

Denver 35(c) Discovery Issue

I. INTRODUCTION

The Denver District Attorney's office offers postconviction lawyers who ask for discovery a choice: they can either sign a sweeping waiver¹ in exchange, or they can file a CCJRA request.

This memo examines other avenues to obtain discovery when postconviction counsel is unwilling to sign the prosecution's proposed waiver. Assuming discovery is in trial counsel's file, there is no reason to ask the prosecution to provide it. With a carefully worded release from the client, postconviction counsel should be able to obtain discovery from trial counsel's file while protecting the client's interests. But if discovery is not in trial counsel's file and postconviction counsel is not willing to sign the proposed waiver, this memo suggests litigation strategies to persuade the postconviction court to order the prosecution to provide it without resort to the CCJRA, based on the state and federal due process clauses, rather than the rules of criminal procedure.

II. WHY WOULD POSTCONVICTION COUNSEL NEED TO ASK THE PROSECUTION FOR DISCOVERY?

¹ A copy of the proposed waiver accompanies this memo as Exhibit A.

If all discovery is in trial counsel's file, it's hard to imagine why postconviction counsel would want to ask the prosecution to produce those same materials. But before asking trial counsel for access to the client's file, it's important to understand the relevant ethical and statutory authorities about the prosecution's ability to piggyback onto the client's waiver.

A. The Effects of a Client's Waiver in Postconviction Proceedings

A carefully drafted waiver from the client to trial counsel requires trial counsel to produce all materials requested. It may be useful to include with that waiver an overview of the ethical considerations relevant to trial counsel when postconviction litigation has begun, because trial counsel should understand that such a waiver authorizes no disclosures of information from trial counsel to the prosecution.

1. Trial Counsel's Ethical Considerations

ABA Formal Ethics Opinion 10-456² finds that Rule of Professional Conduct 1.6 forbids disclosure of information protected by that rule for both current and former clients. "The confidentiality rule applies not only to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source.*" *Id.* at 1 (emphasis added). Trial counsel cannot violate the duty of confidentiality unless the current or former client first gives informed

² This opinion accompanies this memo as Exhibit B.

consent. *Id.* But even informed consent does not waive confidentiality beyond its express terms. The exception in R.P.C. 1.6(b)(4) is often used to justify trial counsel's decision to provide documents and speak to prosecutors about the former client's pending 35(c). That exception is often called the self-defense exception and provides in relevant part that trial counsel can reveal confidential information "to the extent the lawyer reasonably believes necessary...to respond to any allegations in any proceeding concerning the lawyer's representation of the client[.]"

But Ethics Opinion 10-456 clarifies that this exception to privilege has very limited application to postconviction proceedings, "because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." *Id.* at 4. A showing of an imminent threat of serious consequences to trial counsel is required to invoke this exception. *Restatement (Third) of the Law Governing Lawyers* § 64 cmt. c. Even then, R.P. C. 1.6 requires an objectively reasonable belief that the disclosure is necessary, and comment 16 to that rule declares that:

...a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Opinion 10-456 clarifies the narrow reach of the self-defense exception: privilege is waived to others beyond the client's initial informed consent only as to communications relevant to the specific allegations of ineffective assistance of counsel raised in a habeas petition. Without the client's informed consent to waiver beyond postconviction counsel, disclosures can be made only in a formal proceeding that provides for judicial supervision.

1. C.R.S. § 18-1-417

C.R.S. § 18-1-417 provides:

(1) Notwithstanding any other provision of law, whenever a defendant alleges ineffective assistance of counsel, the (1) 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. After the defendant alleges ineffective assistance of counsel, the allegedly ineffective counsel and an expert witness *may* discuss with, *may* disclose any aspect of the representation that is related to the defendant's claim of ineffective assistance to, and *may* produce documents relate to such representation that are related to the defendant's claim of ineffective assistance to the prosecution without the need for an order by the court that confidentiality has been waived.

(2) If the allegedly ineffective counsel or an expert witness has released his or her file or a portion thereof to defendant or defendant's current counsel, defendant or current counsel *shall* permit the prosecution to inspect and copy any or all portions of the file that are related to the

defendant's claim of ineffective assistance upon request of the prosecution.

(emphasis added).

This statute is often read more generously than its language permits. Although it creates an “automatic waiver” limited to information related to IAC claims, it does not require trial counsel or trial experts to talk to or provide documents to the prosecution. § 18-1-417(1). Trial counsel and trial experts can refuse. And the mandatory language in § 18-1-417(2) only applies when trial counsel has released the file to the client or to postconviction counsel.³ When postconviction counsel simply looks at trial counsel's files (as opposed to copying documents from it or taking the file itself), the file is not “released.”

As well, the statute may be unconstitutional. The self-defense exception in R.P.C. 1.6(b)(4) is intended to mitigate the damage keeping client confidences may have on the lawyer's own interests. So, it makes sense to use it when the lawyer responds to a grievance or a malpractice suit. “In contrast, the harms a lawyer seeks to avert by defending against ineffective assistance of counsel claims are minimal. Therefore, ineffectiveness claims are not a controversy for which a lawyer should invoke the exception.” Newmark, *The Lawyer's “Prisoner's Dilemma”: Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 Fordham L. Rev. 699, 731

³ Colorado Ethics Opinion 104 describes what portions of a file must be provided at the client's request; that opinion accompanies this memo as Exhibit C.

(Nov. 2010). In the criminal context, the duty of confidentiality is a matter of constitutional mandate, because it is part and parcel of the Sixth Amendment guarantee to effective assistance of counsel. Infringing on confidentiality in that context cannot be done without careful consideration of the constitutional forces at play.

Colorado takes attorney-client privilege very seriously. *See, e.g., People v. Isaac*, 470 P.3d 837, 847 (Colo. O.P.D.J. 2016) (lawyer suspended for six months to ensure he “understands the gravity of violating clients’ trust by breaching their confidences[.]”). This suggests that the wisest course of action is for trial counsel to obtain a court’s ruling on the scope of the former client’s waiver before disclosing information to any party beyond those the waiver identifies. A thoughtfully written waiver and a letter that reviews the relevant ethical and statutory provisions will help trial counsel afford the former client the “keystone obligation” of the continuing duty of loyalty as the habeas litigation proceeds. *Isaac*, 470 P.3d at 843. It is also wise to consider including in that letter the wealth of authority that clarifies trial counsel’s ethical obligation to cooperate fully with postconviction counsel.

B. The Lost File

With surprising frequency, trial lawyers cannot locate their former client’s files when postconviction counsel asks for it. When that happens, postconviction counsel has two choices: give up or learn more. Learning more about a trial lawyer’s

approach to file retention often gives insight into other issues that may bear on ineffective assistance of counsel claims. By permitting a client's file to be lost, trial counsel may be in breach of R.P.C. 1.3 (diligence) and/or other ethical obligations.

Some questions that may be important to ask trial counsel who has lost the former client's file include:

- What is the lawyer's current file retention policy? Was it different at the time of representation? Why has it changed? Is it in writing and if so, can the lawyer provide that document?
- Depending on the explanation for the loss (negligent staff, natural disasters, etc.), what steps has the lawyer taken to prevent other losses? When the loss was discovered, what steps did the lawyer take to notify affected clients?

If trial counsel was a deputy state public defender at the time of the representation, that fact does not insulate the lawyer from the regional office's failure to properly retain the client's file. When working for a government agency, "the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule." R.P.C. 1.16(A), cmt. 2. Asking the lawyer to describe the reasonable measures taken, in addition to the other questions identified above, may provide helpful information.

III. IS THERE A POSTCONVICTION RIGHT TO DISCOVERY IN COLORADO?

- A. Crim.P. 16 does not apply to 35(c) proceedings, and Crim.P. 35(c) does not confer a right to discovery.**

If you’ve decided that you want to ask the prosecution for discovery, start with a clear understanding of the law in case the prosecutor balks (or wants you to sign a sweeping waiver in exchange for discovery). In Colorado, habeas litigation “is not a civil proceeding. Rather, it is but one phase of a criminal proceeding.” *Bresnehan v. District Court*, 164 Colo. 263, 268, 434 P.2d 419, 421 (1967). But the argument that Crim.P. 16 applies to habeas litigation goes nowhere. Rule 35(c) “does not authorize discovery procedures.... Had the supreme court intended to allow such discovery in connection with a Crim.P. 35(c) motion, it easily could have said so. It did not.” *People v. Thompson*, 2020 COA 117, ¶ 32. While *Bresnehan* held that 35(c) proceedings “are controlled by criminal procedural rules with respect to any permitted discovery...[,] *Bresnehan* does not entitle a defendant to any postconviction discovery under Crim.P. 35(c).” *Id.* ¶ 34.

This means that any argument that a postconviction client has a right to discovery must be framed in terms of state and federal constitutional due process guarantees, rather than the rules of criminal procedure. U.S. Const. amend. XIV; Colo. Const. art. II, § 25.⁴

B. Why due process entitles you to discovery in post-conviction proceedings when trial counsel has lost the original discovery.

⁴ The Confrontation Clause, because it creates “a trial right—not a constitutionally-compelled rule of pre-trial discovery” is unlikely to lend any persuasive force to your argument. *People v. Baltazar*, 241 P.3d 941, 944 (Colo. 2010); *see also People v. Ray*, 252 P.3d 1042, 1048 n7 (Colo. 2011) (declining to address whether Confrontation Clause has any application in postconviction proceedings).

Due process protections apply in 35(c) proceedings. *See People v. Germany*, 674 P.2d 345, 349 (Colo. 1983) (“The very idea of due process of law includes a meaningful opportunity for a criminally accused to challenge assertedly unconstitutional evidence[.]”); U.S. Const. amend XIV; Colo. Const. art, II, § 25.

Although there is no constitutional right to postconviction review, by creating one in Crim.P. 35(c), courts must ensure that it comports with due process of law. *See People v. Close*, 180 P.3d 1015, 1019 (Colo. 2008) (Crim.P. 35(c)’s “overriding concern [is] that defendants have a meaningful opportunity to challenge their convictions as required by due process.”).

Postconviction procedure:

should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims.... It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings.... It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts.

Case v. Nebraska, 381 U.S. 336, 346-47 (1965) (Brennan, J., concurring) (internal citations omitted).

If trial counsel has lost the discovery, a motion asking the court to order to prosecution to provide it to postconviction counsel based on the client’s right to due process of law should be filed and an evidentiary hearing requested. U.S. Const.

amend. XIV; Colo. Const. art. II, § 25. At that hearing, testimony from trial counsel about all the circumstances relevant to how this loss occurred is relevant. *See* 6, *supra*. Testimony from the relevant administrator in the prosecution’s office about the lack of hardship such an order would create is also relevant.

B. *Kilgore* does not prevent the postconviction court from ordering the prosecution to provide discovery to postconviction counsel

The Denver District Attorney reads *People v. Kilgore*, 455 P.3d 746 (Colo. 2020) as prohibiting a court from ordering it to provide discovery to postconviction counsel and that case is likely to feature prominently in its objection.

In *Kilgore*, the court accepted the defense Rule 21 from the trial court’s order that the prosecution and defense had to exchange exhibits 30 days before trial. 455 P.3d at 747. The court determined that the trial court had no authority to order the defense to do so. 455 P.3d at 749. But the court expressly limited its decision to the trial court’s power under Crim.P. 16, not “discovery authorized by the Colorado Constitution or any of our statutes.” *Id.* at 751. Crim.P. 16 does not create a defense obligation to disclose exhibits prior to trial, and the court rejected the State’s argument that the trial court’s order was a proper exercise of its “inherent discretion to manage cases” because that “discretion cannot expand the contours of Rule 16(II).” *Id.*

Kilgore is distinguishable on several grounds.

First, Crim.P. 16 does not apply in postconviction proceedings. *Thompson, supra*. Because that rule was the only subject of the *Kilgore* court’s analysis, its holding does not extend to 35(c) proceedings, especially in light of the fact that postconviction counsel’s request is premised on the client’s right to due process of law, not on Crim.P. 16. *See* 455 P.3d at 750 (court expressly refuses to address “discovery authorized by the Colorado Constitution[.]”).

Second, while *Kilgore* rejected the argument that a court’s inherent authority authorized disclosure in excess of Crim.P. 16, the grounds for doing so was its holding that the inherent authority doctrine could not “expand the contours of rule 16(II).” *Id.* at 751. In other words, *Kilgore* does not stand for the proposition that a court cannot order discovery not required by a rule of criminal procedure; rather, it held that in a criminal trial, the court cannot order discovery beyond what Crim.P. 16 provides. *Kilgore* did not address whether the inherent authority doctrine permits a court to order the prosecution discovery in a Crim.P. 35(c) proceeding when the petitioner shows an unsuccessful good faith effort to get it elsewhere.

C. The inherent authority doctrine permits a postconviction court to order the prosecution to provide discovery when good faith efforts to obtain it elsewhere have failed.

The inherent authority doctrine gives courts:

[A]ll powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective. These powers are inherent in the

sense that they exist because the court exists; the court *is* therefore, it has the powers reasonably required to act as an efficient court.

Peña v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984) (emphasis in original) (internal quotation marks and citations omitted). The tension between the inherent authority doctrine and the separation of powers doctrine means the former is “generally limited to matters that are reasonably necessary for the proper functioning of the judiciary.” *Board of County Com’rs v. Nineteenth Judicial Dist.*, 895 P.2d 545, 548 (Colo. 1995).

There is no constitutional right to counsel in postconviction proceedings. However, when counsel is appointed under Crim.P. 35(c), counsel must provide constitutionally effective assistance. *Silva v. People*, 156 P.3d 1164, 1169 (2007). And the judiciary must ensure “fair modes of criminal proceeding” in its courts. *Columbe v. Connecticut*, 367 U.S. 568, 600 (1961). But postconviction counsel cannot be effective without access to discovery. If a petition’s claims “are bare and conclusory in nature, and lack supporting factual allegations[,] they must be denied without a hearing. *People v. Delgado*, 442 P.3d 1021, 1024 (Colo. App. 2019). Thus, to ensure basic fairness, postconviction counsel must be given discovery from the prosecution when efforts to obtain it elsewhere prove fruitless.

True, the CCJRA is another mechanism for obtaining discovery. But for the indigent petitioner, the costs associated with a request under the CCJRA makes that

less an avenue than a dead end. Providing a court with an estimate of cost from the prosecution for production under the CCJRA is another piece of evidence relevant to the court's decision about whether fundamental fairness requires the prosecution to simply provide discovery in postconviction proceedings when it cannot be gotten from another source. When the legislature decided to make discovery available without charge to ADC and PD clients, it reduced those agencies' budgets accordingly. Permitting the prosecution to charge postconviction counsel for discovery because trial counsel lost the file is not only unfair but risks significant financial harm to the agencies who represent indigent clients postconviction.

Denver District Court Lindsey-Flanigan Courthouse 520 West Colfax Avenue, Room xxx Denver, CO 80204		
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. Xxx, Defendant.		
Robert M. Russel, Reg. No. 15218 Deputy District Attorney Beth McCann, Denver District Attorney 201 West Colfax Avenue, Dept. 801 Denver, CO 80202 720-913-9038 bob.russel@denverda.org	▲ Court Use Only ▲ Case No. xx CR xxxx Division: Criminal Courtroom: xx	
Stipulated Disclosure Agreement and Schedule		

Defendant [xxx] has filed a motion for postconviction relief under Crim. P. 35(c). To facilitate a just and efficient disposition of that motion, the parties jointly request an order adopting the following disclosure schedule.

I. INITIAL DISCLOSURES

A. People's obligation

Within ____ days of the date on which this court enters its order, the the People will provide defendant's postconviction counsel with an electronic copy of the Denver District Attorney's discovery file. That file will contain the material previously provided in discovery under Crim. P. 16(1), Part I. The file may also contain reports and statements received after the date of conviction or sentencing. The People are not required to update criminal histories or gather information that the district attorney did not possess prior to the filing of this stipulated schedule.

B. Defendant's obligation

Within 7 days of filing any amended or supplemental postconviction motion, postconviction counsel will provide the People with electronic copies of the following:

1. Any document, record, statement, photograph, or tangible object within the defendant's possession or control that is or will be used to support a claim for postconviction relief, including any material referenced in the

defendant's postconviction motion or supplement, regardless of whether that material is filed as an exhibit or attachment.

2. If the defendant is asserting a claim of ineffective assistance of trial, appellate, or previous postconviction counsel, a copy of any material in the pertinent counsel's files (including confidential communications) that relate to the ineffective assistance claim presented. Within the meaning of this paragraph, materials "relate" to an ineffective assistance claim if they tend to make more probable or less probable either of two related assertions: (1) that counsel committed the error alleged; and (2) that the defendant was prejudiced by the alleged error. ¹

¹ If, at the time of filing the defendant's supplemental postconviction motion, postconviction counsel has not obtained the files of the lawyer whose performance is being challenged, counsel will do the following: (1) within seven days of filing of the amended or supplemental petition, request the prompt production of that file; (2) within the same seven-day period, notify the district attorney of the expected date of delivery, and thereafter apprise the district attorney of any change in that expected date; and (3) within seven days of receiving the file, produce the pertinent portions of that file.

II. DISCLOSURES PRIOR TO HEARING

Should the court determine that a hearing is required, the following schedule applies:

A. Eight weeks before

Eight weeks before the hearing, each party will provide the following to opposing counsel:

1. The name and contact information of any witness that the party intends to call at the hearing.
2. For each expert witness that the party intends to call, a written report, prepared and signed by the witness, that contains the following:
 - a. A statement of the opinions that the witness will express, and the basis and reasons for them, including all supporting facts or data;
 - b. Any exhibit that will be used to summarize or support the witness's opinions; and
 - c. The witness's resume, which will list the witness's educational and professional history and will identify any publications authored within the past ten years.

B. Four weeks before

Four weeks before the hearing, each party will identify any rebuttal expert that the party intends to call. For each rebuttal expert, the party will provide a report that contains the information set forth in Part II.A of this agreement.

III. GENERAL PROVISIONS

Duty of good faith. Each party shall make reasonable and good faith efforts to ensure that every disclosure under this agreement is complete and correct as of the time it is made.

Supplementation. Each party has a duty to supplement its disclosures under Parts I and II of this agreement if that party learns that information previously disclosed is incomplete or incorrect in some material respect. Supplementation must be performed in a timely manner.

Enforcement. Should either party discover that the other has failed to comply with its disclosure obligations under this agreement, the aggrieved party may file a motion for appropriate relief with the court having jurisdiction over the defendant's postconviction motion. If the court finds that either party has failed to comply with its disclosure obligations under this agreement, it may

require such party to make the disclosure, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or grant other relief that the court deems just under the circumstances.

Term. This agreement shall be effective on the date of filing and shall remain effective until the court issues a final ruling on the defendant's postconviction motion.

Severability. Should the court finds any provision of this agreement to be invalid or unenforceable, that term shall be excluded, and all other provisions shall remain in full force and effect.

For the People: _____, 2020:

ROBERT M. RUSSEL
Senior Chief Deputy District Attorney
Appellate Division

For the defendant: _____, 2020:

XXXXX XXXX
Postconviction counsel for the defendant

Certificate of Service

I certify that on _____, I electronically filed this Stipulated Disclosure Agreement and Schedule via the Colorado Courts E-Filing system, which will send notification to all persons registered in this case.

Dianne L Johnson

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456

July 14, 2010

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer “reasonably believes [it is] necessary” to do so in the lawyer’s self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client’s informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant’s claim in order to help the prosecution establish that the lawyer’s representation was competent.¹ This question may arise, for example, because a prosecutor or other government lawyer defending the former client’s ineffective assistance claim seeks the trial lawyer’s file or an informal interview to respond to the convicted defendant’s claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,² a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer’s failure to provide constitutionally effective representation, must establish both that the representation “fell below an objective standard of reasonableness” and that the defendant thereby was prejudiced, i.e., that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³ Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer’s representation based on the defendant’s failure to show prejudice. The Supreme Court recently expressed confidence “that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit.”⁴ Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,⁵ and commentators have expressed concerns about the practice.⁶

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. See Rules 1.6 & 1.9(c). The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”⁷

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² 466 U.S. 668 (1984).

³ *Id.* at 694.

⁴ *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

⁵ See, e.g., *Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client’s ineffective assistance of counsel claim); *State v. Binney*, 683 S.E.2d 478 (S.C. 2009) (defendant’s trial counsel met with law enforcement authorities and provided his case file to them in response to defendant’s ineffective assistance of counsel claim).

⁶ See, e.g., Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

⁷ Rule 1.6 cmt. 3. See, e.g., *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when, under threat of subpoena, it disclosed former client’s statement to prosecutor without former client’s consent; court stated that “[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.⁸ Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make non-frivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.⁹ For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.¹⁰ A client might agree that the former lawyer may testify in an adjudicative proceeding to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client

prohibited by the disciplinary rules," *id.* at 265 n.5).

⁸ "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); see also Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

¹⁰ Cf. *Clock v. United States*, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the “self-defense exception” of Rule 1.6(b)(5),¹¹ which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” The self-defense exception grows out of agency law and rests on considerations of fairness.¹² Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer’s self-defense.¹³

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.¹⁴ For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception.¹⁵ Although the scope of the exception has expanded over time,¹⁶ the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.¹⁷ Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer’s associate or agent with *serious* consequences”¹⁸

When a former client calls the lawyer’s representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not

¹¹ Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

¹² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b (“in the absence of the exception . . . , lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group”).

¹³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

¹⁴ Rule 1.6 cmt. 10 (“The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.”). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

¹⁵ See, e.g., *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer’s interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof’l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof’l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

¹⁶ Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: “A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct,” but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

¹⁷ Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

¹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

respond in order “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,” because the legal controversy is not between the client and the lawyer.¹⁹ Nor is disclosure justified “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” because the defendant’s motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer’s alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer’s representation of the client to which the lawyer might wish to respond.²⁰

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.²¹ It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer’s belief must be objectively reasonable.²² The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit “access to the information to the tribunal or other persons having a need to know it” and to seek “appropriate protective orders or other arrangements ... to the fullest extent practicable.”²³ Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.²⁴ These limitations are equally applicable to Rule 1.6(b)(5).²⁵

¹⁹ See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant’s claim that lawyer’s prior advice was confusing; court stated, “[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the ‘controversy’ is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no ‘controversy’ between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer.”). But see Arizona State Bar Op. 93-02 (1993), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=652> (interpreting “controversy” to include a disagreement in the public media).

²⁰ Cf. State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

²¹ See Rule 1.6(b)(5) (allowing disclosure only “to the extent the lawyer reasonably believes necessary”); Rule 1.6 cmts. 10 & 14.

²² See Rule 1.0(i) (“‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”)

²³ Rule 1.6 cmt. 14 (emphasis added). Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 250 (1943), in *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED* 555, 556 (American Bar Foundation 1967) (“where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights”).

²⁴ For example, in *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 692 (C.D. Ca. 1988), the district court “reject[ed] the suggestion made by some parties that ‘selective’ disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed,” finding that this suggestion was “directly contrary to the reasonable necessity standard.” Accord *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 83 cmt. e (“The lawyer’s invocation of the exception must be appropriate to the lawyer’s need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence.”); cf. *Dixon v. State Bar*, 653 P.2d 321, 325 (1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client’s motion to enjoin lawyer from harassing her); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) (“In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word ‘necessary’ in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.”).

²⁵ Courts further recognize that disclosures may be made to defend against a non-client’s accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. Cf. *SEC v. Forma*, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor’s evidence against lawyer must “pass muster under Fed. R. Civ. P. 11”).

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.²⁶ Disclosure of such information might prejudice the defendant in the event of a retrial.²⁷ 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.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.²⁸ If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.²⁹

²⁶ Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

²⁷ Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, see, e.g., *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir.), cert. denied, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. See, e.g., *Fears v. Warden*, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

²⁸ See, e.g., Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

²⁹ See Rule 1.6 cmt. 14.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312)988-5300

CHAIR: Robert Mundheim, New York, NY ■ Robert A. Creamer, Evanston, IL ■ Terrence M. Franklin, Los Angeles, CA ■ Paula J. Frederick, Atlanta, GA ■ Bruce A. Green, New York, NY ■ James M. McCauley, Richmond, VA ■ Susan R. Martyn, Toledo, OH ■ Mary Robinson, Downers Grove, IL ■ Philip H. Schaeffer, New York, NY ■ E. Norman Veasey, Wilmington, DE

CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel ©2010 by the American Bar Association. All rights reserved.

104

SURRENDER OF FILE TO THE CLIENT UPON TERMINATION OF THE REPRESENTATION

Adopted April 17, 1999; Revised September 15, 2018.

Introduction and Scope

The Colorado Bar Association Ethics Committee (Committee) has received numerous inquiries concerning the responsibility of a lawyer to surrender the client's file to the client when the representation terminates. These inquiries generally relate to the lawyer's obligations to deliver the file and involve discussion of the file's contents or portions thereof to which the client is entitled. These discussions can be especially difficult when the client's newly-retained counsel requests the file from the terminated lawyer and the terminated lawyer's prior representation is being challenged or questioned.

The purpose of this opinion is to address the lawyer's general obligations to surrender the file upon demand after termination and to discuss what does, or does not, constitute the portion of the file to which the client is entitled. This opinion does not address those situations in which a lawyer has not been fully paid and the lawyer is asserting a retaining lien on the client's file. For a discussion of the lawyer's duties in those circumstances, see, CBA Formal Op. 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (1989, addendum issued 1995).¹ For purposes of this opinion, the Committee assumes the lawyer has not asserted such a lien. This opinion also does not address the lawyer's specific obligations to retain and preserve files after the representation terminates, or whether, and under what circumstances, all or any part of the file may be subject to disclosure or discovery in civil and criminal proceedings.²

Syllabus

A lawyer's primary ethical obligation upon the representation's termination is to take the steps necessary, to the extent reasonably practicable, to protect the client's interests. One of these steps involves the lawyer's duty to surrender the file to the client. Lawyers are consistently disciplined for blanket refusals to surrender the file to the client on demand. Since the client may be uninformed about what is, or is not, contained in the file, the lawyer may inquire as to the client's needs; however the lawyer should understand that it may be difficult for the client to define what is needed. Interrelated with the obligation to protect the client's interests is the lawyer's duty to define the client's needs liberally. In this context, the client's entitlement is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access the file related to the representation so as to enable continued protection of the client's interests.

Under Colo. RPC 1.16(d), the portions of the file to which the client is entitled must be surrendered upon demand within a reasonable time, regardless of duplication costs and inclusive of documents in accessible or editable electronic format when such documents exist. In the event that the lawyer decides to retain a copy of the file for the lawyer's own purposes, the duplication costs for these items are not properly billed to the client. However, in the event that the lawyer voluntarily produces practice-related material, it is appropriate for the lawyer to charge the duplication costs of these documents to the client.

It is undecided under Colorado law whether an agreement between the lawyer and the client regarding duplication costs is binding as a matter of contract. While the payment of such charges may be purely a contractual matter, the Committee believes that the terms of such an agreement must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct

(Colo. RPC or the Rules). However, retention of papers and property to which the client is entitled until such costs have been paid is subject to the same exceptions to the right of retention as under a properly asserted retaining lien. *See* CBA Formal Op. 82.

There are two primary types of material the lawyer may retain because they constitute portions of the file to which the client is not entitled. The first type of material includes documents in which a third party, e.g., another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model from which to draft documents for the present client. However, the product drafted by the lawyer for the present client may not be withheld.

The second type of material involves those documents that would be considered practice-related materials relating to the business of representing the client. These include, for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is not needed to protect the client's interests and does not constitute a portion of the file to which the client is entitled.

Defining this second category in detail is difficult, as it is factually specific to each situation. In making these determinations, the lawyer should be guided by the principle that he or she has a duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information. Generally, that duty favors production.

In the event that practice-related materials are intertwined with information that should be surrendered, the lawyer should produce factual information in the form of a summary or with personal impressions redacted if necessary. Given the variety of factual circumstances that may arise and the fact that Colorado courts have not addressed this area, the Committee provides its

own analysis together with a summary of authorities from other jurisdictions to assist the lawyer in analyzing the particular situation which the lawyer may face. In the event of a dispute regarding production of documents in the context of litigation, a review of the documents *in camera* may be necessary.

Analysis

I. Discussion of the Lawyer's General Obligations

Colo. RPC 1.16(d) states:

Upon termination of representation, *a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.*

(emphasis added.) Rule 1.16A, comment 1, states that the client's file "consists of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." For purposes of this opinion, the Committee uses the term "file" to include papers, e-mails, property, electronic data, and documents (including documents in editable format) as usually maintained in the ordinary course of practice except as otherwise specifically defined in the Colo RPC.³

The Colorado Supreme Court has consistently recognized the client's right to the prompt delivery of the portions of the file to which the client is entitled upon the representation's termination and has consistently disciplined lawyers for failing to do so.⁴ In each of these cases, the Court disciplined the lawyer for refusing or failing to deliver, after client request, the file to which the client was entitled. The emphasis has been on recognizing the lawyer's duty to protect the client's interests rather than in defining in detail what constitutes the "papers and property to which the client is entitled" under Rule 1.16(d).

Indeed, Rule 1.16(d) does not define what constitutes the “papers and property to which the client is entitled.”⁵ The Committee believes the definition should be derived from the Rule’s purpose to reasonably protect the client’s interests. In this context, it is the Committee’s opinion that the file to which the client is entitled is not necessarily defined by traditional concepts of property and ownership. Rather, the file is defined by the client’s right to access the information related to the representation and the lawyer’s duty to protect the client’s interests.

This duty includes providing documents in accessible and editable electronic format, where the documents are already maintained in that format and the client requests them in that format. This distinction is one of format, not substance; the client can easily retype or optimize (i.e., OCR) a PDF to make it editable. But providing them in the requested format is a “reasonably practicable step” a lawyer must take under Colo. RPC 1.16(d). This duty should not be read to expand the scope of documents to which the client is entitled or to impose a further duty on the lawyer to create documents that do not already exist. The Committee is of the opinion that the lawyer is obligated to provide only those editable electronic documents maintained in the ordinary course of practice that exist in the client’s file as of the date the lawyer-client relationship is terminated.⁶ This is consistent with other jurisdictions that have addressed similar questions.⁷

Therefore, subject to the narrow qualifications outlined below, upon termination of the attorney-client relationship, the client should be provided with the file.⁸ The file includes, but is not limited to: those documents and other property the client provided; originals and copies of other papers and documents the lawyer possesses relating to the representation that the client reasonably needs to protect the client’s interests; and documents in electronically accessible and editable format, when such documents exist as of the date of the representation’s termination and are requested. Where a lawyer has asserted a valid retaining lien, this duty may be deferred until

such time as the lien is resolved.

This position is consistent with the majority of cases and ethics opinions that conclude that upon termination of the attorney-client relationship, the client has the right to full access to the file on the represented matter, subject to a few qualifications discussed below.⁹ The lawyer must deliver originals and copies of other documents that the lawyer has which relate to the representation and which the client reasonably needs.¹⁰

The Committee notes that Rule 1.16(d) requires the lawyer, to the extent reasonably practicable to protect the client's interest, to "surrender" the file to the client. The use of this term is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand. While it is appropriate for a lawyer to request a reasonable period to produce the file, a lawyer may not ignore or refuse a client's request for such papers and property.¹¹ When provided with an ambiguous request from a client, the lawyer should seek further clarification.¹²

Numerous questions may arise concerning the costs of duplicating the file at the time of delivery. Consistent with recognition that the file must be surrendered to the client, it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy.¹³ The fact that copies of documents may have been previously provided to the client does not eliminate the lawyer's responsibility to provide the client with the file. If the lawyer wishes to keep copies of the documents to which the client is entitled, the lawyer may do so at the lawyer's own expense.

Unless there is a valid agreement to the contrary, the Committee believes that refusal to provide the file until the client pays duplication costs restricts the client's right to the file and is improper.¹⁴ Note, however, that this responsibility would not necessarily apply to those portions of the file to which the client is not entitled (as further discussed below) in the event that the lawyer

voluntarily decides to make these documents available to the client.

The Committee is aware that many fee agreements seek specifically to establish the obligations of the lawyer and client for payment of duplication costs.¹⁵ While the payment of such charges may be purely a contractual matter,¹⁶ the Committee believes that such terms must be reasonable and otherwise must not violate the Rules. Retention of documents contingent upon payment of duplication costs is subject to the same exceptions that apply to a properly asserted retaining lien as discussed more completely by the Committee in CBA Formal Opinion 82.¹⁷

II. Documents to Which the Client is Not Entitled

A. Documents Protected from Disclosure Based Upon Third Party Interests

The client is not entitled to documents obtained from or prepared for a third party, usually another client, that the lawyer used as a guide or model in the current representation. The lawyer is not required to disclose documents that may violate the duty of confidentiality and nondisclosure owed to some third party, or otherwise imposed by law.¹⁸ In the event that a pleading from a file related to a third party's representation was used as a draft for the requesting client, it may be properly withheld. However, the pleading that was drafted for the requesting client from that model is not within this exception. Drafts of pleadings, if maintained in the file and not destroyed in the normal course of the representation, should be produced.

B. Practice-Related Materials

Authorities differ as to the lawyer's responsibility to produce practice-related materials contained in the file.¹⁹ These discussions focus on varying definitions of what constitutes those materials and the lawyer's responsibilities related to various portions of documents identified as such.

Virtually all authority that has discussed this category recognizes that practice-related

materials does not include documents belonging to the client or documents which are the “end product” of the lawyer’s services. These documents must be produced to the client. End product items include pleadings filed in the action, correspondence with the client, opposing counsel and witnesses, and final versions of contracts, wills, corporate records, and similar records prepared for the client’s actual use.²⁰

While there is some authority to the contrary,²¹ the majority of authority asserts that a lawyer may not retain preliminary drafts, legal research, and legal research memoranda as practice-related material and must be surrendered.²² The Committee agrees with this view.²³

Internal firm administration documents, such as conflicts checks and personnel assignments, are properly retained as practice-related material. The lawyer may withhold certain firm documents that were intended for law office management or use because they are unnecessary to protect the client’s interests in the matter.²⁴

It is much more difficult to address documents, in any form, containing the lawyer’s personal impressions and comments. While recognizing that clear direction in this area depends on the specific circumstances the lawyer may encounter, the Committee reminds lawyers that the client’s interests must be protected to the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect both the client’s and the lawyer’s interests.²⁵

The lawyer should err on the side of production. If documentation is retained and production requests persist, a court may need to resolve *in camera* disputes concerning access to documents which the lawyer perceives to be practice-related material.²⁶

NOTES

¹ CBA Formal Opinion 82 recognizes that a lawyer ethically may assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may not be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Rules; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

² The Committee notes that the duty to surrender papers to the client to the extent reasonably practicable to protect the client's interests is not identical to the obligations of the lawyer to preserve the file. While certain documents might be withheld since they are contained in one of the exceptions addressed in this opinion, the fact that the lawyer has retained these documents does not diminish the obligation to preserve the file as that obligation is defined by agreement or by law. See Colo. RPC 1.16A (setting forth lawyer's obligation to retain client file). Discussion of this obligation is beyond the scope of this opinion.

³ This definition is consistent with the Colo. RPC's definition of "document." See Colo. RPC 1.0(b-1) (defining document to mean "email or other electronic modes of communication subject to being read or put in readable form.").

⁴ See *People v. Garrow*, 35 P.3d 652, 655 (Colo. 2001) ("The Colorado Supreme Court has consistently recognized the client's right to the prompt delivery of papers and property to which the client is entitled upon termination of the representation, and the Court has consistently disciplined lawyers for failure to do so."); see also *People v. Greene*, 276 P.3d 94, 110-11 (Colo. 2011); *People v. Rishel*, 956 P.2d 542, 543 (Colo. 1998); *People v. Holmes*, 951 P.2d 477, 479 (Colo. 1998); *People v. Davis*, 950 P.2d 596, 597 (Colo. 1998); *People v. Kuntz*, 942 P.2d 1206, 1207-08 (Colo. 1997).

⁵ Colo. RPC 1.16A sets forth a lawyer's obligations concerning client file retention. Colo. RPC 1.15 sets forth a lawyer's general duties regarding client property, including funds and "other property." In cases addressing violations of Rule 1.16(d), the Colorado Supreme Court has not defined with precision what comprises a client file. Generally, the Court has broadly interpreted "papers and property to which the client is entitled" as those "files generated during (the) representation." *Garrow*, 35 P.3d at 655. In the limited number of cases addressing attorney discipline for violating Rule 1.16(d) where the Colorado Supreme Court has identified the contents of a client file in question, the file has included abandoned trademark applications, *People v Webb*,

306 P.3d 120, 123 (Colo. 2013); files of disability payment recipients when a tax refund on such payments was contested, *Garrow*, 35 P.3d at 654; estate documents, *People v. Smith*, 93 P.3d 1136, 1138 (Colo. 2004); financial documents provided during the representation, *People v. Lynch*, 35 P.3d 509, 512 (Colo. 2000); and immigration papers, *People v. Romero*, 35 P.3d 164, 167 (Colo. 1999).

⁶ See Colo.RPC 1.16A, cmt [1].

⁷ See N.Y.C Bar Ass'n Comm. on Prof'l & Judicial Ethics Formal Op. 2008-01, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation" (2008) (stating lawyers have obligation to provide client with electronic documents created and contained within client's file in that format); State Bar of Cal. Formal Op. 2007-174 (emphasis in original) (concluding "the *form* of the items in question . . . proves immaterial" to a lawyer's obligation to return client paper's upon termination of representation); Ill. State Bar Ass'n Advisory Op. on Prof's Conduct No. 01-01 ("It is also the Committee's opinion that the request to have the client file materials downloaded onto disk is a 'reasonable' request as set forth in Rule 1.4(a), and that the client is entitled to receive his or her files in the format in which the lawyer or law firm maintains such files.").

⁸ The lawyer's obligations concerning the client file are different when the lawyer is selling his or her law practice. See Colo.RPC 1.17(c)(1)-(3).

⁹ For a discussion of situations where these concerns have been addressed, see *In the Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 91 N.Y.2d 30 (1997), citing *Resolution Trust Corp. v. H. P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989); State Bar of Ga., Formal Advisory Op. 875; Massachusetts Rules of Court, Rule 3.07, DR 2110[A][4] (West, 1997); Ohio Sup. Ct. Bd. Of Comm'rs On Grievances and Discipline, Formal Op. 928; *Maleski v. Corporate Life Ins. Co.*, 163 Pa. 36, 641A.2d 1 (Pa. Commw. 1994); State Bd. of Cal. Standing Committee On Professional Responsibility and Conduct, Formal Op. 1992127; Connecticut Bar Ass'n Committee On Professional Ethics, Op. 941; State Bar of Michigan Commission on Professional and Judicial Ethics, Syllabus CI926 (1983); Or. State Bar Ass'n, Op. 1991125.

¹⁰ See Restatement (Third) of the Law Governing Lawyers § 58(3), cmt. d (1998).

¹¹ See also Colo.RPC 1.16A & 1.15A.

¹² See *Dubose v. Shelnutt*, 566 So.2d 921 (Fla. Dist. Ct. App. 1990) (client request for "depositions of following witnesses" placed a duty on the lawyer to call the client and find out exactly what the client needed.); see also *Matter of Struthers*, 877 P.2d 789 (Ariz. 1994); *Finch v. State Bar of California*, 621 P.2d 253 (Cal. 1981); *People v. Damkar*, 908 P.2d 1113 (Colo. 1995); *Matter of Kelly*, 655 N.E.2d 1220 (Ind. 1995); *Comm. on Prof. Ethics & Conduct v. Leed*, 477 N.W.2d 390 (Iowa 1991); *Matter of England*, 894 P.2d 177 (Kan. 1995); *Kentucky Bar Ass'n v. Delahanty*, 878 S.W.2d 795 (Ky. 1994); *In re Turissini*, 655 So.2d 327 (La. 1995), *In re Disciplinary Action Against Cowan*, 540 N.W.2d 825 (Minn. 1995); *Matter of DePietropolo*, 603A.2d 951 (N.J. 1992); *Cleveland Bar Ass'n v. Bancsi*, 651 N.E.2d 949 (Ohio 1995); *Matter of Meeder*, 463 S.E.2d 312 (S.C. 1995); *In re McCarty*, 1665A.2d 885 (Vt. 1995); *State Bar Committee*

on *Legal Ethics v. Karl*, 449 S.E.2d 277 (W. Va. 1994).

¹³ The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo.RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation).

¹⁴ See *Apa v. Qwest Corp.*, 402 F. Supp. 2d 1247, 1250 (D. Colo. 2005) (citing this Opinion for the proposition that “Rule 1.16(d) of the Colorado Rules of Professional Conduct requires counsel, upon termination of representation, to surrender papers to which the client is entitled, which the Court understands to mean without additional cost to the client.”); see also ABA Formal Op. 15-471, “Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled” (2015) (stating lawyers should make clear in retention letter who is responsible for the cost of copying the file and under what circumstances); D.C. Bar Ass’n, Op. 357 “Former Client Records Maintained in Electronic Form” (2012) (stating that lawyers and clients may enter into reasonable agreements about who will bear the costs associated with providing files in a particular form).

¹⁵ Consistent with the suggestions raised by the authors of the cited article, the Committee encourages lawyers to address matters concerning file disposition in the initial retention letter or fee agreement, or in writing upon the representation’s completion.

¹⁶ See, e.g., ABA Formal Op. 15-471, “Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled” (2015) (agreeing with the reasoning in D.C. Bar Op. 357 (2012) that lawyers and clients “may enter into reasonable agreements addressing how the client’s files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form;”).

¹⁷ See *Kallsen v. Big Horn Harvestore Sys., Inc.*, 761 P.2d 292 (Colo. App. 1988).

¹⁸ In certain areas of practice, lawyers are subject to court orders that prohibit the disclosure of certain documents or certain information to the client. This opinion does not address documents covered by such court orders.

¹⁹ The authorities that discuss this issue unfortunately use the term “work product.” The Committee emphasizes that this term may be misleading in that it could be confused with “work product” which is protected against discovery because it relates to mental impressions, conclusions, opinions, or legal theories of a lawyer concerning a matter in litigation. For purposes of this opinion, “practice-related materials” relates to that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting lawyer impressions that is not needed to protect the client’s interests in the matter for which the lawyer was retained and, therefore, need not be produced pursuant to Colo. RPC 1.16(d).

²⁰ See, e.g., Ill. State Bar Ass’n, Op. 9413.

²¹ See *Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, mod. 128 F.R.D. 182 (S.D. Miss. 1989); *Corrigan v. Armstrong, et. al.*, 824 S.W.2d 92 (Mo. App. 1992); Ala. State Bar, Formal Ethics Op. RO8602; Ariz. State Bar Committee on Rules of Professional Conduct, Op. 921; Ill. State Bar Ass’n, Op. 94-13; N.C. State Bar Ethics Committee, RPC 178 (1994); R.I. Sup. Ct. Ethics Advisory Panel, Op. 92-88 (1993). The Committee disagrees with these authorities to the extent they state that the client is required to establish some specific need for the documents since it may be especially difficult for the client to establish that need when the client is unaware of what the file contains.

²² Under the majority approach, a client is presumptively entitled to the entire file unless the lawyer can show good cause to withhold certain documents. Under the minority approach, or the “end product” approach, a client is entitled to the end product of a lawyer’s services but must make a showing of need to obtain access to the lawyer’s personal impressions or relating to law firm administration. Ellen J. Bennett et al., *Annotated Model Rules of Professional Conduct* 286 (8th ed. 2013).

²³ Preservation of drafts of documents in the ordinary course of the attorney’s business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.

²⁴ See *People v. Preston*, 276 P.3d 78, 89 (Colo. O.P.D.J. 2011) (citing this Opinion for the proposition that extending “personal attorney work product,” i.e. practice-related materials, to only “that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting attorney impressions that is not needed to protect the client’s interests”).

²⁵ Some authority has applied definitions in this area that do not mirror the Committee’s opinion here. Various definitions of “work product” and accompanying discussions can be found in: *In the Matter of Sage Realty Corp.*, *supra*, (“documents containing a firm attorney’s general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purposes of giving internal direction to facilitate performance of the legal services entailed in that representation”); ABA Informal Op. 1376, “Files in Possession of Trademark Counsel Pertaining to Trademark of a Client” (1977) (“lawyer need not deliver [to client] his internal notes and memos which have been generated primarily for his own purpose in working on the client’s problem”); Ariz. Ethics Op. 81-32 (papers and documents belonging to client do not include “attorney’s own notes and memos to himself; nor his myriad scratchings on note sheets; nor records of passing thoughts dictated to a machine or a secretary and placed in the file; nor ideas, plans or outlines as to the course the attorney’s representation is to take”); Del. Ethics Op. 1997-5 (1997) (“lawyer’s working notes, impressions and draft documents”); Ill. Ethics Op. 94-13 (Jan. 1995) (“lawyer’s notes, drafts, internal memoranda, legal research and factual research materials, including investigative reports, prepared by or for the lawyer for use of the lawyer in the representation”); Kan. Ethics Op. 92-05 (1992) (includes attorney’s “recorded mental impressions, research notes, legal theories, and unfiled pleadings included in the client’s file”); ABA/BNA Lawyer’s Manual on Professional Conduct

31:1206 (examples of lawyer's work product include "recorded mental impressions, research notes, legal theories, and unfiled draft documents").

²⁶ See, e.g., *People v. Salazar*, 835 P.2d 592, 595 (Colo. App. 1992) (holding that lawyer does not violate ethical obligations by disclosing information *in camera* if ordered to do so).