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From: Uphoff, Rodney <uphoffr@missouri.edu>
Sent: Friday, June 19, 2020 10:28:21 AM
To: Glenn Grant <Glenn.Grant@njcourts.gov>
Subject: [External]Duty of Confidentiality and Wrongful Convictions

Hon. Glen A. Grant
Acting Administrative Director of the Courts
Subj: Working Group on the Duty of Confidentiality and Wrongful Convictions
Hughes Justice Complex: P.O. Box 037
Trenton, NJ 08625-0037

Dear Judge Grant:

We have read the Report and Recommendations of the Working Group on the Duty of Confidentiality and Wrongful Convictions. Certainly no one wants to see an innocent person be wrongfully convicted of a crime nor languish in prison. And there are many reforms needed to make our criminal justice systems function more effectively and minimize wrongful convictions. In our view, however, the minority of the Working Group is correct that creating a new exception to confidentiality is "not worth the resultant erosion of the lawyers-client relationship. The damage to a defense lawyer's relationship with the client is too great and the utility of the information is too small."

In 2010, the ABA Criminal Justice Section(CJS) considered whether to recommend an amendment to ABA Rule 1.6 which would require criminal defense lawyers to divulge confidential information to save an innocent person from execution. After a vigorous debate, the CJS declined to support such an amendment even in such a compelling situation for the reasons articulated by the minority in this report. New Jersey's proposed rule is even more problematic than that we considered which like Alaska and Massachusetts was a permissive , not a mandatory rule.

Absent highly unusual circumstances, the only reason a criminal defendant is going to disclose that he or she committed the crime for which the innocent person is about to be executed is because that defendant has been persuaded by counsel to be open and honest. Most conscientious criminal defense lawyers urge their clients to be truthful and in return, pledge that they will hold their client's disclosures in strict confidence. Although law professors and legal scholars might debate whether lawyers should give a more nuanced Miranda-type warning re confidentiality, the reality is that more nuanced warnings undermine trust between counsel and client. As Justice Brennan noted years ago, "[i]t is no secret that indigent clients often mistrust the lawyer appointed to represent them." *Jones v. Barnes*, 463 U. S. 745, 761 (1982). Because public defenders

and court appointed counsel have such a difficult time developing the trust of their clients, very few lawyers defending indigent clients are going to give them a watered-down pledge of confidentiality. A rule that mandates disclosure of a client's confidences to save another not just from execution but from imprisonment or even a wrongful conviction sweeps much too far. Requiring such disclosures generally means that counsel will be reneging on his or her confidentiality pledge and betraying his or her client. Instead of serving the undivided interests of his or client, counsel will be forced to promote the interests of another at the expense of his or her own client's life or liberty. Of course after a lawyer reveals a client's confession to save another person, counsel may become the government's main witness against his/her own (now former) client. And in a capital case, counsel could even become the instrument of his/her former client's execution. The more common such disclosures become, the more difficult it will ever be for defense counsel to establish the trust that is critical if counsel is to provide effective assistance of counsel. Clients simply won't know if counsel is going to be one that can be trusted or not.

We fully appreciate that the proponents of this proposed change are understandably concerned about correcting injustices that occur. We believe that they do not appreciate the difficulty for a state paid lawyer of creating a trusting relationship with a defendant threatened by the state with imprisonment. As a young public defenders trying to get minority clients to trust us – the state-paid lawyer that was foisted upon them- and be truthful, we discovered quickly that we had to look our clients in the eye and pledge that we would keep their confidences secret. Having gained a client's trust in this way, we find it almost unimaginable that we would turn around and disclose his or her confession to the court(?) or prosecutor(?) in an attempt to prevent the wrongful imprisonment of another. As Prof. Abbe Smith and many other scholars have discussed, good criminal defense lawyers don't and won't Mirandize their clients and those lawyers who do, won't get information.

Indeed we would posit that only the trusting, unwarned client will ever reveal information about the wrongly conviction of another. In our experience, a defense lawyer who has established a good attorney- client relationship is well positioned to dissuade a client who has expressed a desire to hurt another to rethink the situation and not engage in violence. So too, conscientious counsel who learns from a client about the pending execution of an innocent person would try to persuade the client to do the right thing and attempt to orchestrate a resolution that will provide the client the softest landing possible while still attempting to save the life of the innocent, wrongly convicted person. However, if the client chooses not to disclose but wants to remain silent, we believe that counsel should honor that choice. Admittedly, under the current rule, if the client insisted on silence but we were confident that our disclosure might save another's life, we may even risk disciplinary action and speak out. We know that the proponents of this change want to protect the moral lawyer who does speak out under such circumstances from disciplinary action. Nonetheless, adopting the language proposed to provide a safe harbor to counsel in this rare situation is an overly broad, unwise solution to the problem. Turning defense counsel into a minister of justice or a potential informant in any case where counsel's disclosure of a client's confidences might save another from conviction or substantial imprisonment means in many multiple-defendant, serious felony cases, a client's statements about his or her own guilt and another co- defendant's innocence would require counsel to take corrective action to ensure the system gets it right. Perhaps this is not the intent of the proposed change but we are convinced that the proposed change will promote more confusion about the proper role of a criminal defense lawyer. Moreover, requiring lawyer- snitching to save others from death or imprisonment is going to exacerbate the already serious conflict problems that bedevil most public defender systems.

Simply put, the proposed fix will do more harm than good. This debate really is about the proper role of the criminal defense lawyer and the importance of confidentiality in enabling conscientious defense counsel to play that role. Clearly there are some who take issue with the role of criminal defense lawyer as defined by Justice White in *United States v. Wade,* 388 U.S. 218, 256-58 (1967*).* Personally we think Justice White got it right. Being a criminal defense lawyer is not easy and, at times, counsel is called upon to represent some very

nasty people who have done some despicable things. Counsel's good advocacy may at times result in those very people escaping the consequences of their actions. Sometimes as a criminal defense lawyer you may find it very challenging to preserve a client's confidences. We doubt that the lawyer in *People v. Belge* felt very good about the fact that his refusal to disclose the whereabouts of the dead bodies for 10 months caused additional suffering to the parents of the victims. There was a public outcry against the lawyer and he was criminally prosecuted – thankfully and appropriately his indictment was dismissed and affirmed on appeal. We believe the lawyer there did exactly what any good criminal defense lawyer would have done in refusing to disclose his client's confidences. As the commentary to ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2 observes, "advocacy is not for the timid, the meek or the retiring."

There are a few in academia who agree with the majority in this report that confidentiality or the attorney/client privilege is not as critical as we claim it is. The Supreme Court in *Swidler & Berlin v. United States,* 524 U.S. 399 (1998), addressed those doubters when it reaffirmed the importance of protecting client confidences in the attorney/client privilege context even after the death of a client. The Court in that case also dealt with the argument that given there are already several exceptions to confidentiality, what's one more. Justice Rehnquist rejected the no harm in one more exception rationale arguing it "could contribute to the general erosion of the privilege, without reference to common-law principles or reason and experience." *Swidler,* at 410. Neither common law, reason, or experience support the weakening of confidentiality that will follow if this proposed rule were to be adopted.

In the end, we have no doubt that expanding the confidentiality exception as proposed would chill attorney-client communications. Indeed, the more we undermine confidentiality, the less likely it will be that clients will ever disclose to counsel that he or she committed a crime for which another person has been wrongfully convicted. If clients trust counsel and are honest with him/her, counsel may be able to fashion a solution that ultimately helps an innocent defendant. In some case, conscientious counsel will struggle to find a way to save the innocent person while minimizing harm to his or her current client. If that can't be done and the client won't consent to a disclosure, we believe counsel should continue to be obligated to remain silent at least as long as his/her client is alive. Further weakening 1.6 not only will greatly reduce the number of instances in which clients will disclose the commission of crimes for which another is imprisoned or facing death, but it ultimately will greatly discourage clients from making full and honest disclosures to counsel in the ordinary case.

Fixing the problem of wrongful convictions by forcing defense lawyers to disclose clients confidences is like focusing on limiting the fees of plaintiffs lawyers as the way to solve the serious health care crisis in this country. The root causes of wrongful convictions are well documented: eyewitness identification problems, false confessions, unreliable forensic science, lying jailhouse snitches, prosecutorial misconduct and ineffective assistance of counsel. Indeed, one of the best ways to minimize wrongful convictions is to ensure that defense counsel's primary obligation remains to advance the best interests of his or her clients. It is underzealous representation by under-resourced defense counsel that is clearly a major factor in producing wrongful convictions.

Respectfully submitted,

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From: Ethics, Gideon & Professionalism Committee discussion [mailto:CJSETHICS@MAIL.ABANET.ORG] **On Behalf Of** Snoddy, Robert
Sent: Tuesday, March 09, 2010 1:32 PM
To: CJSETHICS@MAIL.ABANET.ORG
Subject: YOUR INPUT NEEDED -- Seeking Comments on ABA CJS Draft Resolution on Proposed Revision to Rule 1.6 of the Model Rules of Professional Conduct

Committee Members:

For the last few years, our committee and the Criminal Justice Section Council considered various proposals to carve out an exception to confidentiality to permit lawyers to reveal information to remedy a wrongful conviction. Several versions of the proposal were circulated and discussed, but it was not possible to reach a majority view, no less a consensus, on any of the proposals.

Bruce Green and Steve Saltzburg, the Chair Elect and former Chair of the Criminal Justice Section – who are both included on this e-mail – submitted a new proposal that does not include a change to the Rule itself but adds to the comments following the Rule.

Please send in your views. We plan to discuss this proposal at the upcoming Ethics Gideon and Professionalism committee meeting in Charleston South Carolina on Friday April 9, 2010. Even if you cannot attend the meeting, it is important that our committee present the views of what has been a controversial issue.

Regards,

Ellen
For the co chairs

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