Roundtable on the ABA Defense and Prosecution Function Standards

Friday, September 17, 2010
University of Wisconsin Law School

Discussion Papers

The papers produced as part of the nationwide discourse on the revisions to the American Bar Association's Criminal Justice Standards for Prosecution and Defense Functions will be published concurrently by the Hastings Law Journal and Hastings Constitutional Law Quarterly in the spring of 2011.

62 HASTINGS L.J. (forthcoming May 2011)
38 HASTINGS CONST. L.Q. (forthcoming Apr. 2011)
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 have 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 Yet despite the cherished image of lawyer as Keeper of Confidences, a lawyer’s confidentiality obligations are far from absolute. Both the attorney-client privilege and the ethical duty

---

1 Visiting Assistant Professor, University of Wisconsin Law School. Thanks to Bruce Green, Rory Little, and the U.C. Hastings Journals for the opportunity to contribute to the ABA Roundtable discussions. 
2 JAMES E. MOLITERO, 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 (Cal. DCA 6 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”). Of course, there are also those who view the duty of confidentiality with more skepticism than admiration. See, e.g., William H. Simon, The Confidentiality Fetish, THE ATLANTIC (Dec. 2004) (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).
of confidentiality contain exceptions permitting disclosure of a significant subset of client communications.\(^4\)

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. Along the way, counsel must answer difficult questions regarding what 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 offered to successor counsel and to courts adjudicating claims of ineffective assistance of counsel. In answering these questions, 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, and local professional customs, passed on to new attorneys by their mentors and supervisors, may exert an even greater influence on attorney conduct.\(^5\) Other sources of guidance will be more formal. Most influential of these are rules of professional conduct that govern the behavior of lawyers within a specified jurisdiction: because breach may result in professional sanction, lawyers are likely to give substantial attention to the content of these rules.\(^6\)

A separate source of formal guidance is the focus of our attention today: the American Bar Association’s Criminal Justice Standards. Although the Standards overlap to some degree with rules of professional conduct,\(^7\) 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.\(^8\) Some of these Standards have attained binding force by virtue of their incorporation into state legislation, rules of criminal procedure, or court practice rules.\(^9\) Others, while not enforceable through disciplinary proceedings or other litigation,

\(^4\)See, e.g., United States v. Zolin, 491 U.S. 554, 563 (1989) (discussing the crime-fraud exception to the attorney-client privilege); ABA MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1)-(3) (2002) [hereinafter ABA MODEL RULES]

\(^5\)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).

\(^6\)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, available at http://www.abanet.org/cpr/mrsc/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)

\(^7\)Compare ABA MODEL RULES, supra, n. 4, R. 1.6(b)(1)-(3) with ABA PROPOSED STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-3.7(d) [hereinafter REVISED STANDARDS]

\(^8\)See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION, Standards 4-3.1, 4-8.6 (3d ed. 1993) [hereinafter DEFENSE FUNCTION STANDARDS].

remain influential. The Standards have been widely cited by courts, quoted by advocates, and implemented by projects designed to improve the criminal justice system.10

Given the important role the Standards have played in guiding 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. This Essay discusses several implications of the proposed changes for the way in which defense counsel maintain the confidentiality of client communications. Despite the Revised Standards’ many strengths, I argue they circumvent critical questions that practitioners must confront with respect to confidentiality and disclosure. Part One examines the manner in which the Standards direct lawyers to advise new clients on the duty of confidentiality and identifies potentially inadvertent ways in which the Standards may encourage counsel to withhold important information from their clients. Part Two focuses on the Standards governing 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 new Revised Standard 4-4.6, which governs communications with successor counsel, and Revised Standard 4-9.6, which pertains to legal claims of ineffective assistance brought by former clients. While acknowledging that many of the changes to the Standards have enhanced their relevance to practicing lawyers, I conclude that the Standards could be further revitalized and their influence increased if they were to confront more of the difficult questions they currently ignore.

I. DEFINING THE BOUNDS OF CONFIDENTIALITY: WHAT TO TELL THE CLIENT?

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

The 1993 Defense Function Standards offer considerable guidance concerning the early stages of representation, and the Revised 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, Revised 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”) 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,11 answering questions,12 planning defense strategies,13 and offering holistic advice14

——

10 Id., at 11-12.
11 See REVIS ED STANDARD 4-3.3(b) (“Defense counsel should meet with the client in person unless impracticable, and very early in the 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.”).
12 See REVIS ED STANDARD 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.”)
presented in a way that enhances the client’s ability to process the information counsel provides. ¹⁵ Yet although the Standards are in many ways detailed, they fail to offer clear guidance regarding the lawyer’s obligation to discuss the scope of confidentiality of attorney-client communications.

It is widely accepted that the duty of confidentiality and its complementary predecessor, the attorney-client privilege, are intended to improve the quality of attorney-client counseling by encouraging clients to provide their lawyers with the facts necessary to offer good counsel.¹⁶ 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.¹⁷ Given the presumed importance of confidentiality to the integrity of the attorney-client relationship, it may come as a surprise that lawyers routinely fail to counsel their clients about both the existence and scope of attorney-client confidentiality.¹⁸

What do the Standards have to say about this failure? Both the 1993 Defense Function Standards and the Revised 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.¹⁹ The 1993 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.”²⁰ The Revised Standards, on the other hand, only direct defense counsel to inform the new client “that

---

¹³ See Revised Standard 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”).

¹⁴ See Revised Standard 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”).

¹⁵ See Revised Standard 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”); Revised 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”).

¹⁶ See Deborah L. Rhode & David Luban, Legal Ethics 244-45 (5th ed. 2009).

¹⁷ In Swidler & Berlin, 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. at 409 n.4 (emphasis added).

¹⁸ 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, Rethinking Confidentiality, supra, n.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 (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.

¹⁹ 1993 Defense Function Standard 4-3.1(a); Revised Standard 4-3.1(a).

²⁰ 1993 Defense Function Standard 4-3.1(a) (emphasis added).
the attorney-client privilege *strongly protects* the confidentiality of communications with counsel.\(^{21}\) Therefore, unlike the 1993 Standards, the Revised Standards emphasize confidentiality over its exceptions.\(^{22}\) This shift in emphasis, while subtle, raises the question whether (and, if so, to what degree) defense counsel may, at the outset of representation, 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 mentions the concept of confidentiality (however defined) to the client interview that follows. Revised 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,”\(^ {23}\) and Revised Standard 4-3.3 reiterates that during client interviews defense counsel should “encourage full and candid disclosure by the client.”\(^ {24}\)

Because it is not inconsistent to encourage full candor while simultaneously ensuring that a client has been fully informed of the potential ramifications of disclosure, these provisions standing alone do nothing to 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 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.”\(^ {25}\) Under one interpretation of these provisions, Revised 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 Revised Standards 4-3.3 is understood to govern all client interviews, including the initial client meeting, it becomes difficult to reconcile a conversation about non-protected disclosures with the admonition to avoid *intimating* that the lawyer is seeking less than full disclosure from the client. Particularly when Standard 4-3.3(d) is coupled with 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 Standards.

A different (and, I would suggest, more plausible) way to reconcile Revised Standards 4-3.1 and 4-3.3 would be to interpret each in isolation. Under that approach, Revised Standard 4-3.1(a) requires defense counsel to inform the client about the attorney-client privilege and its protections, but it does not prevent counsel from

---

\(^{21}\) *REVISED STANDARD* 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. *See ibid.* 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.

\(^{22}\) 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, “Because 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 FUNCTION STANDARDS, *supra*, n. 8, Standard 4-3.1(a) cmt., at 149-50.

\(^{23}\) *Id.*

\(^{24}\) *REVISED STANDARD* 4-3.3(d).

\(^{25}\) *Id.* (Emphasis added.)
engaging in a more complete discussion of the limitations of both the privilege and the ethical duty of confidentiality. Under this reading, Revised Standard 4-3.3(d)’s admonition to avoid the appearance of desire for “calculated ignorance” is limited to subsequent client interviews, where a renewed discussion of the limits of confidentiality could well be misinterpreted by the client as a warning not to divulge inconvenient, but otherwise relevant, information to defense counsel. Since defense counsel’s approach to client counseling may vary dramatically depending on which of these competing interpretations prevails, the Standards Committee would do well clarify the intended interaction between Revised Standards 4-3.1 and 4-3.3.

Assuming for present purposes that the Standards are not intended to discourage defense counsel from discussing the limits of confidentiality with the client, 26 the question remains how best to approach that 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 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. 27 Professor Roy Sobelson has argued in favor of providing clients with detailed written disclosure forms, 28 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. 29 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. 30 Others have argued strenuously that placing any

---

26 There are many reasons to favor such a conversation, not least of which is a concern for client autonomy. As Frank 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.’” Rethinking Confidentiality, supra, n.3, at 381. See also Lee A. Pizzimenti, The Lawyer’s Duty to Warn Clients About the 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.”)


28 Id. (providing a sample disclosure form).

29 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.” The Lawyer’s Duty to Warn Clients About the Limits on Confidentiality, supra, n.26, at 485.

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.\textsuperscript{31}

What is clear from the academic literature is the fact that defense counsel need guidance on how best to approach the subject of confidentiality and its limits when counseling their clients. That guidance is not found in the Model Rules of Professional Conduct and, at this time, cannot be found in the Revised Standards for the Defense Function. If the Standards are to remain influential in helping defense counsel determine how best to position clients for effective representation, that omission may be worthy of correction.

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.\textsuperscript{32} 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 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 oddly silent with respect to the remaining questions counsel must resolve.

Both the old and new versions of the Defense Function Standards set forth clear conditions for the disclosure of otherwise confidential client communications.\textsuperscript{33} 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.\textsuperscript{34} The 1993 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.”\textsuperscript{35} The Revised 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

\textsuperscript{31} See, e.g., MONROE FREEDMAN, UNDERSTANDING LAWYER’S ETHICS 119 (1990); Ellmann, Truth and Consequences, supra, n. 30, at 918 (discussing Anthony Amsterdam’s suggested use of a model statement of confidentiality that suggests to the client the duty of confidentiality is absolute).

\textsuperscript{32} In Leslie Levin’s 1993 survey of New Jersey lawyers, 67 percent 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.” Testing the Radical Experiment, supra, n.18, at 111.

\textsuperscript{33} See, e.g., 1993 DEFENSE FUNCTION STANDARD 4-4.6(d) (disclosure of physical evidence); 1993 DEFENSE FUNCTION STANDARD 4-8.6(d) (challenges to the effectiveness of counsel); REVISED STANDARD 4-1.7 (disclosure of confidential communications conveyed to lawyer advisory group); REVISED STANDARD 4-4.6(d) (disclosure of physical evidence); REVISED STANDARD 4-9.6 (challenges to the effectiveness of counsel).

\textsuperscript{34} See REVISED STANDARD 4-3.7(d).

\textsuperscript{35} 1993 DEFENSE FUNCTION STANDARD 4-3.7(d).
services have been or will be used to further.\textsuperscript{36} 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.\textsuperscript{37}

On its face, Revised Standard 4-3.79(d) appears more streamlined than its 1993 predecessor. The Revised Standard eliminates the “reasonable belief” and imminence requirements contained in the 1993 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 Revised Standard defense counsel may disclose client confidences to prevent harm even in the absence of threatened criminal conduct by the client.\textsuperscript{38} 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 Revised Standards, disclosure is permitted “to prevent reasonably certain . . . substantial bodily harm;”\textsuperscript{39} 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. 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 Revised Standard, it appears that disclosure would not be permitted, much less advised, in such an instance.\textsuperscript{40} But what if it

\textsuperscript{36} REVISED STANDARD 4-3.7(d).
\textsuperscript{37} See ABA MODEL RULE 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 Confidentiality: An Overview of the Recent Changes to Model Rule 1.6, 17 GEO. J. LEGAL ETHICS 1003 (2004).
\textsuperscript{38} 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).
\textsuperscript{39} REVISED STANDARD 4-3.7(d).
\textsuperscript{40} 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)).
were unclear whether disclosure to law enforcement—or even to the victim herself—would have the desired effect? As this hypothetical scenario demonstrates, although Revised 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 Revised 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 Revised Standards offer substantial guidance, it is also the least useful feature of Revised Standard 4-3.7. The Revised 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 Revised Standard 4-3.7(d), but with the approach taken by the jurisdictions in which they practice. Some of these differ significantly from Revised Standard 4-3.7(d).\(^{41}\) Although this is a reality the Standards themselves anticipate,\(^ {42}\) it makes more troubling the Revised Standard’s failure to provide guidance on other aspects of disclosure not addressed by the Rules of Professional Conduct.

One area in which the 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? How much information should be disclosed? 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 Standards give no clear answers to any of them.

To press on this point, consider the question whether lawyers should be obliged to inform clients when disclosure of confidential information is contemplated or takes place. Revised Standard 4-3.7(a) requires defense counsel to “always advise his or her clients to comply with the law,”\(^ {43}\) 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.

---

41 See, e.g., Mich. R. Prof’l Conductor 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”); Ore. R. Prof’l Conductor 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. R. Prof’l Conductor 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 a crime or fraud in furtherance of which the client has used the lawyer’s services”).

42 See Revised Standard 4-1.1(a) (“These Standards do not modify a defense attorney’s ethical obligations under applicable rule [sic] of professional conduct”).

43 See Revised Standard 3-4.7(a); cf. 1993 Defense Function Standard 4-3.7(d) cmt. (“Where practical, the lawyer should seek to persuade the client to take suitable action.”)
Revised Standard 4-5.1 directs defense counsel to “advise the accused with complete
candor concerning all aspects of the case.”\textsuperscript{44} 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
Revised Standard 4-5.1 is taken directly from 1993 Standard 4-5.1.\textsuperscript{45} 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 but not directly relating to
the client’s pending criminal charge.\textsuperscript{46}

Though the Revised Standards offer no direct guidance on the matter, several state
codes of professional conduct explicitly require attorneys to consult with clients before or
after disclosing confidential information when disclosure has been prompted by concerns
over 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.\textsuperscript{47} 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.”\textsuperscript{48} 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.\textsuperscript{49}
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.”\textsuperscript{50} 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.”\textsuperscript{51} These state rules take the position that forthrightness is desirable within the
lawyer-client relationship, even on matters as sensitive as disclosure.\textsuperscript{52} While both the

\textsuperscript{44} Revised Standard 4-5.1.
\textsuperscript{45} See 1993 Defense Function Standard 4-5.1.
\textsuperscript{46} See id. cmt.
\textsuperscript{47} Cal. R. Prof’l Conduct 3-100(B), (C) (2004) in Richard Zitrin et al., Legal Ethics: Rules,
Statutes, and Comparisons 615 (2009).
\textsuperscript{48} Id., R. 3-100(C)(1).
\textsuperscript{49} Id., 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.” See ibid. 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.
\textsuperscript{50} Va. R. Prof’l Conduct 1.6(c)(1) (2000).
\textsuperscript{51} Id.
\textsuperscript{52} 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, lawyers “the vast majority of
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 people may certainly 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 the Standards do not. Given the complexity of the decisions counsel must make in this regard, the 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 Defense Function Standards to practicing defense attorneys.

III. DISCLOSURE AFTER REPRESENTATION: TO WHAT DEGREE SHOULD CONFIDENCES BE REVEALED?

Having criticized several aspects of the Revised Standards’ treatment of confidentiality and disclosure at the outset and in the midst of representation, I wish to turn briefly to the Revised Standards’ treatment of post-representation disclosure. The Revised Standards make significant advances over the 1993 Defense Function Standards with respect to the guidance they offer counsel on post-representation disclosure, as exemplified by Revised Standards 4-4.6 (Relationship Between Prior and Successor Counsel) and 4-9.6 (Challenges to the Effectiveness of Counsel). What makes these Revised Standards more helpful than those discussed above? Primarily, it is their willingness to cover new ground, offering novel or expanded guidance on matters that defense counsel are routinely forced to confront. In so doing, Revised Standards 4-4.6 and 4-9.6 address both the purpose of and degree to which permissible disclosures may be made when representation has ended.

New Revised Standard 4-4.6 addresses for the first time the complicated matter of communications between prior and successor counsel on matters pertaining to client representation. 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, 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, Revised Standard 4-4.6 identifies the purpose of disclosure—to advance the client’s interest through cooperation with successor

---

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.” Testing the Radical Experiment, supra, n.18, 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.

53 See REvised STANDARD 4-1.3(a) (describing defense counsel’s ongoing duty of loyalty to current and former clients).
counsel—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, Revised 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. By addressing a recurring issue with important ethical implications not previously acknowledged by the Standards, Revised Standard 4-4.6 provides helpful 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.

Unlike the subject matter of Revised Standard 4-4.6, the ground covered in Revised Standard 4-9.6 is hardly new. 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. Within that broad rule, however, questions 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, 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 matters raised by his former client to the extent reasonably necessary, even though this involves revealing matters which were given in confidence.

The comment to that Standard provides a bit of 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.” The Standard does not discuss the scope of disclosure or any other relevant considerations.

The revision to former Standard 4-8.6 stands in stark contrast to its predecessor. Revised 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

---

54 Cf. Revised Standard 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”).
55 See Revised Standard 4-4.6(a).
56 Revised Standard 4-4.6(b).
57 See, e.g., ABA Model Rule 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”).
58 See Revised Standard 4-1.3(a), (b).
59 1993 Defense Function Standard 4-8.6(d).
60 Id., cmt.
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. 61

Here, at last, is an example of the type of guidance that is likely to assist defense counsel in the most difficult aspects of decision-making! Rather than offering a generalized rehashing of the exception to the confidentiality rule found in ABA Model Rule 1.6(5), 62 Revised Standard 4-9.6(e) offers a nuanced description of the options available to counsel. The Standard acknowledges the possibility of disclosure, but also invites consideration of reasonable alternatives to, and limitations on, divulging client communications that encourage counsel to thoughtfully consider the purpose for and necessity of disclosure in any given case. The Revised 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.” 63 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, Revised Standard 4-9.6(e) serves as a model for how the Criminal Justice Standards might serve the needs of practitioners while advancing the overall quality of criminal defense representation.

CONCLUSION

The Revised Criminal Justice Standards have much to say about the duty of confidentiality and the circumstances in which it may be abrogated. The guidance offered by the Revised Standards could be made more robust and hence, more helpful, however, if the Standards 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. By confronting these difficult questions, the Revised Standards can rightfully retain their

61 REVISED STANDARD 4-9.6(e).
62 See supra, n.58.
63 REVISED STANDARD 4-9.6(f). To that end, the Revised Standard prohibits counsel from relying on the prosecutor to act as her lawyer during proceedings adjudicating the former client’s ineffectiveness claim. Id.
claim as “the single most comprehensive . . . undertaking in the field of criminal justice ever attempted by the American legal profession.”64