Proposed Ethics Opinion: Defense Lawyers May Assist the State in Responding to Claims of Ineffective Assistance

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Criminal defendants, especially those sentenced to long prison terms, sometimes try to attack their convictions and sentences by claiming that their trial lawyers provided ineffective assistance of counsel. The state sometimes seeks trial lawyers' help in answering these claims, and trial attorneys may want to help in order to avoid findings of ineffectiveness. At the same time, trial counsel may have ongoing duties of loyalty and confidentiality that make it inappropriate simply to open their files to the state. The State Bar just issued a proposed ethics opinion -- Proposed 2011 FEO 16 -- concerning how to balance these competing considerations. It's available in full here. The Bar's summary of the opinion is as follows:

Proposed opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

In other words, the Bar may soon rule that a defense lawyer may assist the state in responding to allegations of ineffective assistance of counsel, perhaps by discussing the case with a prosecutor or by preparing an affidavit summarizing the attorney's view of the relevant facts. The Bar views such assistance as permitted under Rule 1.6(b)(6), which allows a lawyer to reveal otherwise confidential information as necessary to respond to allegations concerning the lawyer's representation of a client. The proposed opinion does emphasize that "lawyers who choose to respond to claims of ineffective assistance of counsel . . . [must] respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim. Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer *carte blanche* to disclose all information contained in a former client's file."

The proposed opinion expressly declines to follow an opinion on the same subject recently adopted by the American Bar Association. ABA Formal Opinion 10-456, available here, asserts that "it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying" at a hearing on collateral review. That's an empirical question, and my experience is contrary to the ABA's conclusion, but it's probably neither here nor there as to the ethics issue. On the ethics issue, the ABA points out that while a claim of ineffective assistance waives the attorney-client privilege and work product protections as to information needed to respond to the claim, a defendant and his prior attorney may disagree about the scope of the implied waiver. Therefore, the ABA reasons, the attorney ought not disclose anything outside a judicial proceeding, during which the defendant will have an opportunity to object to disclosure. Nor is extra-judicial disclosure normally "necessary" to respond to the defendant's claim, because many claims of ineffective assistance are dismissed on procedural grounds, while the remainder, in the ABA's view, may be answered adequately in court. Thus, the ABA concludes that "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."

I welcome any thoughts about this issue generally and about the Bar's proposed opinion specifically. If I receive substantive comments, either on the blog or by email, I'll forward them to the Bar.