

# THE DEFENSE ATTORNEY'S ETHICAL RESPONSE TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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## Preface

Every Georgia Constitution since 1789 has declared that no one in the State of Georgia should ever be prosecuted without having the “privilege and benefit of counsel.” In 1873 Georgia Supreme Court Justice Trippe wrote

The constitutional guaranty that every person charged with an offense against the law shall have the privilege and benefit of counsel should be strictly guarded and preserved. So deeply grafted in our practice has this great right become that none are so low or so poor that they may not rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation.

Martin v. State, 51 Ga.567, 568 (1973)

The Indigent Defense Act of 2003 completed the constitutional mandate referenced by Justice Trippe by creating Georgia’s first state wide public defender system. The Mission of the Georgia Public Defender Standards Council to ensure, independently of political considerations or private interests, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003; to provide all such legal services in a cost efficient manner; and to conduct that representation in such a way that the criminal justice system operates effectively to achieve justice.

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# **The Defense Attorney's Ethical Response To Ineffective Assistance of Counsel Claims**

## **Introduction**

Every lawyer who participates in the defense of criminal cases will eventually have to deal with the allegation that he failed to provide effective assistance of counsel. The usual, and understandably normal reactions of the lawyer against whom such a allegation is made are embarrassment, disappointment, outrage, and anger. This range of visceral response does not necessarily come in this order of emotional venting. However, after the initial feelings of outrage, disappointment, embarrassment, and anger subside or diminish, the next usual, and again normal, reaction is for the attorney to develop a strategy of defense to the allegations. From that point, most attorneys facing an ineffective assistance of counsel claim begin to distance themselves from their former client. In other words, the allegations of ineffective assistance of counsel create, unfortunately, an adversarial relationship between the former lawyer and the former client.

If this assessment seems to be somewhat harsh, or if these described reactions seem foreign to you, you may not need to read further! But if you have ever had these feelings, even though you might never publicly admit them, or if you know someone who has expressed these feelings to you after being confronted with an ineffectiveness

of counsel claim, you might want to consider the following discussion.

Our system of equal justice and the accompanying rights of due process and equal protection depend upon the commitment of the criminal defense lawyer to the defense of the constitutional rights of all individuals accused of criminal conduct. Everyone involved in the defense of persons charged with criminal offenses must continually reassess the strength of their personal and professional commitment to the role of the criminal defense lawyer in our society. Unlike any other area of the practice of law, criminal defense requires a deep and abiding commitment to the concept of equal justice, constitutional rights, and to the concept of the adversarial system upon which our criminal justice system is based. Constitutional protections are not self-actuating! The rights and privileges guaranteed by both the federal and state constitutions must be asserted and aggressively defended.

The commitment by the criminal defense lawyer to those ideas and principles should not disappear or become meaningless simply because the client has asserted his Sixth Amendment right and questioned the effectiveness of counsel's conduct or advice. In addition to reassessing the strength of his commitment to the profession, each criminal defense lawyer must periodically review his legal obligations, duties and responsibilities to the individual client. The following is a brief review of what each criminal defense lawyer should consider when faced with questions about the effectiveness of the legal representation which he provided to the client. This review will also discuss the standards by which such allegations or assertions are to be judged as well as the manner in which a criminal defense lawyer should respond.

## **The Timing of Ineffective Assistance of Counsel Claims: When Must Claims Be Filed?**

When an allegation of ineffective assistance of counsel claim must be filed has been the subject of some debate in Georgia and other jurisdictions. When and where the claim is filed will, in substantial part, help guide the lawyer's appropriate response. Georgia has adopted the rule that an ineffective assistance of counsel claim must be raised at "the earliest practicable moment."<sup>1</sup> The Georgia Supreme Court has acknowledged that an attorney cannot assert or argue his own ineffectiveness and that one member of a law firm or public defender office cannot raise or assert an ineffectiveness claim against another member of the same firm or office.<sup>2</sup> However, the Georgia Supreme Court has consistently held that once there has been a change of counsel or whenever the original counsel's firm or public defender office is no longer representing the defendant, an ineffective assistance of counsel claim must be raised or that claim will be waived.<sup>3</sup>

Thus, in Georgia if a defendant does not change attorneys during the course of the trial or direct appeal, he does not have to raise ineffectiveness of counsel claims and those claims are preserved until such time as there has been a change in representation.<sup>4</sup> However, in federal courts a different rule has been adopted. The United States Supreme Court, in adopting the rule of when ineffective assistance of counsel claims must be raised, has stated:

An ineffective assistance of counsel claim may be brought in a collateral proceeding under §2255 whether or not the petitioner could have raised the claim on direct appeal.<sup>5</sup>

The Court also noted in dicta that

When an ineffective assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.<sup>6</sup>

One of the factors which must, of necessity, influence the time and venue of any claims of ineffective assistance of counsel is the purpose of the claim. Ineffective assistance of counsel claims are not, and should not be, an attempt to grade the performance of the lawyer.<sup>7</sup> The reason for raising an ineffective assistance of counsel claims is to address and hopefully correct possible constitutional errors that were committed during the defendant's trial or appeal. All claims relating to whether or not a defendant's right to have the effective benefit and privilege of counsel are, by definition, constitutional claims.

The United States Supreme has stated, rather unequivocally that:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or

appointed, who plays the role necessary to ensure that the trial is fair.<sup>8</sup>

In that same decision, the Supreme Court, citing a long historical line of cases, including Gideon<sup>9</sup> and, Powell,<sup>10</sup> noted that

[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.<sup>11</sup>

## **THE ETHICAL AND PROFESSIONAL FUNCTIONS OF THE CRIMINAL DEFENSE LAWYER**

### **The Defense Function: Standard 4-1.1:**

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

### **Ineffective Claims and Legal Malpractice Claims**

The criminal defense lawyer must separate a claim of ineffective assistance of counsel from a malpractice claim. The two claims are not the same. The issues generally raised in an ineffective assistance claim are closely analogous to the claims which defense attorneys routinely raise in motions for new trials and in appellate

briefs on direct appeal which usually deal with the conduct of the trial judge, the prosecutors, and law enforcement personnel. These claims are vastly different from legal malpractice claims where the former client and the defense counsel are, in fact, in an adversarial relationship. The ineffective assistance of counsel claim seeks to answer the question of whether mistakes of counsel prejudiced the defendant's right to a fair trial sufficiently enough to require another trial.

Indeed, while an ineffectiveness claim generally does not relate to guilt or innocence issues in a defendant's case, those issues are very relevant in malpractice situations. In Georgia anyone making a successful claim of legal malpractice must establish three elements:

- (1) the employment of the defendant attorney;
- (2) the failure of the attorney to exercise ordinary care, skill and diligence; (the ordinary care, skill and diligence element is determined by the degree of skill and care ordinarily employed by members of the legal profession under similar conditions and circumstances); and
- (3) that the attorney's negligence was the proximate cause of damage to the claimant.<sup>12</sup>

In another case, the Georgia Court of Appeals held that in a legal malpractice case the plaintiff must show that he would have prevailed in the underlying litigation if the lawyer had not been negligent and "where the underlying action is a criminal trial, the plaintiff is precluded from doing this if he has pled guilty."<sup>13</sup> In case from Pennsylvania, the Court made clear the distinction between the different types of relief

which an individual can expect when dealing with a malpractice claims and a claim of ineffective assistance of counsel claims. The Pennsylvania court stated:

If a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial. However, if an innocent person is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred.<sup>14</sup>

The Seventh Circuit Court of Appeals held that a plaintiff may be required to allege and prove actual innocence before prevailing in a malpractice claim based upon a criminal defense attorney's conduct. In that case, the Seventh Circuit held that in order to establish legal malpractice, a former criminal defense client must show that he would have prevailed in the underlying criminal case if the former defense lawyer had not been negligent.<sup>15</sup>

**The Defense Function: Standard 4-1.2:**

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has not duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

While representing a criminally charged client, the defense lawyer cannot

subscribe to a standard of conduct that would permit him to violate any professional standards, statutes, or other laws. When providing representation to the criminally charged defendant, the defense attorney must never misrepresent the facts of a case or the applicable law to the court. This requirement also applies to the defense lawyer's response to questions about how he conducted the client's defense. If the defense lawyer is aware of his own failure or ineffectiveness in any area, this fact must be conveyed to the court. Simply because a defendant has brought an ineffectiveness claim against the defense lawyer the rules of honesty and candor do not disappear nor should the defense lawyer attempt to defend himself of the ineffectiveness allegations by misrepresenting the facts to the relevant tribunal.

**The Defense Function: Standard 4-3.7:**

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

# PROFESSIONALISM AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

## The State Bar of Georgia's Rules of Professional Conduct

### Preamble: A Lawyer's Responsibility

[1] A lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice.

[8] In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

[19] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

These references to the lawyer's responsibility are not just lofty goals or ideals, but part of the Rules by which lawyers must evaluate their responses to claims of

ineffectiveness. The lawyer is not just a representative of clients, but also an officer of the legal system and a citizen with special responsibilities! The lawyer must maintain an interest in remaining an “upright person” and conflicts between these roles and being an upright person must be resolved through “professional and moral judgment.”<sup>16</sup> At the least, a response to a claim of ineffective assistance of counsel compels studied introspection by the criminal defense lawyer. The Rules of Professional Conduct places the responsibility for maintaining the public’s confidence in the system squarely in the hands of the legal profession.

The admonition against misrepresentation applies when addressing the court as a witness within the context of an ineffective assistance claim just as it applies in other matters. The defense lawyer should not misrepresent the quality or extent of his or her legal representation in a criminal defense case. If witnesses were not contacted, the attorney should admit that they were not contacted. If only two hours of research were applied to preparing a motion or request to charge, the defense lawyer, in an ineffectiveness assistance of counsel evidentiary hearing, should not expand that two hours into ten hours.

The rules against engaging in professional conduct involving fraud, deceit and misrepresentation do not "go out the window" just because an attorney's conduct has been called into question by the attorney's former client and because he is appearing in court as a witness rather than as an advocate. If a defendant in a criminal trial has been denied a fair trial, equal protection, or due process because of ineffective representation, there has been prejudice to the administration of our society’s sense of

justice. The defense attorney's commitment to justice must not be limited to cases which do not involve questions about his or her performance. The commitment to justice must be higher than the relative egos of individual defense attorneys.

### **Rule 1.6 Confidentiality of Information**

(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

(b) (1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

(I) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

(ii) to prevent serious injury or death not otherwise covered by paragraph (I) above:

(iii) 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.

(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

Subsection (e) of the Rule 1.6 of the Professional Rules of Conduct is extremely important and quite frequently abused by defense attorneys when called upon to respond to an ineffective assistance of counsel claim. It must be noted without reservation that the simple act of alleging an ineffective assistance of counsel act or claim, does not remove the duty of confidentiality nor does the filing of such a claim, in and of itself, breach the former lawyer's duties to his client with regard to confidentiality.

#### **Attorney-Client Privileges:**

#### **OCGA Section 24-9-21: Confidentiality of Certain Communications.**

There are certain admissions and communications excluded on grounds of public policy.

Among these are:

- (1) Communications between husband and wife;
- (2) Communications between attorney and client;
- (3) Communications among grand jurors;
- (4) Secrets of state;
- (5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between patient and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this Code section.

#### **OCGA Section 24-9-24: Client's Communications to Attorney Privileged**

Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment.

#### **OCGA Section 24-9-25**

[N]o attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as

attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner.

Communications between attorney and client are excluded from being used as evidence in Georgia as a matter of public policy.

The Sixth Amendment of the Constitution of the United States and guarantees a person charged with a criminal offense the right to have the assistance of counsel. Georgia's version of the Sixth Amendment as set forth in Paragraph XIV of Article I, Section I of the Georgia Constitution of 1983 provides, in part,

Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.

### **The Role of the Prosecutor: Ineffective Assistance of Counsel Hearings**

After a claim of ineffective assistance of counsel has been filed, the district attorney or an assistant attorney general will immediately prepare to refute the allegations. The state's council or a staff member from the Attorney General's office will contact the defense lawyer against whom the claim has been made. This contact usually involves a request to talk about the ineffective assistance claim and the prosecutor will appear as the criminal defense lawyer's defender. If the defense lawyer does not remember his ethical and professional responsibilities, it will be easy to be seduced into believing that the former client is an adversary.

Defense counsel must remind himself or herself that the prosecutor's role is to ensure that the conviction is not overturned because of allegations of ineffective

assistance of counsel; it is not to protect defense counsel. Defense counsel's role in the criminal justice system is not converted to the role of the prosecutor simply because ineffective assistance of counsel claims are made. The privilege of not having attorney-client communications revealed belongs to the client and not to the defense attorney. The "ownership" of the privilege certainly implies that the privilege can be waived in some circumstances. As a result of a waiver, if such a waiver has taken place, an attorney who has defended a criminally charged person may be compelled to testify in a habeas corpus action concerning some particularized matters growing out of the attorney-client relationship. However, the scope of the compelled testimony depends upon the scope of the waiver of the attorney-client privilege by the client. The defense counsel can never waive the privilege! Therefore, the scope of a defense counsel's testimony at a habeas corpus hearing is limited precisely by the scope of the waiver.

The same commitment to the administration of equal protection, protection of individual liberties, and protection of due process rights should remain in force even after allegations of ineffectiveness are made. A careful study and application of the rules by which the criminal defense lawyer must conduct his or her professional practice will reveal that the defense attorney is not empowered as a result of the claim to become another arm of the prosecutor's office. The ethical defense lawyer must never lose sight of the client's absolute right to raise claims of ineffective assistance of counsel.

### **Defense Counsel As Witness For The State**

The availability of a criminal defense lawyer as a witness for the prosecution

in hearings held to determine ineffective assistance of counsel claims is generally based upon the holding in the case of Daughtry v. Cobb,<sup>17</sup> where the Court held:

Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. . . . Thus the rule as to privilege has no application where the client, in an action against the attorney, charges negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney.<sup>18</sup>

However, Daughtry is a civil case and did not deal with the various special aspects of the relationship between a criminal defense lawyer and an individual facing their loss of liberty and possibly the loss of their life. Therefore, great caution is urged when the defense lawyer is subpoenaed to testify by the prosecution in response to ineffective assistance claims. Daughtry and its progeny, should be read within the context of the Rules of Professional Conduct which limits the privileged disclosures to only those matters *necessary* "to defend [the defense lawyer] from an accusation of wrongful conduct." The defense lawyer facing an ineffective assistance of counsel claim should not feel that, as a result of the claim, all privileges or obligations to the former client have been waived.

### **The Waiver of Attorney-Client Privileges**

The attorney-client privilege, which finds its roots in Roman law, has long been recognized at common law two and a half centuries ago. One commentator put it as follows:

This necessity [to rely on expert assistance] introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions.<sup>19</sup>

More recently, the Supreme Court has reiterated that

[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.<sup>20</sup>

The Georgia Courts have similarly discussed this most important, confidential relationship

The relationship of attorney and client is confidential, and it has been said with regard to it: "The law making the relationship of attorney and client confidential is a salutary one, and it is the duty of the courts to strictly enforce it. That relationship makes it imperative that the clients rely implicitly upon the acts and words of his attorney, and he is entitled to the protection of law in reposing this confidence."<sup>21</sup>

Indeed, the extensive discussions which must take place in any effective attorney-client relationship involves not just the casual assistance of a lawyer, but it also requires that an intimate process of consultation and planning takes place and which culminates in a relationship of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty.

So important a function does this confidential relationship have that one essential component of the Sixth Amendment is the basic trust between counsel and client, which is the cornerstone of the adversary system. This basic trust can only be

protected by rigorous adherence to the attorney-client relationship.

There is also the issue of what happens to the attorney-work product privilege whenever a defendant in a criminal case raises an ineffective assistance of counsel claim. The relationship which produced the attorney work-product privilege, that is the attorney-client relationship, must survive allegations of ineffective assistance. As noted in the case of McKinnon v. Smock:

[H]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepares his legal theories and plan his strategy without undue and needless interference . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, brief, mental impressions, personal beliefs, and countless other tangible and intangible ways.<sup>22</sup>

The Utah Supreme Court established a clear distinction between a waiver of the attorney work product privilege in malpractice cases and in ineffective assistance of counsel claims. The Utah Supreme Court held that a criminal defendant's claim that his trial lawyer provided ineffective assistance of counsel, does not automatically lift the attorney work-product protection of the defense lawyer's files from discovery by the state in a post-conviction proceeding. The Utah Court went on to hold that:

[I]n a malpractice case, reliance on work product immunity would directly undermine the client's interest, contrary to the policy that justifies the immunity in the first place. In the 'advice of counsel' cases, it is precisely the process of

preparing and creating the work product that is at issue. There is a sense in which the mental impressions, conclusions, and opinions constitute ‘the facts’ of the case and therefore may be discoverable. In [ineffective assistance of counsel claims] there is no adversary relationship between client and counsel. It is not the client seeking access to the files - it is the client’s adversary, the State. Furthermore, at issue is the performance of counsel during preparation and trial, not solely counsel’s internal processes in compiling the file. Finally, ineffective assistance of counsel is in significant part a question of behavior observable from the record and ascertainable from counsel’s testimony. The contents of counsel’s files may or may not have a bearing on the specific claims of ineffectiveness made in this case.<sup>23</sup>

The Georgia Supreme Court has made this point perfectly, and unequivocally, clear in the case of Waldrip v. Head.<sup>24</sup> In that decision, the Court also clarified the question of whether or not the waiver of the attorney-client privilege is limited solely to the attorney’s testimony. The Court held that the access to a client’s file being held by defense counsel is also subject to a specific waiver by the defendant. Again, the extent of the access to a former client’s file in a habeas corpus proceeding is limited by the scope of any waiver of the attorney client privilege by the client. In Waldrip, the Court stated

[W]e reject the state’s contention that the filing of an ineffectiveness claim is an absolute waiver that entitles it to the complete file of a former trial and appellate counsel. Instead, we hold that a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel’s documents and files relevant to the specific allegations of ineffectiveness.<sup>25</sup>

The Court suggested that the parties to a habeas corpus proceeding use the following procedure in resolving any disputes about the scope of an alleged waiver of the attorney-client privilege or attorney-work-product privilege.

[I]nitially, petitioner's current counsel determines the documents waived by the privilege. When the state disagrees, the parties should attempt to resolve their dispute; if they are unable to reach an agreement, the state may move for an in-camera inspection of the disputed parts of the files. At that point, the habeas court needs to review the files and order the disclosure of the parts that are relevant to the issues raised.<sup>26</sup>

Therefore, trial and appellate counsel should always turn the former client's complete files over to habeas counsel and adamantly resist any effort by the state to obtain the files directly. It will then be the job of habeas counsel to determine and, if necessary, litigate, what documents are to be revealed to the state.

The Georgia Supreme further clarified the issue of whether or not former defense counsel's testimony at a habeas corpus hearing can be used against the defendant at any subsequent trials. The Georgia Supreme Court noted the Pennsylvania case of Commonwealth v. Chmiel<sup>27</sup> for the proposition that disclosure of attorney client communications would chill a defendant's sixth amendment rights. In Chmiel, supra, the Pennsylvania Supreme Court reversed a murder conviction and death sentence because the trial court permitted the state to introduce a former defense counsel's testimony at a habeas corpus hearing in a second trial. The Pennsylvania court held that the policies inherent in the attorney-client privilege

restricted the use, as well as the scope, of testimony given in response to the rebuttal of ineffective assistance of counsel claims. The court in Chmiel noted

[J]ust as an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations, so the client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges.

The Court in Waldrip felt that it did not need to address that specific issue since the habeas petition in Waldrip's case had not been resolved. However, the Court did state

[H]aving seen the potential problems that can be created by public disclosure and use of counsel's files, we conclude that the files retain their confidential nature despite the client's implied waiver of the attorney-client privilege in this habeas corpus proceeding. To protect the petitioner's constitutional right to effective assistance of counsel and against compelled self-incrimination, we hold that Waldrip is entitled to a protective order limiting disclosure in this habeas proceeding to persons needed to assist the warden in rebutting the claim of ineffectiveness.

If the former client is represented by counsel, the client's new attorney will also contact the defense lawyer. The new attorney will ask for an opportunity to talk with the defense lawyer to discuss, and perhaps explain, the allegations in the ineffective assistance claim. The new attorney will also ask for the client's file. This file must be produced and turned over to the new attorney. The file belongs to the client! It is

appropriate for the defense lawyer to keep a copy of the file, if he or she wishes to do so, but under no circumstances should the attorney refuse to cooperate with the new attorney's request for the client's file. The defense lawyer should never destroy or remove anything from the client's file before it is provided to the new attorney. The ownership of the file and the privileges attached to the file are not destroyed or waived by the filing of a claim of ineffective assistance of counsel. The file should never be produced or its contents divulged to the prosecutor without the express written consent of the former client or the new attorney.

The defense lawyer, when facing a claim of ineffective assistance of counsel, has a duty not only to be honest and candid with the court, but the defense lawyer also has a continuing duty not to injure the client. It should also be noted that the duty to the client insofar as confidentiality and matters relating to the client's file continue even after the attorney-client relationship has ended.

#### **Rule 1.7: Conflict of Interest: General Rule**

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

#### **Rule 1.9 Conflict of Interest: Former Client**

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the

representation to the disadvantage of the former client except as Rule 1.1: Confidentiality of Information or Rule 3.3 Candor Towards the Tribunal would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6: Confidentiality of Information of Rule 3.3 Candor Towards the Tribunal would permit or require with respect to a client.

### **Rule 3.3: Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [Confidentiality of Information]

Comment:

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client . . .

**INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS:  
The Legal Standards By Which Claims Are Judged**

As noted previously, the legal standards upon which federal constitutional ineffective assistance claims are judged can be derived primarily from Strickland v. Washington, which created a two-prong test:

[T]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.<sup>28</sup>

[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.<sup>29</sup>

To prevail on an ineffective assistance claim, the defendant must first prove that his counsel's performance "fell below an objective standard of reasonableness."<sup>30</sup> As a second prong of the standard for evaluating claims of ineffectiveness, the 'prejudice prong', the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"<sup>31</sup>

In a companion case to Strickland, United States v. Cronic,<sup>32</sup> decided on the same date, the Supreme Court recognized that no specific showing of prejudice is required when counsel 'entirely fails to subject the prosecution's case to meaningful adversary testing.<sup>33</sup> The "presumption of ineffectiveness" was articulated as a standard but not applied in the Cronic case. Since Cronic, however, ineffectiveness has been found in cases in which the failure of the defense lawyer has been so gross and the error so pervasive that on the face of the record it is obvious that the defendant could not have received a fair trial.

Georgia has followed the Strickland analysis. In applying the Strickland analysis to Georgia ineffective assistance of counsel cases, the Georgia Supreme Court<sup>34</sup> stated

[C]oncerning counsel's performance, the Court [referring to habeas court's ruling] noted that all federal courts of appeal and most state courts have adopted the "reasonably effective assistance" standard, as Georgia has and approved it (104 S. Ct. at 2064). The Court went on to note that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and stated that every effort must be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time (104 S. Ct. at 2065). The Court also pointed out that a reviewing court should recognize that counsel is entitled to a "strong presumption" (which the defendant must overcome) that counsel's conduct falls within the wide range of reasonable professional conduct and that all significant decisions were made in the exercise of reasonable professional judgment

Concerning the prejudice component, the Court held that the defendant must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's

unprofessional errors, the result of the proceeding would have been different (104 S. Ct. at 2068). Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.<sup>35</sup>

## **THE SCOPE OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS**

### **Ineffective Assistance of Counsel Claims: State Bar Disciplinary Action**

In any discussion of the scope of the actual ineffective assistance of counsel claim, it should be noted that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation of state bar rules. However, there have been some instances where a state bar disciplinary committee has brought charges based on a finding of ineffective assistance of counsel. In The Florida Bar v. Ray Sandstrom<sup>36</sup> a defense attorney was charged by with violating disciplinary rules after a state court found that the attorney had been grossly ineffective in his representation of a client in a murder case. The Supreme Court of Florida, in upholding sanctions against the attorney noted

[W]e note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation. However, the circumstances of this case involved such a flagrant lack of preparation and such deficient performance by counsel as to warrant the finding that [the defense attorney] violated the disciplinary rules.

In Arizona, the Supreme Court, when faced with a similar disciplinary proceeding based upon a finding of ineffective assistance of counsel, wrote,

We decline to adopt a per se rule that successful post-conviction relief based on ineffective assistance of counsel

automatically results in an ethical violation, or, conversely, that a denial of post-conviction relief will always insulate an attorney from professional discipline.<sup>37</sup>

A New York attorney was charged with a disciplinary violation, i.e., neglect, after having been found to be ineffective in his defense of a criminal case. The New York court held that a prior court's ruling that the attorney was ineffective in his representation of a defendant did not necessarily establish a disciplinary violation.<sup>38</sup> Similarly, an Indiana court held that successful post-conviction relief based upon a finding of ineffective assistance of counsel is not controlling in a subsequent state bar disciplinary matter.<sup>39</sup>

### **Constructive Ineffectiveness versus Actual Ineffectiveness**

Courts across the country have generally recognized the concepts of "constructive ineffectiveness" and "actual ineffectiveness." Constructive ineffectiveness can be described as ineffectiveness caused by the conduct and the interference of the prosecutors and of the court itself or by defense counsel laboring under a conflict of interest created by the facts and circumstances of the case.

### **Constructive Ineffectiveness**

#### **A. Conflict of interests on the part of the defense lawyer.**

As noted from a reading of the Preamble to the Rules of Professional Conduct and from referencing the Rules preceding authority, the Ethical Rules of Professional Conduct where it was noted that

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.

Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

B. Ineffectiveness caused by the actions or non-actions of the Court.

1. The failure of the court to grant a continuance where trial counsel was given too little time to prepare.<sup>40</sup>
2. The trial court appointed an inexperienced attorney and then failed to provide adequately trained co-counsel to assist.<sup>41</sup>
3. The trial court refused to recuse himself or herself despite a showing of bias or prejudice against the defendant and/or his lawyer.
4. The trial court refused to provide adequate funds and professional assistance to the defense lawyer so that a defense could be presented.<sup>42</sup>
5. The trial court refused to provide sufficient resources with which the defense attorney could have their client psychiatrically examined. In Blake v. Kemp,<sup>43</sup> the Eleventh Circuit stated that:

[H]e is alleging actions on the part of the state which made it impossible for his counsel to render meaningful assistance on the issue of the appellee's sanity. Our inquiry must therefore begin by focusing on the effect of the challenged actions upon the adversary process: did they so completely deprive Blake of the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing .

. . . as to make the outcome of the trial presumptively unreliable.<sup>44</sup>

C. Ineffectiveness caused by the conduct of the prosecutors.

1. The defense lawyer's trial strategy and tactics were subverted by the misconduct of the prosecutors.<sup>45</sup>
2. A District Attorney is disqualified where he, or past, present, or future members of his office, have unduly close ties to the judge.<sup>46</sup>
3. Where one member of the staff of the District Attorney's office could reasonably be called as a witness in a case, this may require recusal of the entire staff.<sup>47</sup>

**Actual Ineffectiveness**

A.. Depriving the client of a specific constitutionally guaranteed right.

1. Right to testify.
2. Right to remain silent.
3. Right to have witnesses cross-examined
4. Right to have an effective closing argument.
5. Right to have the presumption of innocence asserted on his or her behalf.
6. Right to have his or her case heard on appeal.

B.. Incorrect or nonexistent advice of counsel on all matters relating to the case.

1. Failure to keep a client informed about the case.
2. Failure to advise a client of the consequences of legal and factual decisions.
3. Failure of trial counsel to effectively attempt to keep out evidence.

- a. Failure to file suppression motions.
  - b. Failure to make proper and legal objections.
  - c. Failure to invoke appropriate privileges which belong to the defendant.
  - d. Failure to challenge illegal evidence offered in aggravation of sentence.
4. Failure of trial counsel or appellate counsel to conduct adequate and effective investigation of factual and legal issues in the case.
  5. Failure to insure ability to lay proper foundations for admission of testimony and evidence.
  6. Failure to prepare and present pre-trial motions.
  7. Failure to preserve issues for possible appellate review.
  8. Failure to present evidence in support of pre-trial motions.
  9. Failure to interview all witnesses.
  10. Failure to prepare proper and adequate impeachment of all of the state's witnesses.
  11. Failure of trial counsel to present evidence available or which could have been made available.
    - a. Failure to subpoena witnesses.
    - b. Failure to seek funds for witnesses.
    - c. Failure to properly prepare witnesses for their trial testimony.
    - d. Failure to investigate client's proffer of possible witnesses.
  12. Failure of appellate counsel to raise all reasonable issues on appeal.

This listing of actual ineffectiveness is obviously general in nature and application. The actual ineffectiveness, when it exists is going to be determined by the facts of each individual case. The Arizona Supreme Court, in its discussion of the ineffectiveness of counsel claims against an attorney whose ineffectiveness led to a disciplinary proceeding brought the Arizona State Bar noted:

The Committee found, and the Commission agreed, that Respondent violated ER 1.1 which requires that a 'lawyer shall provide competent representation . . . [that] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' We note that some of Respondent's acts and omissions, if viewed independently of one another, are not objectionable and may be explained by legitimate lawyering and trial strategy. Nevertheless, an examination of Respondent's conduct, in the aggregate, tells a much different story. Respondent's handling of the criminal matter fell far short of what is required of an experienced, competent attorney charged with such a serious task. It is true that any chose defense may obviate the need for some investigatory work, but that strategy must be based on some reasonable investigation. The investigation takes on added importance when, as here, the stakes are high: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.<sup>48</sup>

## CONCLUSION

The defense lawyer facing a claim by a client that his or her assistance has not been up to the appropriate legal standards has several obligations and responsibilities. The State Bar of Georgia's Rules of Professional Conduct have been cited for review. However, the defense lawyer must never lose sight of the fact that his or her responsibility to the client continues beyond the trial and into the adjudicatory process of the ineffective assistance claim.

There might be circumstances where the defense lawyer's testimony might be adverse or contrary to the defendant's allegation setting forth the ineffective assistance claim. There might be situations where the defense lawyer will have to divulge otherwise privileged information in order to be honest and candid with the court. If the defendant has attempted to mislead the court with his or her allegations in the ineffective assistance claims, the defense lawyer must not acquiesce to those misrepresentations. However, the requirement of candor and honesty requires that the defense lawyer make admissions of ineffective conduct when that ineffective conduct actually took place. The defense lawyer should consider the ethical requirement that the client be informed of areas of possible ineffectiveness. Some very experienced attorneys in the area of criminal representation make a practice of preparing an exit memorandum listing issues that should be raised on appeal, including a list of possible omissions in the attorney's representation of the defendant. There is no rule or standard which would allow the defense lawyer to act to the detriment or harm of the

former client simply because an ineffective assistance claim has been made.

Next, the defense lawyer facing a claim of ineffective assistance must also remember the property rights of the defendant to the file and work product done on behalf of the defendant. The right to have the defendant, and/or his new counsel, review and use, if appropriate, the defendant's file must not be overlooked. It is not only unprofessional to refuse to produce the client's file, it is a violation of the property interest which the client has in the file itself.

The obligations and responsibilities of the defense lawyer facing an ineffectiveness claim by a former client extend equally to the new lawyer (assuming the former defendant is not proceeding *pro se*). The defense lawyer is bound not only by the Rules of Professional Conduct, he should be bound by the "golden rule." Refusal to cooperate with the former client's new attorney is not only contrary to the standards by which lawyers must govern themselves, that refusal is also contrary to the unspoken rule among all professionals embodied by the "golden rule."

The criminal defense lawyer must never lose sight of the importance of the advocacy role required within the context of the criminal justice system.

The duties of an Advocate are among the most elevated functions of humanity. Whilst he is the representative of his client's cause, yet these considerations insure an honorable advocacy. His business is to comment on the evidence -- to sift, compare and collate the facts -- to draw his illustrations from the whole circle of the sciences -- to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspirations of genius, and adorn it with all the attributes of eloquence.<sup>49</sup>

The only way ethical and professional attorneys can ever hope to maintain the

confidence of the public in our system of justice is to insure the integrity of the maintenance of justice "pure and unsullied." The integrity of our system of justice and the protection of the rights of all people depend upon the professional conduct of those lawyers who defend the constitutional rights of criminal defendants daily. The protection which each of us is called to provide cannot allow us, as criminal defense lawyers, to place our self-interests above the rights of the people for we are called to defend. The only ethical and professional response allowed to a claim of ineffective assistance of counsel is complete honesty. If an attorney will respond honestly, courteously, and completely to a defendant's allegations of ineffective assistance of counsel, the general public, the courts, and our colleagues will continue to enjoy absolute confidence in the integrity of our system of justice.

## ENDNOTES

1. White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991).
2. Ryan v. Thomas, 261 Ga. 661, 662, 409 S.E.2d 507 (1991).
3. Johnson v. State, 259 Ga. 428, 383 S.E.2d 115 (1989).
4. Thompson v. State, 257 Ga. 336, 359 S.E.2d 664 (1987).
5. See, 18 U.S.C.S. § 2255. Federal custody; remedies on motion attacking sentence: “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”
6. Massaro v. U.S., 538 U.S. 500, 505, 1235 S.Ct. 1690, 144 L.Ed2 714 (2003).
7. Shelton v. State, 220 Ga. App. 163, 469 S.E.2d 298 (1996).
8. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984).
9. Gideon v. Wainwright, 372 U.S. 335 (1963).
10. Powell v. Alabama, 287 U.S. 45 (1932).
11. Strickland v. Washington, supra, at 685.
12. Cornwell v. Kirwan et al, 270 Ga. App. 147, 149, 606 S.E.2d 1 (2004).
13. Gomez v. Peters et al, 221 Ga. App. 57, 59, 470 S.E.2d 692 (1996).
14. Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108, 113 (1993).
15. Walker v. Kruse, 484 F.2d 802, 804 (7<sup>th</sup> Cir. 1973).
16. The State Bar of Georgia: Rules of Professional Conduct; Preamble: A Lawyer’s Responsibility.

17. Daughtry v. Cobb, 189 Ga. 113, 5 S.E.2d 352 (1939).
18. Ibid.
19. Arnesly v. Earl of Anglesea, 17 How. St. Tr. 1225 (1743)
20. Upjohn Co. V. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).
21. Lowe v. Presley, 86 Ga.App. 328, 71 S.E.2d 730, 733 (1952)
22. McKinnon v. Smock, 264 Ga. 375, 445 S.E.2d 526 (1994).
23. Salt Lake Legal Defender Association v. Uno, 932 P.2d 589, 309 Utah Adv. Rep. 11 (1997).
24. Waldrip v. Head, 272 Ga. 572, 576, 532 S.E.2d 380 (2000).
25. Ibid.
26. Ibid.
27. Commonwealth v. Chmiel, 17. 738 A.2d 406 (Pa 1999)
28. Ibid. at 685.
29. Ibid. at 686.
30. Ibid. at 688.
31. Ibid. at 695.
32. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).
33. Ibid. at 659.
34. Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d 362, cert.den., 474 U.S. 925 (1985).
35. Ibid.
36. The Florida Bar v. Ray Sandstrom , 609 So. 2d 583 (1992).
37. In the Matter of a Member of the State Bar of Arizona, Donald E. Wolfram, Respondent, 174 Ariz. 49, 847 P.2d 94 (1993).

38. In the Matter of Armand R. Riccio, an Attorney, Respondent, 131 A.D.2d 973, 517 N.Y.S. 2<sup>nd</sup> 791 (1987).
39. In the Matter of Edward D. Lewis, 445 N.E.2d 987 (1983).
40. See, United States v. Rivera, 837 F.2d 906 (10th Cir. 1988).
41. See, State v. Didlemeyer, 371 S.E.2d 793 (S.C. 1988); but see, also United States v. Cronic, *supra*, fn.29.
42. See Louisiana v. Peart, La.SupCt. No. 92 KA-0907(the court noted that: not even a lawyer with a "big S on his chest" could be expected to provide reasonably effective assistance of counsel "without the time and resources necessary to apply that skill and knowledge to the task of defending each individual client.")
43. Blake v. Kemp, 758 F.2d 523 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985).
44. Id. at 529.
45. See, Greater Newbury Port Claim Shell Alliance v. PSC of N.H., 838 F.2d 12 (1st Cir. 1988); Vanderbilt v. Lynaugh, 683 F.Supp. 1118 (E.D. Tex. 1988); Jenkins v. Coombe, 821 F.2d 158 (2d Cir. 1986).
46. See Pope v. State, 256 Ga. 195, 345 S.E.2d 831 (1986), later appeal, 257 Ga. 32, 354 S.E.2d 429 (1987) (Where trial judge's law clerk had accepted employment with District Attorney's Office, disclosure and opportunity for defendant to request recusal required).
47. See, e.g., Waldrop v. State, 424 So.2d 1345 (Ala.Cr.App. 1983) (Reversible error for prosecutor to be main witness against defendant on statements issue); Tarver v. State, 492 So.2d 328 (Ala.Cr.App 1986) (Reversal required where prosecutor testified and gave opening and closing arguments); Ex parte Gilchrist, 466 So.2d 991(Ala. 1985); Pease v. District Court, 708 P.2d 800, 802-03 (Col. 1985); People v. Conner, 34 Cal.3rd 141, 193 Cal. Rpt. 148, 666 P.2d 5, 7-9 (1983); State v. Donahue, 315 So.2d 329 (La 1975). See also United States v. Pepe, 247 F.2d 838, 844 (2nd cir. 1957); People v Janes, 138 Ill.App.3rd 558, 93 Ill.Dec. 216, 486 N.E.2d 317 (1985).
48. In the Matter of a Member of the State Bar of Arizona, Donald E. Wolfram, *supra.* at 55.
49. Garrison v. Wilcoxson, 11 Ga. 154 (1852).