Trial Counsel's Continued Duty of Confidentiality in Postconviction Proceedings

BY ANN M. ROAN

This article examines trial counsel's duties surrounding client confidentiality in postconviction proceedings.

"Whatever You Say, Say Nothing."[1] Following conviction, clients have the right to pursue a petition for postconviction relief under Crim. P. 35(c). Such petitions most commonly allege that trial counsel provided ineffective assistance. This article examines trial counsel's duties to the client in the face of such allegations, including application of the attorney-client privilege, the duty of confidentiality, and the work product privilege. It also examines the intersection between privilege, confidentiality, and the lawyer's ethical duty to cooperate with postconviction counsel.

The Attorney-Client Privilege and the Duty of Confidentiality

Lawyers faced with ineffective assistance of counsel claims must nevertheless maintain the attorney-client privilege, subject to narrow exceptions, and the confidentiality of client communications. Attorneys must also adhere to work product privilege protections.

The Attorney-Client Privilege

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law. Its 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."[2] The law esteems this privilege so highly that it survives the client's death.[3]

In Colorado, the attorney-client privilege is codified at CRS § 13-90-107(1)(b), which provides that

> [a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

"The privilege's scope is limited; it covers only those communications between a lawyer and her client related to counsel, advice, or direction about the client's rights and legal obligations made in circumstances that demonstrate a reasonable expectation that they will be private."

The attorney-client privilege is "rooted in the principle that candid and open discussion by the client to the attorney without fear of disclosure will promote the orderly administration of justice."[4] The privilege facilitates the full development of facts necessary to properly represent a client and encourages the general public to seek legal assistance.[5] While the privilege sometimes conflicts with the judicial system's truth-seeking goals, its overall social benefits outweigh any harm that might result from the privilege's application in a specific case.[6]

The privilege's scope is limited; it covers only those communications between a lawyer and her client related to counsel, advice, or direction about the client's rights and legal obligations[7] made in circumstances that demonstrate a reasonable expectation that they will be private.[8] Moreover, the privilege does not permit the client to refuse to disclose otherwise unprivileged information communicated to the lawyer "merely because he incorporated a statement of such fact into his communication with his attorney."[9] If a third party is present during the discussion between the client and lawyer, the attorney-client privilege does not ordinarily apply.[10] Colorado also recognizes a crime-fraud exception to the attorney-client privilege,[11] which covers communications between a lawyer and client made for the purposes of committing a future crime, a present continuing crime, or the perpetration of a fraud.[12]

> The presumptive sanction for violating Colo. RPC 1.6(a) is suspension from the practice of law. This drastic presumptive sanction reflects the principle that a lawyer's highest ethical obligations are those owed to clients, and the duty of loyalty is chief among those obligations.

The attorney-client privilege may be impliedly or explicitly waived, but because the privilege is personal to the client, only the client may waive it.[13] Even when the client does not explicitly waive the privilege, Colorado courts recognize that an implied waiver is created when the client (1) discloses information protected by the privilege to a third party,[14] or (2) puts privileged communications at issue by asserting a claim or defense that depends on privileged information.[15]

The Duty of Confidentiality

As a general matter, the duty of confidentiality commands that "[a] lawyer shall not reveal information relating to the representation of the client[.]"[16] While the CRS § 13-90-107(1)(b) protections cover only communications between the lawyer and client, Colo. RPC 1.6(a) is broader and covers *all* information relating to the representation, regardless of the lawyer's source of knowledge.[17] For example, a lawyer may not reveal to the court, the prosecutor, or any other third party that his client rejected a plea agreement over his advice, that his relationship with his client is strained, or that he thinks the client is trying to manipulate the judicial system and set him up for a later allegation of ineffective assistance of counsel.[18]

The presumptive sanction for violating Colo. RPC 1.6(a) is suspension from the practice of law.[19] This drastic presumptive sanction reflects the principle that a lawyer's highest ethical obligations are those owed to clients, and the duty of loyalty is chief among those obligations.[20] When a lawyer breaches her duty of confidentiality to a client, she "chip[s] away at one of the most fundamental elements of the attorney-client relationship: clients' trust in lawyers to protect their interests and preserve their confidential

information, particularly information that is embarrassing or legally damaging."[21]

Further, the duty of confidentiality prohibits a lawyer from revealing information relating to the representation, even if that information would be evident from a review of public records.[22]

The Work Product Privilege

The work product privilege protects materials that an adverse party's counsel prepares in performing his legal duties.[23] This protection is grounded in "the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."[24] Absent this privilege, "[a]n attorney's thoughts, heretofore inviolate, would not be his own."[25]

The privilege in criminal cases is described in Crim. P. 16(I)(e)(1), which provides:

> Disclosure shall not be required of legal research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

This same protection extends to defense counsel's work product.[26] The protection is consistent with the U.S. Supreme Court's declaration that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."[27] In Colorado, the work product doctrine is most frequently asserted during civil litigation as a bar to discovery, "but it *applies with equal, if not greater, force in criminal prosecutions.*"[28] Rule 16(I)(e)(1) distinguishes between opinion work product and factual work product. Opinion work product (including a lawyer's mental impressions, legal theories, and opinions) is highly protected.[29]

Factual work product "encompasses the factual observations memorialized by an attorney while conducting an investigation and generally receives a lower level of protection."[30] The trial court has the discretion to order disclosure of factual work product, but the party seeking production must first show that the materials sought are relevant and the request is reasonable.[31]

The work product privilege is not confined to work product prepared in anticipation of litigating the case currently before the court. Such a limitation would incentivize a lawyer to not evaluate a case thoroughly due to "fear that her mental impressions, legal analysis, and trial strategies would be discoverable by [an opposing party] in future cases."[32]

"Thus, when a client alleges ineffective assistance, trial counsel is not permitted to disclose all information relating to the representation. Rather, trial counsel may only disclose specific information that is reasonably necessary to avoid adverse legal consequences."

Ineffective Assistance Allegations

When a person convicted of a crime seeks relief pursuant to Crim. P. 35(c)(2)(I), alleging ineffective assistance of trial counsel in violation of the Sixth Amendment to the U.S. Constitution and article II, § 16 of the Colorado Constitution, many trial counsel and prosecutors believe that the fact of the allegation constitutes a blanket waiver of all privileges with respect to trial counsel's file and knowledge concerning the representation. This belief is incorrect.

When a client initiates an action that alleges misconduct of his lawyer, the lawyer is only permitted to breach the duty of confidentiality to respond to allegations concerning the lawyer's representation of the client in a particular proceeding,"[33] and only insofar as the lawyer has a reasonable, objective belief that such response is *necessary*.[34] Thus, when a client alleges ineffective assistance, trial counsel is not permitted to disclose all information relating to the representation. Rather, trial counsel may only disclose specific information that is reasonably necessary to avoid adverse legal consequences.[35]

This principle is recognized by CRS § 18-1-417(1), which provides:

> Notwithstanding any other provision of law, whenever a defendant alleges ineffective assistance of counsel, the defendant automatically waives any confidentiality, including attorney-client and work-product privileges, between counsel and defendant, and between defendant or counsel and any expert witness retained or appointed in connection with the representation, *but only with respect to the information that is related to the defendant's claim of ineffective assistance.* (Emphasis added.)

In *People v. Madera*, the Colorado Supreme Court rejected the prosecution's "broad assertion" that by seeking to withdraw his guilty plea because his lawyer gave him ineffective assistance, the defendant had waived the attorney-client privilege as to the entirety of his prior counsel's representation.[36] When the prosecution seeks access to privileged material based on an ineffective assistance allegation, the court cannot impose a waiver any broader than necessary to ensure the fairness of the proceedings.[37] *Madera* prescribes a three-pronged test to assess the waiver's scope:

1. whether the privilege was asserted as a result of an affirmative act, such as filing suit, by the asserting party;

2. whether, through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
3. whether application of the privilege would deny the opposing party access to information vital to his defense.[38]

Because the defendant in *Madera* asserted that trial counsel had failed to explain the plea agreement to him properly, the court concluded that he had waived his attorney-client privilege only with respect to communications he had with his former lawyer about the potential sentence he would face by pleading guilty.[39] After *Madera*, it is clear that the scope of a waiver created by a postconviction assertion of ineffective assistance of counsel is limited to the allegations in the postconviction petition, and the trial court must carefully delineate the scope of such a waiver before permitting the prosecution to access any information, including pre-hearing interviews, from trial counsel. And before a trial court can find a waiver of the attorney-client privilege, the party asserting waiver must first present the trial court with "'prima facie evidence that it has some foundation in fact.'"[40]

Following an assertion of ineffective assistance, trial courts should be reluctant to grant a prosecutor's request for in camera review of a trial lawyer's file to determine what material is privileged. While recognizing that in camera review is sometimes permissible pursuant to Crim. P. 16(III)(f), the court in *Madera* cautioned that

> [a] trial court should be reluctant to review the contents of an attorney's file precisely because of the importance of the privileges involved. *In camera* disclosure to the court is still a form of disclosure. Even if it goes no further and the court declines to release any documents to the moving party, the court's review could have a chilling effect on attorneys and their clients, especially if *in camera* review occurred frequently or was easily obtained.[41]

Madera also emphasized the practical realities attendant to in camera review; such review presents the trial court with a significant workload burden, particularly where the information sought is not carefully delineated and thus presents a tedious and likely unproductive task.[42]

Trial Counsel's Duty to Cooperate with Postconviction Counsel

Trial counsel has an ethical duty to cooperate with postconviction counsel investigating whether trial counsel provided a client with ineffective assistance, because refusal to cooperate may harm the client's postconviction

claims.[43] But this duty is not triggered unless postconviction counsel first secures the client's written waiver of attorney-client privilege, work product privilege, and attorney confidentiality regarding trial counsel. This is because lawyers owe clients and former clients a duty of loyalty, even when their representation is challenged as ineffective. Lawyers are prohibited from taking any action that negates "the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney,"[44] which duty is the crux of a lawyer's ethical obligations owed to the client.[45] During the representation, a lawyer is prohibited from using "information relating to representation of a client to the disadvantage of the client unless the client gives informed consent."[46] And after the representation concludes, a lawyer remains bound not to use or reveal information related to the representation absent the client's express permission.[47]

Accordingly, defense lawyers should think carefully before agreeing to be interviewed by a prosecutor defending against a claim of ineffective assistance. If the client waiver is limited to communications with postconviction counsel, trial counsel must refrain from providing the prosecution with any protected information absent a clear order from the court regarding the scope of the waiver. And in the context of postconviction claims, "[a] private interview between prosecutors and trial counsel could easily become a freewheeling inquiry into privileged matters that fall outside the scope of the ineffectiveness claims raised by [the former client]."[48] Avoiding even an inadvertent violation of the scope of any limited waiver effectuated by a Crim. P. 35(c) petition is often impossible during an extrajudicial discussion between former counsel and the prosecution. When the prosecution seeks to interview "a professional who formerly worked for the defense, it does not seem possible to eliminate or even minimize the possibility of such disclosure."[49]

The American Bar Association recognizes that permitting the prosecution to question former counsel outside court-supervised proceedings both undermines the public interests that inform the duty of confidentiality and runs the risk of improper disclosures that could prejudice the client were the case retried.[50] "Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers."[51]

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Conclusion

Trial counsel's duties to maintain client confidentiality remain when a client alleges ineffective assistance of trial counsel in a postconviction proceeding. Absent a detailed written waiver from the former client or a court order, defense lawyers whose representation is the subject of an ineffective assistance of counsel claim must refrain from the natural impulse to justify their actions by revealing confidential information, and instead exercise the reticence the law commands. And both postconviction counsel and the prosecution must seek a clear order from the court delineating the scope of any waiver created by the assertion of such a claim before the prosecution begins investigating the matter, to avoid the inadvertent disclosure of protected information. CL

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NOTES

1. Seamus Heaney, "Whatever You Say, Say Nothing," *North* (Faber & Faber, 1975).
2. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citations omitted).
3. *See Swidler & Berlin v. United States*, 524 U.S. 399, 400 (1998).
4. *A. v. Dist. Court*, 550 P.2d 315, 324 (Colo. 1976).
5. *Nat'l Farmers Union Prop. and Cas. Co. v. Dist. Court*, 718 P.2d 1044, 1047 (Colo. 1986).
6. *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 2001).
7. *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000).
8. *Id.*
9. *Upjohn Co.*, 449 U.S. at 396 (citations omitted).
10. *People v. Tippett*, 733 P.2d 1183, 1192–93 (Colo. 1987). However, the presence of a third person does not destroy the privilege if "'a person other than client and lawyer becomes a party to the communication if that person is needed to make the conference possible.'"

D.A.S. v. People, 863 P.2d 291, 295 (Colo. 1993) (quoting 2 Weinstein et al., *Weinstein's Evidence* 503(a)(4)[01] (1993)).

11. *A.*, 550 P.2d 315.

12. *Caldwell v. Dist. Court*, 644 P.2d 26, 31 (Colo. 1982).

13. *Losavio v. Dist. Court*, 533 P.2d 32, 35 (1975).

14. *Wesp*, 33 P.3d 191. *But see D.A.S.*, 863 P.2d 291.

15. *People v. Trujillo*, 144 P.3d 539, 543 (Colo. 2006).

16. Colo. RPC 1.6(a).

17. Colo. RPC 1.6 cmt. 3 (rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

18. *In re Roose*, 69 P.3d 43, 48 (Colo. 2003) (imposing suspension of lawyer's license for a year and a day). *See also People v. Ragusa*, 220 P.3d 1002, 1006–09 (Colo.App. 2009).

19. *In re People v. Isaac*, 2016 WL 6124510 *7 (Colo. O.P.D.J. 2016). *See also* ABA Standards for Imposing Lawyer Sanctions 4.22 (2015).

20. *Isaac*, 2016 WL 6124510 at *6.

21. *Id.*

22. *People v. Muhr*, 370 P.3d 667, 695 (Colo. O.P.D.J. 2016).

23. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (recognizing existence of and protection afforded by doctrine).

24. *Id.* at 511.

25. *Id.*

26. *People v. Ullery*, 984 P.2d 586, 590 (Colo. 1999).

27. *Hickman*, 329 U.S. at 510.

28. *People v. Angel*, 277 P.3d 231, 236 (Colo. 2012) (quoting *People v. Dist. Court*, 790 P.2d 332, 335 (Colo. 1990) (emphasis in *Angel*)). *See also United States v. Nobles*, 422 U.S. 225, 236 (1975).

29. *Angel*, 277 P.3d at 235.

30. *Id.*

31. *Id.*

32. *Id.* at 237.

33. Colo. RPC 1.6(b)(6).

34. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-456 at 4 (2010) (emphasis in original), https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf.

35. *Id.*

36. *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005).

37. *Id.* (quoting *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003)).

38. *Id.* at 691–92 (citing *Mountain States Tel. & Tel. Co. v. DiFede*, 780 P.2d 533, 543–44 (Colo. 1989)).

39. *Id.* at 692.

40. *Id.* at 690 (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933)).

41. *Id.* at 691.

42. *Id.* (internal citation omitted).

43. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel," 99 *Colum. L. Rev.* 1103, 1131 (May 1999).

44. *Cuyler v. Sullivan*, 446 U.S. 335, 356 (1980) (Marshall, J., concurring in part and dissenting in part).

45. *Isacc*, 2016 WL 6124510 *6.

46. Colo. RPC 1.8(b). *See also People v. Albani*, 276 P.3d 64, 71 (Colo. O.P.D.J. 2011).

47. Colo. RPC 1.9(c).

48. *Commonwealth v. King*, 167 A.3d 140, 148 (Pa.Super.Ct. 2017).

49. *Id.*

50. ABA Formal Ethics Op. 10-456, *supra* note 34 at 4–5.

51. *Id.*