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ABA Formal Opinion Emphasizes the Duty of Confidentiality in Responding to Ineffective Assistance of Counsel Claims

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American Bar Association Formal Opinion 10-456 (July 14, 2010)

Brief Summary
The ABA issued a formal opinion addressing the issue of whether a criminal defense attorney may provide confidential information concerning a former client to the prosecution to help establish a defense to the former client's claim of ineffective assistance of counsel. Although such a claim ordinarily waives the attorney-client privilege, lawyers should strive to protect information relating to the representation of a client under ABA Model Rule 1.6. Accordingly, lawyers should only make disclosures in a court-supervised setting.

Complete Summary
Communications made in confidence between a lawyer and client are generally protected by privilege but can be waived under certain circumstances. When a client puts the attorney's legal advice at issue, the client generally relinquishes the privilege so that the lawyer may defend against his or her client's claims. In the criminal context, this can arise when a convicted criminal defendant seeks relief based on the attorney's failure to provide constitutionally effective representation. Such claims are often dismissed without taking evidence and without a determination regarding the reasonableness of the lawyer's representation. It is possible, however, that a trial attorney may be asked to assist the prosecution in advance of testifying or to submit evidence in a judicial proceeding. In those situations, the opinion states, Model Rules 1.6(a) and 1.9 still apply unless the defendant gives informed consent to its disclosure. As such, lawyers who are required to give evidence at a deposition, hearing, or other formal proceeding regarding the former client's ineffective assistance claim must invoke the attorney-client privilege unless the former client has provided informed consent.

The opinion clarifies that Model Rule 1.6(b)(5) still permits a lawyer to disclose otherwise privileged information if he or she reasonably believes that it is necessary to do so. This is, however, an extremely narrow exception, "only

to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences." The opinion notes that permitting disclosure outside court-supervised proceedings "undermines important interest protected by the confidentiality rule." This is because information revealed to the prosecution may prejudice the former client in any subsequent proceedings. The opinion therefore concludes that without either a court order or the client's express informed consent, the lawyer should not reveal client information to the prosecution.

Significance of Opinion

As the opinion acknowledges, the vast majority of claims of ineffective assistance of counsel are dismissed without taking evidence and without a determination regarding the reasonableness of the lawyer's representation. The opinion emphasizes the importance of maintaining the confidentiality of client communications and reinforces that attorneys should be reluctant to reveal any client communications in response to an ineffective assistance claim unless there is a court-supervised proceeding or the former client provides informed consent.

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