



Going Federal

HOW TO ETHICALLY AND EFFECTIVELY ADVISE CLIENTS AND
PRESERVE CLAIMS IN ANTICIPATION OF FEDERAL POST-CONVICTION REVIEW

Direct Review

(2 bites at the apple – as appellate attorneys well know)

- ▶ Charging/Arraignment
- ▶ Discovery/Motions
- ▶ Guilty Plea or Trial
- ▶ Sentencing
- ▶ Appeal of right
 - ▶ 23B remand
- ▶ Discretionary appeal to State Supreme Court
- ▶ Discretionary appeal to US Supreme Court

State Collateral Review

- ▶ Charging/Arraignment
- ▶ Discovery/Motions
- ▶ Guilty Plea or Trial
- ▶ Sentencing
- ▶ Appeal of right
 - ▶ Rule 23B remand
- ▶ Discretionary appeal to State Supreme Court
- ▶ Discretionary appeal to US Supreme Court
- ▶ State Petition for relief under
 - ▶ Post-conviction Remedies Act
 - ▶ Writ of habeas corpus
- ▶ Motion to dismiss/Summary J.
- ▶ Evidentiary hearing
- ▶ Ruling on merits
- ▶ Appeal of Right
- ▶ Discretionary appeal to State Supreme Court
- ▶ Discretionary appeal to US Supreme Court

Federal Collateral Review –

(6 bites at the apple)

- ▶ Charging/Arraignment
- ▶ Discovery/Motions
- ▶ Guilty Plea or Trial
- ▶ Sentencing
- ▶ Appeal of right
 - ▶ 23B remand
- ▶ Discretionary appeal to State Supreme Court
- ▶ Discretionary appeal to US Supreme Court
- ▶ State Petition for relief
 - ▶ PCRA
 - ▶ Writ of habeas corpus
- ▶ Disc/Mot to dismiss/Sum. J.
- ▶ Evidentiary hearing
- ▶ Ruling on merits
- ▶ Appeal of Right
- ▶ Discretionary appeal to State Supreme Court
- ▶ Discretionary appeal to US Supreme Court
- ▶ Petition for a writ of habeas corpus. 28 U.S.C. § 2254
- ▶ Disc/Mot to dismiss/Sum. J.
- ▶ Evidentiary hearing
- ▶ Ruling on merits
- ▶ Discretionary appeal
- ▶ Discretionary appeal to US Supreme Court



Ethical Rules that impact
post-conviction review

Rule 1.1 - Competence

- ▶ “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation”

Pop Quiz!

- ▶ True or False
- ▶ A claim of ineffective assistance of counsel necessarily entails a claim that an attorney has acted incompetently.

6th Amendment – Right to Effective Assistance of Counsel

- ▶ Strickland
 - ▶ Attorney's representation was objectively unreasonable
 - ▶ Defendant was prejudiced

Ethical Advice:

- ▶ Don't take it personally
- ▶ Help your client continue to bite at the apple
- ▶ Cooperate with post-conviction counsel

Pop Quiz!

- ▶ Yes or no
- ▶ A former client has filed a petition for post-conviction relief, alleging that your representation was constitutionally deficient. The prosecutor now asks you for an affidavit describing your representation of the petitioner, including what advice you gave him about whether to plead guilty. Do the rules of professional conduct prevent you from providing that affidavit?

Rule 1.6 - Confidentiality

- ▶ (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- ▶ (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - ▶ (b)(1) to prevent reasonably certain death or substantial bodily harm;
 - ▶ (b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - ▶ (b)(3) 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 and in furtherance of which the client has used the lawyer's services;
 - ▶ (b)(4) to secure legal advice about the lawyer's compliance with these Rules;
 - ▶ (b)(5) 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; or
 - ▶ (b)(6) to comply with other law or a court order.; or
 - ▶ (b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or 20 from changes in the composition or ownership of a firm, but only if the revealed information would not 21 compromise the attorney-client privilege or otherwise prejudice the client.22
- ▶ (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or 23 unauthorized access to, information relating to the representation of a client.24 (c)

Rule 1.9 – Duties to Former Clients

- ▶ (c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
 - ▶ (c)(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - ▶ (c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Ethical Advice:

- ▶ Do not talk to the prosecutors about your representation until under court order to do so via discovery order for your files or a subpoena to testify.
- ▶ Do talk to post-conviction counsel

Pop Quiz!

- ▶ True or False
- ▶ An attorney does not have to provide work product from the original case to a former client who has filed an IAC claim against him or to the attorney representing the former client in the post-conviction claim.

Rule 1.16 – Terminating representation

- ▶ (d) 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 or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

Rule 1.16 - Note 9

- ▶ Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See Rule 1.15. Upon termination of representation, a lawyer shall provide, upon request, the client's file to the client notwithstanding any other law, including attorney lien laws. It is impossible to set forth one all encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings. The Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.

Ethical Advice:

- ▶ Provide entire file, including work product, to post-conviction counsel.
- ▶ Remain loyal to your client
- ▶ Don't make it personal - acknowledge errors
- ▶ Give accurate advice about "next steps"
- ▶ Contact Federal Defender Office early in the process

Writ of Habeas Corpus

- ▶ Common law writ of habeas corpus – you “have the body” - bring the prisoner to court
 - ▶ Used to challenge legality of detention
- ▶ Constitutional authority
 - ▶ Article I (executive branch) – Suspension Clause
 - ▶ Utah Constitution
 - ▶ Article I § 5 – Suspension Clause
 - ▶ Article VII § 4, § 7 – Courts have jurisdiction to grant writ
- ▶ Statutory authority
 - ▶ 28 USC §§ 2241-2266
 - ▶ § 2254 – State habeas
 - ▶ § 2255 – Federal post-conviction
 - ▶ PCRA
 - ▶ Rule 23B

1996 AEDPA - Federal Limitations

- ▶ 1 year statute of limitations
- ▶ Exhaustion of claims
- ▶ Must seek evidentiary hearing in state first
- ▶ Successive petitions
- ▶ Highly deferential standard of review
- ▶ Discretionary right to appointment of counsel

Statute of Limitations – § 2244(d)

- ▶ 1-year statute of limitations begins
 - ▶ When judgment is “final”
 - ▶ Judgment is “final” when time to appeal expires
 - ▶ When state “impediment to filing” is removed
 - ▶ Be alert for deficiencies in prison contract counsel
 - ▶ When a “right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review
 - ▶ When the “factual predicate . . . could have been discovered through the exercise of due diligence.”
- ▶ § 2244(d)(2) – time during any “properly filed” state post-conviction claim is not counted
 - ▶ Not likely to benefit from favorable ruling in *Patterson*.

Equitable Tolling

- ▶ Holland v. Florida (2010)
- ▶ Test: Pursued rights diligently + “some extraordinary circumstance stood in his way”
 - ▶ Contract counsel?
- ▶ “garden variety,” excusable neglect (like attorney missing a deadline) doesn’t warrant tolling

Exhaustion – 28 USC § 2254(b)

- ▶ Comity
- ▶ State high court must consider it first (once)
- ▶ Mixed petitions and *Rhines*
 - ▶ Withdraw petition, proceed only on exhausted claims, or stay petition

Right to Counsel

- ▶ State must provide “meaningful access” to the courts.
 - ▶ This can be accomplished by providing either “adequate law libraries or adequate assistance from persons trained in the law.”
- ▶ No constitutional right to counsel, even in a capital case
- ▶ Statutory rights
 - ▶ Most states provide appointment of counsel in capital cases; many in all
 - ▶ Federal court has discretion to appoint counsel in noncapital cases
 - ▶ Right to counsel on Rule 23B remand



What can you do in federal court?

FROM JURISDICTION TO CONSTITUTIONAL ERROR

What errors?

- ▶ Federal supervision (error correction)
- ▶ Process guarantee – ensure state provides a “full and fair opportunity” to litigate a constitutional claim
- ▶ “Stop-gap” while states adjust to changes in federal law; limited role
- ▶ “Guard against extreme malfunctions”
- ▶ Review only claims related to a defendant’s “factual guilt”

- ▶ *Stone v. Powell* (1976) – No habeas review of 4th Amendment claim (not concerned about conviction someone who is innocent)
- ▶ *Withrow v. Williams* (1993) – Allowing habeas review of *Miranda* violation
- ▶ *Kimmelman v. Morrison* (1986) – Allowing IAC challenge to failure to raise Fourth Amendment claim



What if you're innocent?
Doesn't that violate the Constitution?

Herrera v. Collins (1993)

- ▶ Bad facts make bad law!
- ▶ 10 years after conviction was final, petitioner argued he was actually innocent based on affidavits that claimed his now-deceased brother was the actual killer.
- ▶ 2 justices – No constitutional right to habeas review based on the discovery of new evidence
- ▶ 3 justices – There is such a right “at least in capital case,” and petitioner is entitled to relief if he can show he “probably is innocent”
- ▶ 4 justices – didn’t reach the issue because petitioner hadn’t made the “extraordinarily high” showing of actual innocence

Schlup v. Delo (1995)

- ▶ Concern: "a constitutional violation has probably resulted in the conviction of one who is actually innocent"
- ▶ Test: "in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt."
- ▶ Remedy: excuses procedural default, including a late filing
- ▶ "Innocence gateway"
- ▶ Can you bring a Schlup claim based on old evidence?
 - ▶ House v. Bell (2006) – habeas court must consider all evidence – "old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted at trial"
- ▶ What if there is a change in the law?



What if you already filed (and lost) a petition?

28 USC § 2244(B)(1) (NEW EVIDENCE OR NEW FACTS)

What if there's some other, non-constitutional reason to deny relief?

- ▶ *Wainwright v. Sykes* (1977)
- ▶ State denied relief because petitioner had not challenged error in trial court before raising it on appeal in post-conviction petition
- ▶ Rule: “a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.”
- ▶ Result: Federal courts will not hear a claim that was procedurally defaulted unless there is “cause” and “prejudice”

Cause

- ▶ State interference
 - ▶ Again, pay attention to the quality of state contract attorneys
- ▶ IAC
 - ▶ Note that this likely requires IAC challenge to appellate attorney as well
- ▶ Abandonment by legal representative (1439 n.1c)
 - ▶ “Negligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’ . . . A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default.”
- ▶ Lack of counsel at “initial-review collateral proceeding”
Martinez v. Ryan (2012) (1439 n.1d)

Prejudice

- ▶ Same as for IAC under *Strickland* (1441 n.2)
 - ▶ “Reasonable probability that the result of the trial would have been different”
 - ▶ “reasonable probability” = probability sufficient to “undermine confidence in the verdict”