Laws of 2000 is intended to deny or alter any existing legal right or cause of action. Nothing in chapter 92, Laws of 2000 should be interpreted to deny postconviction DNA testing requests

under existing law by convicted and incarcerated persons who were sentenced to confinement for a term less than life or the death penalty." [2000 c 92 § 4.]

APPENDIX C

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456

July 14, 2010

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

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

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

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

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

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

² 466 U.S. 668 (1984).

³ *Id.* at 694.

⁴ *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

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

⁶ See, e.g., Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 *HOFSTRA L. REV.* 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, *CHAMPION*, Feb. 2009, at 14.

⁷ Rule 1.6 cmt. 3. See, e.g., *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when,

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

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

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

under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally prohibited by the disciplinary rules," *id.* at 265 n.5).

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

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

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

extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding.

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

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

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer

explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

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

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

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

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

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

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

¹⁷ Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 *HOFSTRA L. REV.* 783, 810-11 (1977).

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

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

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

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

Permitting disclosure of client confidential information outside court-supervised proceedings

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

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

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

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

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

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

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

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

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

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

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

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

²⁹ *See* Rule 1.6 cmt. 14.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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