INEFFECTIVE ASSISTANCE OF COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE: PROCEED WITH CAUTION![1]

Materials prepared by: David Nathanson, Committee for Public Counsel Services[2]

I. Summary

The attorney-client privilege is at least two hundred years older than our constitution.[3] (Although the work-product privilege and attorney-client privileges are not synonymous, this presentation uses the phrase "attorney-client" privilege to describe both privileges.) It exists in part to vindicate the Sixth Amendment and Article Twelve right to counsel. It reflects a policy judgment that

> The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice." . . . It is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice.[4]

Given the above, courts and counsel do not and should not lightly intrude upon the privilege.

When a claim of ineffective assistance of counsel is made in a criminal proceeding, this may or may not impact the attorney-client privilege that exists between the defendant and his former attorney. Absent an express waiver of the privilege by the defendant, all concerned (judges, prosecutors, former defense counsel, and current defense counsel) *should proceed with caution.*

In general, the caselaw holds that a claim of ineffective assistance waives the attorney-client privilege only to the extent that the client has put his privileged communications with the attorney at issue. There are numerous important caveats to this general rule, however. First and most importantly, the privilege may only be waived by the client or deemed waived *by a court*. Prior to that, counsel has a duty to not to disclose privileged communications.

II. Analysis

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[1] This presentation is based substantially on a presentation give by Attorney Stephen Paul Maidman to the Massachusetts Association of Criminal Defense Lawyers in April, 2006. Defense counsel are encouraged to contact Attorney Maidman for copies of his presentation.

[2] This presentation does not necessarily reflect the views or policies of the Committee for Public Counsel Services.

[3] *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005); (*citing Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 1577)).

[4] *Id.* (*quoting Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (*in turn quoting Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Mass. R. Prof. Conduct 1.6(b) is the starting point for analyzing any issue of attorney-client privilege. That rule provides:

> (b) A lawyer may reveal, and to the extent required by Rule 3.3 [(governing candor to the tribunal)], Rule 4.1(b) [(governing disclosures to prevent criminal or fraudulent acts by a client)], or Rule 8.3 [(governing the reporting of professional misconduct)] must reveal, such information:
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> > (1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;
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> > (2) 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;
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> > (3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3 (e);
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> > (4) when permitted under these rules or required by law or court order.

May prior counsel rely on any of the four above (mostly permissive) exceptions to the rule forbidding the disclosure of privileged information? In sum, the answer is that only the last clause of (b)(2) could possibly apply. An explanation follows.

Section (b)(1) would almost never apply to a claim of ineffective assistance. Even if the claim of ineffective assistance somehow constituted a criminal or fraudulent act, a claim of ineffective assistance cannot reasonably be expected to result in death, substantial bodily injury, substantial property or financial injury, or the wrongful incarceration of another.

As for section (b)(2), there are several clauses that need to be analyzed discretely. The first clause does not apply because an ineffective assistance claim is a controversy between the client and the Commonwealth, not the trial attorney. The second clause does not apply because an ineffective assistance claim is not a criminal charge nor is it a civil claim against the lawyer.

The last clause, the "respond to allegations clause", clearly permits prior counsel to reveal *some* privileged information if called to testify at an evidentiary hearing regarding a claim of ineffective assistance. A more detailed description of the permissible course for prior counsel called to testify at a hearing can be found below.

Section (b)(3) does not apply because it is not prior counsel who is eliciting the affidavit or testimony, even if prior counsel believes that the client's affidavit or testimony regarding the ineffective assistance claim is fraudulent or perjurious.

A. Prior Defense Counsel's Response to A Claim of Ineffective Assistance

Rule 1.6(a) imposes a duty upon prior counsel to invoke the privilege, even when dealing with successor counsel. Therefore, in order to conform to the letter of the ethical rules, prior defense counsel should ask appellate counsel to obtain a waiver from the client prior to speaking to him. That waiver should be worded to apply only to appellate counsel. Such a waiver does not permit prior counsel to speak to anyone else about the privileged communications from the client.

As part of appellate counsel's legal duty to investigate,[5] appellate counsel should seek to discuss the claim of ineffective assistance with prior counsel prior to filing such a claim. Prior counsel have a duty to provide to appellate counsel not only with the client's file but also with truthful, complete answers to questions regarding their representation of the client.[6]

Once a claim of ineffective assistance is filed in court, that claim permits a lawyer testifying at an evidentiary hearing to reveal privileged information only "to the extent the lawyer reasonably believes necessary to . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client."[7] But the clause does not permit trial counsel to speak to the prosecutor *ex parte* without a court order. The "allegations" are made by the client and his lawyer, not the prosecutor. This clause permits prior counsel to reveal confidential information to *appellate counsel* or the client who is making the allegation, not to the prosecutor.

Only two Massachusetts cases, *Commonwealth v. Brito* and *Commonwealth v. Woodberry*, have directly addressed this issue.[8] Counsel will note well that the disclosures made in *Woodberry* were subject to a court-ordered evidentiary hearing where the defendant could interpose objections in an attempt to limit the disclosures made by prior counsel.[9] In *Brito*, prior counsel made extra-judicial disclosures by turning

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[5] *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984).
[6] Committee for Public Counsel Services, Performance Standards Governing the Representation of Indigent Persons in Criminal Cases, §§ 1.3(h), 8.2(b) (1999); David M. Siegel , My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings, 23 J. Legal Prof. 85, 106 (1999).
[7] Mass. R. Prof. C. 1.6(b).
[8] *Commonwealth v. Woodberry*, 26 Mass. App. Ct. 636, 636-40 (1988); *Commonwealth v. Brito*, 390 Mass. 112, 119 (1983).
[9] *Woodberry*, 26 Mass. App. Ct. at 636-40.

over portions of the client's file to the prosecutor.[10] The Supreme Judicial Court assumed error but held that there was no prejudice to the defendant.[11] However, the SJC noted that even where there is a claim of ineffectiveness, "trial counsel's obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel."[12] The Office of Bar Counsel has more strongly suggested that

> an attorney in this situation should be cautious not to gratuitously reveal confidential information merely to protect her own reputation. It would be prudent for an attorney to request a subpoena from the party seeking disclosure, as opposed to merely volunteering information, or to reveal the confidential information only in a court-supervised setting.[13]

But even the issuance of a subpoena or order to testify at an evidentiary hearing does not completely release the attorney.

Obviously, once a court-order is in place, counsel has a duty to comply.[14] But the Office of Bar Counsel has made it clear that prior counsel also has a duty to resist such subpoenas or orders unless the client consents. Comment 20 to Rule 1.6 states that "(i)f a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable." Further, Bar Counsel advises that prior counsel receiving such orders have

> have an ethical obligation to attempt to limit the subpoena on any legitimate available grounds, and, without client approval, may not reveal confidential information protected by Rule 1.6(a) until ordered to do so by an appropriate tribunal. . . . If the former client does not consent to the disclosure . . . the lawyer has an ethical duty under Mass. R. Prof. C. 1.6(a) to resist the subpoena if the lawyer's testimony or the production of documents would violate either the attorney-client privilege or the ethical duty of confidentiality. As an initial step, the lawyer should seek a protective order, bring a motion to quash, or serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials in compliance with the applicable discovery rules.[15]

In addition, prior counsel may have an obligation to attempt to appeal such an order.[16] Discovery orders that violate the attorney-client privilege have been held

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[10] *Brito*, 390 Mass. at 119.
[11] *Id.*
[12] *Id.*
[13] Dorothy Anderson, When Your Client Sues You, Are Your Lips Still Sealed?, http://www.mass.gov/obcbbo/lips.htm (2003).
[14] Mass. R. Prof. C. 1.6(b)(4).
[15] Linda G. Bauer, Subpoena Savvy: What to do when your client's file is subpoenaed, http://www.mass.gov/obcbbo/subpoena.htm (2002).
[16] Bauer, *supra*; Mass. R. Prof. C. 1.6 (Comment 20).

to be immediately appealable in federal court under the "collateral order" doctrine.[17] The Massachusetts equivalent to the collateral order doctrine is called the "present execution" doctrine.[18] Therefore, such an order may be immediately appealable independent of any petition pursuant to M.G.L. c. 211, § 3.

If, notwithstanding the above, prior counsel feels that they can ethically discuss privileged matters with the prosecutor, their obligations are not over. Prior counsel still have a duty to provide the client with advance notice of their intent to disclose (allowing the client the opportunity to seek a protective order).[19]

B. The Prosecutor's Response to A Claim of Ineffective Assistance

Once a claim of ineffective assistance is filed, there arises the question of whether the Commonwealth may speak, *ex parte*, with prior counsel. In my opinion, the answer is no for the reasons stated above. Whatever investigation the prosecutor wishes to pursue regarding such a claim, they are well-advised to seek judicial approval prior to speaking to defense counsel. This by no means prevents prosecutors from seeking information from non-privileged sources. For examples, transcripts of prior proceedings will frequently reveal prior counsel's choice of strategy and the extent of their investigation. Prosecutors are cautioned that, absent judicial approval, encouraging prior counsel to reveal privileged information would likely be an independent ethical violation.[20]

C. The Court's Response to a Claim of Ineffective Assistance

When presented with a claim of ineffective assistance, a judge has considerable discretion in deciding whether to hold an evidentiary hearing.[21] Assuming that the judge does decide to hold a hearing, the judge may permit either side to call prior counsel as a witness. But the court should be particularly sensitive to claims of privilege raised at such a hearing.

The court is required to carefully limit the scope of any inquiry touching on attorney-client privileged matter. Following *Woodberry*, the Court should determine "whether the disclosure is *relevant, material, or necessary*" to resolution of the claim of ineffective assistance.[22] Even in the civil context, the SJC has cautioned that when a litigant puts their communications with counsel "at issue" the waiver is only a limited waiver.[23] As such, discovery orders touching on attorney-client privileged information must be "carefully craft[ed] … so as to limit the permissible discovery to what is truly 'at issue.'"[24] And similar to the "necessary" prong of *Woodberry*, the SJC has held that "there can be no 'at issue' waiver unless it is shown that the privileged information

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[17] *Lott*, 424 F.3d at 449.
[18] *Breault v. Chairman of Bd., Fire Commr. of Springfield*, 401 Mass. 26, 31 (1987).
[19] Mass. R. Prof. C. 1.6 (Comment 19A).
[20] Mass. R. Prof. C. 8.4(a).
[21] *Commonwealth v. Denis*, 442 Mass. 617, 628 (2004).
[22] *Woodberry*, 26 Mass. App. Ct. at 637 (emphasis added).
[23] *Darius v. City of Boston*, 433 Mass. 274, 283 (2001).
[24] *Id.*

sought to be discovered is not available from any other source."

Finally, the court likely should not entertain *in camera* proffers from prior counsel at any hearing.[25]

[25] *Cf. Commonwealth v. Goldman*, 395 Mass. 495, 497 n.2 (1985).