Confidentiality and Disclosure: What the New ABA Criminal Justice Standards (Don't) Say About the Duties of Defense Counsel

by CECELIA KLINGELE*

Introduction

The duty to hold client confidences inviolate is one of the defining features of a lawyer's professional identity. One law school text describes the duty of confidentiality as "one of the most fundamental, even sacred, professional obligations of a lawyer."[1] Another explains that the "ability to keep secrets is, if not the heart of the lawyer's duty of loyalty to the client, its most visible, tangible aspect."[2] Courts, too, have long lauded the unique protections afforded by both the evidentiary attorney-client privilege and the broader ethical duty to guard against disclosure of client communications.[3] The image of the lawyer as "keeper of

* Visiting Assistant Professor, University of Wisconsin Law School. Many thanks to Bruce Green and Rory Little for the opportunity to contribute to the ABA Roundtable discussions, and to the University of Wisconsin Law School and Cardozo Law School and their Roundtable participants for the opportunity to engage talented and experienced practitioners in a thoughtful discussion of confidentiality issues.

1. W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS 115 (2004).

2. JAMES E. MOLITERNO, ETHICS OF THE LAWYER'S WORK 152 (2d ed. 2003).

3. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (stating that the attorney-client privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice'"); Styles v. Mumbert, 79 Cal. Rptr. 3d 880, 884 (Ct. App. 2008) ("The duty of confidentiality of client information involves public policies of paramount importance."); Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 251 (N.J. 1988) (citations omitted) ("[T]he ethical obligation of every attorney to preserve the confidences and secrets of a client is basic to the legitimate practice of law . . . . Preserving the sanctity of confidentiality of a client's disclosures to his attorney will encourage an open atmosphere of trust, thus enabling the attorney to do the best job he can for the client."). There are also those who view the duty of confidentiality with more

confidences" is widely embraced by the legal profession as evidence of the protection afforded by counsel against the power of the State.[4]

Nonetheless, a lawyer's confidentiality obligations are far from absolute. Both the attorney-client privilege and the ethical duty of confidentiality contain exceptions permitting disclosure of a significant subset of client communications.[5] For criminal defense counsel, issues of confidentiality and disclosure may arise throughout the course of representation, from the moment of initial client contact through possible post-representation litigation. When they do, counsel must confront difficult questions regarding what to tell clients about the limits of confidentiality; whether, when, and to whom disclosure should be made; and to what degree post-representation disclosures should be offered to successor counsel and to courts adjudicating claims of ineffective assistance of counsel. In addressing these matters, criminal defense lawyers may seek guidance from both informal and formal sources. Personal values and temperament will of course affect the approach lawyers take to client counseling and disclosure decisions; also, local professional customs, passed on to new attorneys by their mentors and supervisors, may exert an even greater influence on attorney conduct.[6]

Other sources of guidance will be more formal. Most influential of these will be the rules of professional conduct that govern the behavior of lawyers within a specified jurisdiction: Because breach

skepticism than admiration. *See, e.g.*, William H. Simon, *The Confidentiality Fetish*, THE ATLANTIC, Dec. 2004, at 113, 113–14 (contending "[t]he bar's commitment to confidentiality is not just an ideology; it is also a marketing strategy" that allows lawyers to "give clients something that other professionals, with the exception of doctors and priests, cannot"); *see also* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (suggesting that strong confidentiality rules are not necessary to ensure full disclosure of relevant facts by the client).

4. The depth of lawyers' commitment to confidentiality was demonstrated repeatedly throughout the ABA Roundtable discussions at both the University of Wisconsin and Cardozo Law Schools. Numerous lawyers voiced their belief that clients should be promised absolute confidentiality, both because it facilitated lawyer-client communication, and because, in their own experience, disclosure occurred only in very rare instances.

5. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 563 (1989) (discussing the crime-fraud exception to the attorney-client privilege); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(3) (2002) [hereinafter MODEL RULES].

6. *See, e.g.*, Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 453 (2007) (drawing on social psychology research to explain the influence of legal practice settings and culture on professional behavior of attorneys and suggesting that contextual factors may have more to do with behavioral decisions than personality traits or values).

may result in professional sanction, lawyers are likely to pay close attention to the content of these rules.[7] A separate and potentially influential source of formal guidance can be found in the American Bar Association's Criminal Justice Standards. Although the current Standards overlap to some degree with rules of professional conduct,[8] they provide broad guidance not only with respect to defense counsel's ethical obligations but with respect to most aspects of the lawyer's professional life. Since their introduction more than thirty-five years ago, the Criminal Justice Standards have offered defense counsel guidance on many important aspects of client representation, ranging from initial client contact to cooperation with post-conviction litigation.[9] Some of these Standards have attained binding force by virtue of their incorporation into state legislation, rules of criminal procedure, or court practice rules.[10] Others, while not enforceable through disciplinary proceedings or other litigation, remain influential. The Standards have been widely cited by courts, quoted by advocates, and implemented by reform efforts designed to improve the criminal justice system.[11]

Given the historically important role played by the current Standards in criminal defense policy and practice, it is appropriate to examine in some detail recent proposed revisions to the Standards governing the function of defense counsel with respect to matters of confidentiality. This Essay discusses several implications of the

7. Every jurisdiction, with the exception of the State of California, has adopted a Code of Professional Conduct modeled at least in part on the ABA Rules of Professional Conduct. *See* ABA, Model Rules of Prof'l Conduct Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Aug. 1, 2010) (listing states that have adopted the Model Rules with year of adoption). These rules are enforced, to a greater or lesser degree, through formal disciplinary proceedings adjudicated by a state bar or state high court. *See* MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 42–43 (8th ed. 2007).

8. *Compare* MODEL RULES, *supra* note 5, MODEL RULE 1.6(b)(1)-(3), *with* STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.7(d) (Proposed Revisions 2010) [hereinafter "PROPOSED DEFENSE STANDARDS"]; Rory K. Little, *The Role of Reporter for a Law Project*, 38 Hastings Const. L.Q. 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

9. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.1, 4-8.6 (3d ed. 1993) [hereinafter "1993 DEFENSE STANDARDS"].

10. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 11 (2009) (describing methods by which jurisdictions and courts have adopted the Standards).

11. *Id.* at 11–12.

proposed changes for the way in which defense counsel maintain the confidentiality of client communications, suggesting that despite the many strengths of the Proposed Standards, the revisions circumvent critical questions that practitioners must confront with respect to confidentiality and disclosure. Part One examines the manner in which the current Standards direct lawyers to advise their new clients on the duty of confidentiality and identifies potentially inadvertent ways in which the current Standards may encourage counsel to withhold important information from their clients. Part Two focuses on how the current Standards govern disclosure of client communications in anticipation of physical harm or criminal conduct by the client, noting critical omissions in the guidance offered to defense counsel who find themselves in such situations. Part Three briefly addresses the lawyer's confidentiality obligations following representation, examining Proposed Standard 4-4.6, which governs communications with successor counsel, and Proposed Standard 4-9.6, which pertains to legal claims of ineffective assistance brought by former clients. While acknowledging that many of the proposed changes to the current Standards enhance their usefulness to practicing lawyers, I argue that the current Standards could be further revitalized and their influence increased if they were to more directly tackle difficult questions on which they are now silent.

I. Defining the Bounds of Confidentiality: What to Tell the Client?

The first meeting between a criminal defendant and his lawyer is almost always an anxiety-laden event for the client. Faced with the prospect of criminal conviction and sanction, the client is in need of honest, direct counsel regarding what lies ahead. Particularly for the client who lacks experience in the criminal justice system, the initial interview promises a welcome opportunity to gain a better sense of what to expect from both the criminal justice system and the lawyer-client relationship.

When the client first meets with his lawyer, he will inevitably disclose information about his case. How much information and of what kind will vary depending on the circumstances of the meeting, the context of the case, and the relationship between lawyer and client. Within the legal community, it is widely accepted that the duty of confidentiality and its complementary predecessor, the attorney-client privilege, improve the quality of attorney-client counseling by

encouraging clients to provide their lawyers with the facts necessary to offer good counsel.[12] Whether this assumption is empirically justified is a matter of debate; regardless, a desire for open client communication indisputably provides the justification for the duty and the privilege.[13] Consequently, given the presumed importance of confidentiality to the integrity of the attorney-client relationship, it may come as a surprise that studies suggest that lawyers routinely fail to counsel their clients about both the existence and the scope of attorney-client confidentiality.[14]

What do the current Standards have to say about this failure? The current Defense Function Standards offer considerable guidance concerning many aspects of the early stages of representation, and the Proposed Standards go even further in outlining what a lawyer should and should not do to set the stage for a productive lawyer-client relationship. Taken in combination, Proposed Standards 4-3.1 ("Establishing and Maintaining an Effective Client Relationship"), 4-3.2 ("Interviewing the Client"), 4-3.8 ("Duty to Keep Client Informed"), and 4-5.1 ("Advising the Accused") attempt to provide defense counsel with a roadmap for establishing a working relationship with the criminal defendant. These Standards require counsel to consult with the client early and often,[15] answer questions,[16]

12. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 244–45 (5th ed. 2009).

13. In *Swidler & Berlin v. United States*, the Supreme Court observed that although the handful of studies that existed "d[id] not reach firm conclusions on whether limiting the privilege would discourage full and frank communication," it was apparent that "a substantial number of clients and attorneys *think* the privilege encourages candor." 524 U.S. 399, 409 n.4 (1998) (emphasis added).

14. Although research studies are limited, one frequently-cited study conducted in Thompkins County, New York, found that more than 20% of lawyers reported "almost never" discussing confidentiality with their clients and almost 60% more discussed confidentiality with their clients in only about half of all cases. Zacharias, *supra* note 3, at 382. When the lawyers surveyed did discuss confidentiality, less than 28% explained to clients that their confidentiality obligations were not absolute. *Id.* at 386. A 1993 study found that more than half of the surveyed criminal defense lawyers in a New Jersey survey did discuss confidentiality with their clients at least 75 percent of the time. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Responses to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 121 n.179 (1994). At the same time, however, the lawyers surveyed in the Levin study generally did not discuss exceptions to the rule of confidentiality for fear it would inhibit useful client disclosures. *Id.* at 122–23. Participants in both the Wisconsin and Cardozo Roundtable discussions echoed that sentiment.

15. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.3(b) ("Defense counsel should meet with the client in person unless impracticable, and very early in the

plan defense strategies,[17] and offer holistic advice[18] in a way that enhances the client's ability to process the information counsel provides.[19] Yet, although the Standards are in many ways detailed, they do not provide clear guidance regarding whether, how, or when a lawyer should discuss the scope of confidentiality of attorney-client communications with the client.

Both the current Defense Function Standards and the Proposed Standards direct defense counsel to "seek to establish a relationship of trust and confidence with the accused" and to do so in part by discussing matters of confidentiality.[20] The current Standards direct defense counsel, when establishing a relationship with a new client, to "explain *the extent to which* counsel's obligation of confidentiality makes privileged the accused's disclosures."[21] The purpose behind such a requirement seems obvious: Because the client will suffer the consequences of his decision to provide or withhold information from his lawyer, respect for client autonomy suggests that the lawyer

representation interview the client in depth . . . . Counsel should interview the client as many times as is necessary for effective representations, which in all but the most simple and routine cases will normally mean more than once."); Little, App.: Proposed Defense Standards, *supra* note 8.

16. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.8(a) ("Defense counsel should timely explain and discuss developments in the case with the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); Little, App.: Proposed Defense Standards, *supra* note 8.

17. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.3(c) ("Early on in the representation, defense counsel should also consider, and discuss with the client, other relevant topics such as (i) the likely length and course of the pending proceedings; (ii) potential sources of helpful information and evidence; (iii) the range of potential outcomes, and punishments if convicted; [and] (iv) the possibility of a negotiated disposition, including the costs and benefits of cooperation with the government and the possibility of lesser-included offenses."); Little, App.: Proposed Defense Standards, *supra* note 8.

18. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-5.1(b) (when advising an accused, defense counsel "may refer not only to law but to other considerations such as moral, economic, social or political factors that may be relevant to the client's situation."); Little, App.: Proposed Defense Standards, *supra* note 8.

19. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.8(a) ("Defense counsel should timely explain and discuss developments in the case with the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* Standard 4-5.1(c) ("Defense counsel should provide the client with such advice sufficiently in advance of decisions to allow the client to consider the options, and avoid unnecessarily rushing the accused into decisions."); Little, App.: Proposed Defense Standards, *supra* note 8.

20. 1993 DEFENSE STANDARDS, *supra* note 9, § 4-3.1(a); PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.1(a).

21. 1993 DEFENSE STANDARDS, *supra* note 9, § 4-3.1(a) (emphasis added).

should inform the defendant of the "rules of play," explaining clearly what kinds of communications will be held in absolute confidence and which may be subject to disclosure, with or without client consent. Unlike the current Standards, the Proposed Standards do not explicitly require counsel to inform the client of the scope of confidentiality. Instead, they direct defense counsel to inform the new client "that the attorney-client privilege *strongly protects* the confidentiality of communications with counsel."[22] In this way, the Proposed Standards emphasize confidentiality over its exceptions, reflecting what appears to be common practice among defense attorneys.[23] This shift in emphasis, while subtle, raises the question of whether (and, if so, to what degree) defense counsel is still permitted (or ought to be encouraged) to discuss the circumstances in which otherwise confidential communications may be subject to disclosure.

In answering that question, it is appropriate to look ahead from the moment when counsel first raises the subject of confidentiality (however defined) to the client interview that follows. Proposed Standard 4-3.1 requires the lawyer to explain "the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense,"[24] while Proposed Standard 4-3.3 reiterates that during client interviews defense counsel should "encourage full and candid disclosure by the client."[25] Because it would not be inconsistent for a lawyer to encourage full candor while

22. PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.1(a) (emphasis added). Notably, both the old and new Standards refer to the attorney-client privilege and not to the lawyer's broader ethical duty of confidentiality; Little, App.: Proposed Defense Standards, *supra* note 8. *See* PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.1(a). Although the distinction between the two would be lost on many clients, it is worth asking whether a lawyer ought to distinguish between them or inform the client of the scope of both the privilege and the duty.

23. There is no question that the 1993 version of Standard 3-3.1(a) requires the lawyer to discuss with the client the limits of the attorney-client privilege. The commentary explains, "[b]ecause it is critical to a healthy lawyer-client relationship that a client not be surprised by the revelation of confidences made by an attorney at some time in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction." 1993 DEFENSE STANDARDS, *supra* note 9, § 4-3.1(a) cmt. As mentioned earlier, however, this practice is not one that has found favor with practitioners, who suggest that it stifles disclosure and inhibits client trust, thereby impeding effective representation. *See supra* text accompanying note 14.

24. PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.1; Little, App.: Proposed Defense Standards, *supra* note 8.

25. PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.3(d); Little, App.: Proposed Defense Standards, *supra* note 8.

simultaneously ensuring that a client has been fully informed of the potential ramifications of such disclosure, these provisions standing alone do not prevent defense counsel from initiating a frank discussion of the limits of attorney-client confidentiality.

The question of what to tell the client about the limits of confidentiality becomes more complicated, however, when the final sentence of Proposed Standard 4-3.3 is considered. That sentence admonishes counsel, when interviewing a client, not to "express any desire for 'calculated ignorance,' meaning that counsel should not *express or intimate* to the client that the client should not be candid in revealing facts for strategic or tactical reasons."[26] Under one interpretation of these provisions, Proposed Standard 4-3.3(d) could be read to implicitly prohibit (or, at the very least, strongly discourage) a discussion between the lawyer and client about the limits of confidentiality. If Proposed Standard 4-3.3 is understood to govern all client interviews, including the initial client meeting, it becomes difficult to reconcile a conversation about limitations on confidentiality with the admonition to avoid even *intimating* that the lawyer is seeking less than full disclosure from the client. Particularly when Proposed Standard 4-3.3(d) is coupled with Proposed Standard 4-3.1(a)'s directive to emphasize the "strong protection" afforded to attorney-client communications by the evidentiary privilege, defense counsel might reasonably infer that disclosing the bounds of confidentiality is a practice disfavored by the Proposed Standards.

One way to reconcile Proposed Standards 4-3.1 and 4-3.3 would be to interpret each independently. Under that approach, Proposed Standard 4-3.1(a) requires defense counsel to inform the client about the attorney-client privilege and its protections at the outset of representation, but it does not prevent counsel from engaging in a more complete discussion of the limitations of both the privilege and the ethical duty of confidentiality. Under this reading, Proposed Standard 4-3.3(d)'s admonition to avoid the appearance of a desire

26. PROPOSED DEFENSE STANDARDS, *supra* note 8, § 4-3.3(d) (emphasis added); Little, App.: Proposed Defense Standards, *supra* note 8. Roundtable participants held conflicting views on the wisdom of encouraging such full and candid disclosure. While some defense attorneys believed they could provide representation most effectively when the client revealed all, others strongly held the position that they did not want to know certain facts about the case (including, in some instances, whether the client was guilty in fact), specifically because knowledge of certain facts might give rise to disclosure obligations and prevent the lawyer from later soliciting testimony from the defendant in court.

for "calculated ignorance" would be limited to subsequent client interviews, when a renewed discussion of the limits of confidentiality could be misinterpreted by the client as a warning not to divulge inconvenient, but otherwise relevant, information to defense counsel.

As Roundtable participants were quick to note, the problem with this approach is that it assumes the initial client meeting will be a thorough one, occurring in an environment where the lawyer is able to explain the nuances and exceptions of confidentiality as well as position the client to understand the full implications of the disclosures he will later make to counsel. The reality of criminal defense practice is not so tidy. Often the first meeting between a criminal defendant and his lawyer occurs in a holding cell, courtroom, or other location where privacy and time are limited, and where meaningful and nuanced conversation is unlikely to occur. Experienced defense counsel are therefore likely to avoid nuanced conversation on the subject of confidentiality at the first client meeting, saving the subject for another day or avoiding it altogether. Unfortunately, as drafted, the current Standards appear to disapprove of such a practice, with the result that conscientious lawyers who wish to advise their clients on the scope of confidentiality may find their instincts at odds with the language of the Proposed Standards.

Assuming that the Proposed Standards are *not* intended to discourage defense counsel from discussing the limits of confidentiality with the client should that prove advisable,[27] the question remains how counsel should best approach the topic. Although the Standards offer no guidance on this point, several commentators have suggested ways in which defense counsel might go about informing clients of confidentiality protections and limitations, cognizant of the balance that must be struck between

27. There are many reasons to favor such a conversation, not least of which is a concern for client autonomy. As Fred Zacharias observed, "To the extent lawyers manipulate clients into confiding based on a mistaken view of confidentiality, that undercuts another of confidentiality's basic rationales: that confidentiality helps clients make informed choices and thus enhances their dignity and 'autonomy.'" Zacharias, *supra* note 3, at 381. *See also* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 489–90 (1990) ("[A]n attorney practices deception upon a trusting client when she misstates or refuses to disclose those circumstances that constitute exceptions to the attorney-client privilege. Deception has the immediate impact of reducing client autonomy and impairing the trust relationship, while the rights that deception might vindicate are varied and speculative. Thus, an attorney is morally required, and should be legally required, to be forthright with a client and allow the client to choose whether the risks of disclosure outweigh its benefits.").

ensuring that the explanation provided is "truthful, accurate, and complete enough to be appreciated by the client" but not "so complicated and frightening that it unduly chills the open and honest exchange of information" essential to quality representation.[28] Professor Roy Sobelson has argued in favor of providing clients with detailed written disclosure forms,[29] while Professor Lee Pizzimenti has suggested that lawyers are obliged to engage their clients in an "ongoing conversation" about secrecy and disclosure—a conversation that should begin at the outset of representation and be revisited as questions arise.[30] One ethics textbook suggests that lawyers make brief reference to the existence of exceptions to the confidentiality rules during the initial client interview, and follow up with a more detailed discussion if the client inquires further.[31] Others have argued strenuously that placing any emphasis on the exceptions is misguided and will only have detrimental effects on the ability of the lawyer to effectively represent her client's interests.[32]

This discontinuity of approach and underlying principle was reflected in the Roundtable conversations. A number of seasoned current and former defense attorneys argued strenuously that anything less than a pledge of complete confidentiality will undermine client trust, making effective representation nearly impossible. Other veteran attorneys, however, expressed deep discomfort with pledging absolute confidentiality to a client while knowing that they possess an ethical obligation to avoid suborning perjury and may have a duty to report serious threats of harm made

28. Roy M. Sobelson, *Lawyers, Clients, and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 772 (1987).

29. *Id.*, 772–74 (providing a sample disclosure form).

30. Pizzimenti takes the position that counsel is obliged to "give a general explanation of the duty of confidentiality and its major exceptions. In that way, the client will have enough information to enable him to ask intelligent questions as specific confidentiality issues arise." Pizzimenti, *supra* note 27, at 485.

31. *See* Clark D. Cunningham, *How To Explain Confidentiality?*, 9 CLINICAL L. REV. 579, 588 (2003) (citing ROBERT F. COCHRAN ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 70–71 (1999)). *See also* Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895, 920–21 (2000) (charting a similar middle course).

32. *See, e.g.*, MONROE FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 119 (1990); Ellmann, *Truth and Consequences*, *supra* note 31, at 918 (discussing Anthony Amsterdam's suggested use of a model statement of confidentiality that suggests to the client that the duty of confidentiality is absolute).

by the client.[33] The debate within the academic literature and among seasoned practitioners highlights the need for guidance on how to best approach the subject of client confidentiality and its limits when counseling criminal defendants. That guidance is not found in the Model Rules of Professional Conduct and, at this time, cannot be found in the Proposed Defense Standards.

Defining best practice standards with respect to client counseling on confidentiality requires engagement with fundamental questions about the nature of representation. Are confidentiality protections meant to advance the autonomy interests of clients or are they meant to ease the job of defense counsel who may be unable to achieve optimal outcomes in the absence of important facts? Who should decide what information is worthy of revelation: The client or the lawyer? While achieving consensus on these important matters may be difficult, if the Standards are to remain influential in helping defense counsel determine how best to position clients for effective representation, the Standards Committee would do well to provide further guidance on this important topic.

II. Disclosure during the Course of Representation: Whether, When, and To Whom?

Regardless whether a lawyer advises her client at the outset of representation of the circumstances under which disclosure of confidential information may occur, circumstances may arise during the course of the representation that invite her to consider disclosing client communications to a third party.[34] In such circumstances, the lawyer must answer several questions. First, as a threshold matter, she must determine whether disclosure is ethically permissible. If so, she must next determine whether disclosure (if discretionary) is the best course of action and what, if any, steps should be taken to inform the client of the

33. The most common types of disclosed threats mentioned by Roundtable participants were threats of harm to significant others made in the context of domestic violence disputes and suicidal threats.

34. In Leslie Levin's 1993 survey of New Jersey lawyers, sixty-seven of them reported having encountered at least one situation in "which they reasonably believed that a client was going to commit a specific wrongful act that was likely to result in death or substantial bodily harm to an identifiable third party." Levin, *supra* note 14, at 111–12. Participants in the Wisconsin Roundtable expressed skepticism about that finding, stating that it contradicted their experience that credible threats of serious harm to third parties rarely arise, while Cardozo participants suggested that such situations are unusual outside the context of domestic violence disputes.

disclosure decision. Finally, if the lawyer opts to disclose, she must decide what to say and to whom to reveal the information. The Standards have much to say about the threshold question, but are strangely silent with respect to the remaining questions counsel must resolve.

Both the current and proposed Defense Standards set forth clear conditions for the disclosure of otherwise confidential client communications.[35] The Standards list numerous conditions that may justify discretionary disclosure of confidential information. One of these exceptions is triggered when client communications give rise to a belief that the physical, financial, or property interests of third parties will be harmed absent disclosure.[36] The current Standards provide that disclosure without prior client authorization is permitted "to the extent [counsel] 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."[37] The Proposed Standards expand the scope of the exception and permit disclosure of otherwise confidential information "to prevent reasonably certain death, substantial bodily harm, or substantial financial or property harm that defense counsel's services have been or will be used to further."[38] These revisions are consistent with recent changes to the Model Rules of Professional Responsibility, which have broadened the circumstances under which disclosure of client communications may be ethically permitted.[39]

---

35. *See, e.g.*, 1993 DEFENSE STANDARDS, *supra* note 9, § 4-4.6(d) (disclosure of physical evidence); *Id.* § 4-8.6(d) (challenges to the effectiveness of counsel); PROPOSED STANDARDS, *supra* note 8, § 4-1.7 (disclosure of confidential communications conveyed to lawyer advisory group); *Id.* § 4-4.6(d) (disclosure of physical evidence); *Id.* § 4-9.6 (challenges to the effectiveness of counsel).

36. *See* PROPOSED STANDARDS, *supra* note 8, § 4-3.7(d); Little, App.: Proposed Defense Standards, *supra* note 8.

37. 1993 DEFENSE STANDARDS, *supra* note 9, § 4-3.7(d).

38. PROPOSED STANDARDS, *supra* note 8, § 4-3.7(d); Little, App.: Proposed Defense Standards, *supra* note 8.

39. *See* MODEL RULES, *supra* note 5, at R. 1.6 (authorizing disclosure "to prevent reasonably certain death or substantial bodily harm;" "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services"). *See also* Amanda Vance & Randi Wallach, Note, *Updating*

On its face, Proposed Standard 4-3.79(d) appears more streamlined than its 1993 predecessor. The Proposed Standard eliminates the "reasonable belief" and imminence requirements contained in the current Standards (though it adds a requirement that the anticipated harm be "reasonably certain" to result absent disclosure). The revision also does away with the requirement that disclosure be designed to prevent the client from committing a crime when death or substantial bodily harm are on the line: Under the Proposed Standard, defense counsel may disclose client confidences to prevent harm even in the absence of threatened criminal conduct by the client.[40] Despite these changes, however, some aspects of the threshold standard for disclosure remain unclear.

To illustrate the problem, imagine that a defendant has been charged with stalking his ex-girlfriend. After learning that the ex-girlfriend was seen walking on the beach with another man, the defendant tells his lawyer that he is going to make sure the woman never walks again. Assume defense counsel is reasonably certain that her client is planning to carry out the threat and has already made plans to do so. What options are available to the lawyer?

Under the Proposed Standards, disclosure is permitted "to prevent reasonably certain . . . substantial bodily harm;"[41] consequently, the lawyer must ask herself whether disclosure in this instance would, in fact, prevent substantial bodily harm to her client's ex-girlfriend. In answering that question, should the lawyer ask whether disclosure *might* make a difference? Whether it *will* have that effect? How certain must she be that disclosure will prevent the harm? The question is an important one, particularly when the effectiveness of disclosure turns on the response of third parties to the information disclosed.

In this scenario, what would law enforcement do with the information the lawyer wishes to disclose? Perhaps police could take proactive steps to protect the potential victim, particularly if the offender is already under supervision or subject to a restraining order.

Confidentiality: An Overview of the Recent Changes to Model Rule 1.6, 17 GEO. J. LEGAL ETHICS 1003 (2004).

40. For an example of the difference between these two standards, see David Lew, Note, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?*, 18 GEO. J. LEGAL ETHICS 881, 881 (2005) (describing scenario in which disclosure of confidential information would prevent death but would not prevent the client from engaging in criminal activity).

41. PROPOSED STANDARDS, *supra* note 8, Standard 4-3.7(d); Little, App.: Proposed Defense Standards, *supra* note 8.

But what if the police are unable to take preventive action and disclosure of the client's threat is unlikely to prevent injury? Under a close reading of the Proposed Standard, it appears that disclosure would not be permitted, much less advised, in such an instance.[42] But what if it were unclear whether disclosure to law enforcement—or even to the victim herself—would have the desired effect? As this hypothetical scenario demonstrates, although Proposed Standard 4-3.7(d) eliminates some of the subjective elements inherent in the 1993 Standard, it has introduced important new questions.

The failure of the Proposed Standards to provide perfect clarity regarding the standard for disclosure is in many ways a harmless error. Although the standard governing disclosure is the only aspect of the disclosure decision on which the Proposed Standards offer substantial guidance, it is also the least useful feature of Proposed Standard 4-3.7. The Proposed Standards' attempt to carefully articulate the conditions under which disclosure is permitted in cases of anticipated physical harm or criminal conduct is largely immaterial to practitioners, who are obliged to comply not with the disclosure standards set forth in Proposed Standard 4-3.7(d), but with the approach taken by the jurisdictions in which they practice. Some of these differ significantly from Proposed Standard 4-3.7(d).[43] Although this is a reality the

42. Thanks to Professor Walter J. Dickey for suggesting a version of this hypothetical with its implications for disclosure under the Rules of Professional Conduct (and, by extension, under the Standard 4-3.7(d)).

43. *See, e.g.*, MICH. RULES OF PROF'L CONDUCT R. 1.6 (c)(4) (2007) ("A lawyer may reveal . . . the intention of a client to commit a crime and the information necessary to prevent the crime."); OR. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2005) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."); TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(1), (c)(1) (2008) ("A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary . . . to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another . . ." and "*shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary . . . to prevent reasonably certain death or substantial bodily harm." (emphasis added)); WIS. SUP. CT. R. 20:1.6(b), (c)(1)–(2) (2007) ("A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing 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 interest or property of another" and "*may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably likely death or substantial bodily harm" or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of

Proposed Standards themselves anticipate,[44] it makes more troubling the Proposed Standard's failure to provide guidance on other aspects of disclosure that are not addressed by Rules of Professional Conduct and on which the Proposed Standards could be influential to practitioner decision making.

One area in which the Proposed Standards might offer greater guidance relates to the conduct of defense counsel after she has determined that disclosure is permitted under Standard 4-3.7(d). When and to whom should disclosure be made? Should the client be told of the proposed disclosure before or after it occurs, or not at all? Despite the weightiness of these questions, the Proposed Standards provide no clear answers to any of them.

The absence of Standards addressing these questions might be of small consequence, were guidance available from other sources. In fact, however, these questions are ones with which practitioners are left to wrestle in private. Given the sacrosanct manner in which confidentiality is treated within the legal community, it is not entirely surprising that lawyers are not quick to confess to disclosure of client information and that the legal literature glosses over the details of how disclosure should occur in those rare occasions when it is required or permitted. Participants in the Roundtable discussions indicated that they rarely encountered situations in which disclosure was necessary and provided few examples of such disclosure. One lawyer admitted that he had once intimated to a bailiff that his client posed a danger, but did not provide the bailiff with details of how or in what way the client was dangerous. Several attorneys had reported to jail officials that their clients were at risk of suicide, and a few others indicated that they had disclosed threats made by clients to the clients' domestic partners or former partners. Somewhat more common were instances in which attorneys asked to withdraw from representation rather than call their clients to testify at trial.

Interestingly, a substantial number of attorneys acknowledged either relaying facts gleaned from client communications to state attorneys in the course of plea negotiations, or having witnessed other

a crime or fraud in furtherance of which the client has used the lawyer's services." (emphasis added)).

44. *See* PROPOSED STANDARDS, *supra* note 8, § 4-1.1(a) ("These Standards do not modify a defense attorney's ethical obligations under applicable rule[s] of professional conduct."); Little, App.: Proposed Defense Standards, *supra* note 8.

attorneys do so without express client authorization.[45] What was striking about the Roundtable conversations on this subject was the discomfort that surrounded attorneys' discussion of the mechanics of disclosure. Whether this was a result of the participants' lack of experience with disclosing such information or the powerful professional taboos against doing so (or some combination of both) was unclear, but it seemed to suggest that formal, external guidance might be useful for those practitioners who find themselves in a position where disclosure is mandated or where the exercise of discretion leads to a decision to reveal client confidences.

What points of decision ought such guidance address? One is whether lawyers should be obliged to inform clients when disclosure of confidential information is contemplated or takes place. Proposed Standard 4-3.7(a) requires defense counsel to "always advise his or her clients to comply with the law."[46] It does not say, however, whether the lawyer is required to discuss the possibility of disclosure if the client fails to abandon any planned criminal activity. Proposed Standard 4-5.1 directs defense counsel to "advise the accused with complete candor concerning all aspects of the case."[47] Although this Standard at first blush appears to be a promising source of guidance (since surely the disclosure of client communications could be considered one "aspect of the case"), the relevant language of Proposed Standard 4-5.1 is taken directly from 1993 Standard 4-5.1.[48] The commentary to the earlier Standard pertains solely to advising the client on the plea decision: It makes no reference to matters arising within the course of representation that do not directly relate to the client's pending criminal charge.[49]

Though the Proposed Standards offer no direct guidance on this matter, a few state codes of professional conduct explicitly require

45. Several attorneys described their understanding that most disclosures made in this context were implicitly authorized by the client's decision to seek a plea deal. A large number of Roundtable participants, however, acknowledged having witnessed other defense attorneys share confidential information with abandon in the context of plea negotiations.

46. *See* PROPOSED STANDARDS, *supra* note 8, § 3-4.7(a); Little, App.: Proposed Defense Standards, *supra* note 8; *cf.* 1993 DEFENSE STANDARDS, *supra* note 9, § 4-3.7(d) cmt. ("Where practical, the lawyer should seek to persuade the client to take suitable action.").

47. PROPOSED STANDARDS, *supra* note 8, § 4-5.1; Little, App.: Proposed Defense Standards, *supra* note 8.

48. *See* 1993 DEFENSE STANDARDS, *supra* note 9, § 4-5.1.

49. *See id.* cmt.

attorneys to consult with clients before or after disclosing confidential information when disclosure has been prompted by concerns regarding anticipated harm to others. California's Rules of Professional Conduct direct lawyers, when "reasonable under the circumstances," to engage clients in honest conversation before revealing confidential information intended to prevent a criminal act that is likely to result in death or substantial bodily harm to an individual.[50] During that conversation, lawyers are directed to "make a good faith effort to persuade the client . . . not to commit or to continue the criminal act or . . . to pursue a course of conduct that will prevent the threatened death or substantial bodily harm."[51] The rule also directs the lawyer to inform the client "at an appropriate time" of the lawyer's "ability or decision to disclose" client communications.[52] Virginia similarly requires its lawyers to consult with clients when disclosure is contemplated in anticipation of a client's criminal act. Under the Virginia rules, lawyers are required to "promptly reveal . . . the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime."[53] Before making such a revelation, however, the lawyer must, "where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel."[54] These state rules take the position that forthrightness is desirable within the lawyer-client

50. CAL. RULES OF PROF'L CONDUCT R. 3-100(B), (C) (2004), *in* RICHARD ZITRIN ET AL., LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS 615 (2009).

51. CAL. RULES OF PROF'L CONDUCT R. 3-100(C)(1).

52. *Id.* at R. 3-100(C)(2). The text of this rule is not entirely clear with respect to the timing of a lawyer's revelation to his client that protected communications have been or will be disclosed. Rule 3-100(C) states that, "when reasonable," the rule's provisions must be followed *before* the lawyer reveals confidential information; however, Subsection (C)(2) indicates that the lawyer should inform the client of the disclosure decision "at an appropriate time." *Id.* The Commentary to the Rule clarifies that the appropriate time for such disclosure will "vary depending upon the circumstances" and may in some cases be inappropriate entirely, such as when "informing a client of [counsel's] ability or decision to reveal confidential information . . . would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to [counsel] or [counsel's] family or associates." *Id.* cmt. 9.

53. VA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2000).

54. *Id.*

relationship, even on matters as sensitive as disclosure.[55] While both the California and Virginia rules leave room for lawyers to conceal disclosure from their clients when safety requires it, they do not permit defense counsel to hide the fact of disclosure based on concerns over the lawyer's professional reputation or future business interests.

Reasonable professionals may disagree with the requirements imposed by California and Virginia with respect to client consultation around the issue of disclosure. To their credit, however, the state codes of professional conduct tackle the issue of client confrontation in a forthright way that the Proposed Standards do not. Given the complexity of the decisions counsel must make in this regard, the Proposed Standards' failure to address the need for client consultation before or after disclosure is disappointing. Similarly, the Standards' silence on other questions related to disclosure under Standard 4-3.7(d)—such as to whom and when disclosures should be made—is a missed opportunity to increase the relevance of the Proposed Defense Standards to practicing defense attorneys.

III. Disclosure After Representation: To What Degree Should Confidences Be Revealed?

The aspects of the Proposed Standards' treatment of confidentiality and disclosure that received the most response (both favorable and unfavorable) from Roundtable participants related to post-representation disclosure. The Proposed Standards provide significantly more direction than the 1993 Defense Standards on these issues, as exemplified by Proposed Standards 4-4.6 (Relationship Between Prior and Successor Counsel) and 4-9.6 (Challenges to the Effectiveness of Counsel). What made these Proposed Standards more robust (and consequently, more discussion-provoking) than other confidentiality-related provisions? Primarily, it is their willingness to cover new ground, offering novel or expanded guidance on matters that defense counsel are routinely forced to confront and on which reasonable attorneys might differ in their approach. In so doing,

55. There are hints in the academic literature that client confrontation prior to disclosure may serve a practical, as well as a dignitary, purpose. In Levin's 1993 study of New Jersey lawyers, "the vast majority of lawyers who believed that their clients were going to commit wrongful acts that were likely to cause substantial bodily harm reported that they discussed this belief with their clients." Levin, *supra* note 14, at 117. Lawyers surveyed reported that most clients did not commit the wrongful acts after counseling, a fact the lawyers largely attributed to their own intervention. *Id.* at 116.

Proposed Standards 4-4.6 and 4-9.6 address the purpose of and the degree to which permissible disclosures may be made when representation has ended.

Proposed Standard 4-4.6 addresses for the first time the potentially complicated issue of communications between prior and successor counsel on matters pertaining to client representation.[56] During the course of representation, criminal defendants may change lawyers for many reasons, including conflicts of interest, scheduling problems, personality conflicts, or changes in financial circumstance. When counsel changes, the former lawyer is placed in a potentially difficult situation. Not wanting to prejudice her former client,[57] she will ordinarily be inclined to cooperate with successor counsel to the greatest degree possible by providing necessary information about the status of the case and any ongoing litigation. At the same time, depending on the reasons for the change in lawyers, there may be information the client wishes to conceal from successor counsel. Under such circumstances, how is a lawyer to decide what may and may not be disclosed?

To guide lawyers in navigating this situation, Proposed Standard 4-4.6 identifies the purpose of disclosure—to advance the client's interest through cooperation with successor counsel[58]—and within that context limits the degree to which disclosures are permitted. While acknowledging that cooperation between counsel is ordinarily in the client's best interest,[59] Proposed Standard 4-4.6 emphasizes the duty of prior counsel to "protect the client's privileges, confidences and secrets, and seek a release from the client before sharing such information" with successor counsel.[60]

---

56. PROPOSED STANDARDS, *supra* note 8, § 4-4.6; Little, App.: Proposed Defense Standards, *supra* note 8.

57. *See* PROPSED STANDARDS, *supra* note 8, § 4-1.3(a) (describing defense counsel's ongoing duty of loyalty to current and former clients); Little, App.: Proposed Defense Standards, *supra* note 8.

58. *Cf.* PROPSED STANDARDS, *supra* note 8, § 4-7.11 ("Trial counsel should take steps to ensure that the client is continuously represented by some competent defense counsel, through the verdict, post-trial motions, sentence, and appeal, so that the client's rights are fully protected at all times."); Little, App.: Proposed Defense Standards, *supra* note 8.

59. *See* PROPSED STANDARDS, *supra* note 8, § 4-4.6(a); Little, App.: Proposed Defense Standards, *supra* note 8.

60. PROPSED STANDARDS, *supra* note 8, § 4-4.6(b); Little, App.: Proposed Defense Standards, *supra* note 8.

Several Roundtable participants indicated that the Proposed Standard had raised their awareness of confidentiality issues surrounding successor counsel, a topic that ordinarily receives little attention. Participants noted that often the transition from former to successor counsel is prompted by a conflict between lawyer and client that arises out of counsel's access to confidential information. In such cases, counsel must be particularly careful to avoid unauthorized disclosure to successor counsel, remembering that confidences belong to the client and not to the lawyer. By identifying a recurring situation with important ethical implications not previously addressed by the Standards, Proposed Standard 4-4.6 provides useful guidance to former defense counsel seeking to comply with their ethical obligations while assisting successor counsel in seamlessly assuming full representation of the criminal defendant.

Proposed Standard 4-9.6 provides enhanced guidance on a matter addressed in less detail by previous versions of the Standards. It is well-established that the lawyer's duty of confidentiality is abrogated when the client brings a claim against his lawyer, including a claim of ineffective assistance of counsel.[61] Within that broad rule, however, questions often arise regarding the degree of permissible disclosure. When the lawyer is asked to balance the robust defense of her professional conduct against her continuing duties of loyalty and confidentiality to her client,[62] how is she to decide how much confidential information to reveal?

The 1993 version of Standard 8-6(d) tersely described the confidentiality obligations of defense counsel in the context of claims of ineffectiveness, stating:

> Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence."[63]

61. *See, e.g.*, MODEL RULE, *supra* note 5, at R. 1.6(b)(5) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client.").

62. *See* PROPOSED STANDARDS, *supra* note 8, § 4-1.3(a), (b); Little, App.: Proposed Defense Standards, *supra* note 8.

63. 1993 DEFENSE STANDARDS, *supra* note 9, § 4-8.6(d).

The comment to that Standard provides some additional guidance, indicating that in such proceedings counsel may only "reveal that confidential information he or she reasonably believes to be necessary to reveal in order to shed light upon the particular matters at issue."[64] The current Standard does not discuss the scope of disclosure or any other relevant considerations.

The proposed revision to former Standard 4-8.6 is a significant development over its predecessor. Proposed Standard 4-9.6(e) offers a lengthy description of defense counsel's confidentiality obligations in the context of post-representation proceedings challenging counsel's effectiveness. In its entirety, the new subsection explains:

> Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the matters raised by his former client to the extent reasonably necessary, even though this involves revealing matters which were given in confidence. However, former defense counsel continues to have a duty of loyalty to the former client, and should carefully consider whether some other course of conduct, short of revealing damaging client confidences or privileged information, is appropriate.
>
> A waiver of the duty of confidence or the attorney-client privilege should not be presumed simply from the filing of an ineffective assistance claim. Rather, a fully informed and voluntary contemporaneous waiver from the client should be sought and the court and counsel advised of potential privilege and confidentiality claims. Even if the privilege is found to be waived, former counsel should, to the extent permitted by law, restrict the disclosure of confidences only to the extent that disclosure is necessary for the relevant purposes of the proceeding.[65]

Rather than offering a generalized rehashing of the exception to the confidentiality rule found in ABA Model Rule 1.6(5),[66] Proposed Standard 4-9.6(e) offers a more nuanced description of the options available to counsel. The Standard acknowledges the possibility of disclosure, but also invites consideration of reasonable alternatives to,

64. *Id.* cmt.

65. PROPOSED STANDARDS, *supra* note 8, § 4-9.6(e); Little, App.: Proposed Defense Standards, *supra* note 8.

66. *See* PROPOSED STANDARDS, *supra* note 8, § 4-7.11; Little, App.: Proposed Defense Standards, *supra* note 8.

and limitations on, divulging client communications that encourage counsel to thoughtfully necessity of disclosure in any given case. The Proposed Standards suggest that although counsel may wish to defend the manner in which she handled her client's case, she should not view herself as her former client's opponent in such proceedings. Instead, former counsel should "to the extent possible, continue to consider the client's best interests."[67]

While the guidance offered by the Proposed Standard is significantly more detailed than that offered in the current version of the Standard, the proposal notably does not go as far as a recent formal opinion issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility.[68] That opinion, interpreting defense counsel's ethical obligation to avoid disclosure of information relating to client representation, takes the position that the abrogation of confidentiality brought about by an ineffective assistance claim is highly limited. The opinion suggests that a client's filing of an ineffective assistance claim, standing alone, "does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information" outside a judicial proceeding, and that (contrary to common belief) the so-called "self-defense exception" to Rule of Professional Responsibility 1.6 is not generally applicable in the context of ineffective assistance of counsel claims.[69] The opinion suggests that "it is highly unlikely" that disclosure of otherwise privileged client information outside a judicial proceeding will ever be justifiable in the context of an ineffective assistance claim.[70] That particular interpretation of defense counsel's obligations does not necessarily flow from the language of Proposed Standard 4-9.6(e), suggesting that the Proposed Standard may need additional development and clarification.

How much the Standards should weigh in on the specifics of disclosure in the ineffective assistance context was a matter of considerable debate among Roundtable participants. Participants in the Roundtable discussions reacted in strong and opposing ways to the ethics opinion, with some lauding its conclusions and calling for

67. PROPOSED STANDARDS, *supra* note 8, § 4-9.6(f); Little, App.: Proposed Defense Standards, *supra* note 8. To that end, the Proposed Standard prohibits counsel from relying on the prosecutor to act as her lawyer during proceedings adjudicating the former client's ineffectiveness claim.

68. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010).

69. *Id.* at 2–3.

70. *Id.* at 5.

greater consonance between the Proposed Standards and the ethics opinion, and others (particularly prosecutors) expressing grave concern over the Standards' potential adoption of the strongly pro-confidentiality position adopted by the ethics opinion. The vigor of the debate illustrated the lack of consensus among practitioners regarding the scope of confidentiality in the ineffective assistance context, and the need for greater clarity on the ethical and professional obligations of defense counsel responding to allegations of deficient performance. On this topic, as on many of the others discussed above, the Standards can prove a significant resource for lawyers trying to discharge their responsibilities ably. Proposed Standard 4-9.6(e) makes significant improvements over its predecessor, but could be improved even more substantially by responding to the situation where a lawyer is free to disclose confidential information because of an ineffective assistance claim brought by a former client. By providing thoughtful guidance on the options available to a lawyer facing a claim of ineffectiveness and inviting a response that goes beyond the minimum permitted under the ethics rules, Proposed Standard 4-9.6(e) could easily become a model of how the Criminal Justice Standards might serve the needs of practitioners, while advancing the overall quality of criminal defense representation.

Conclusion

The Proposed Criminal Justice Standards have much to say about the duty of confidentiality and the varied circumstances in which it may be abrogated. The guidance offered by the Proposed Standards could be made more robust and hence, more helpful, however, if they were to more directly confront the thorniest questions defense counsel face. These questions include how much to tell clients about the limits of confidentiality; whether, when, and to whom disclosure should be made during the course of representation; and to what degree post-representation disclosures should be made to successor counsel and to courts adjudicating claims of ineffective assistance of counsel. Only by confronting these difficult questions can the Proposed Standards rightfully retain their claim as "the single most comprehensive . . . undertaking in the field of criminal justice ever attempted by the American legal profession."[71]

71. Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251 (1974).

* * *