MAKING THE LAST CHANCE MEANINGFUL: PREDECESSOR COUNSEL'S ETHICAL DUTY TO THE CAPITAL DEFENDANT

*Lawrence J. Fox**

Walter Mickens is dead. He has been dead for a year now. It is hard to say who killed Walter Mickens. Some would say it was the United States Supreme Court. Others might say it was the Commonwealth of Virginia. I say it was in large part due to the ethical dereliction of Bryan Saunders.

Mickens was killed for the murder of Timothy Hall.[1] All murders are grisly, this one particularly so. Timothy Hall was found lying face down on a mattress naked from the waist down except for socks underneath an abandoned building in Newport News on March 30, 1992.[2] By Saturday, April 4, Walter Mickens had been picked up by the police,[3] and on the following Monday, Walter Mickens stood before Judge Aundria Foster, accused of capital murder and in need of a lawyer.[4] And a lawyer he got, in the person of Bryan Saunders, appointed by Judge Foster to defend Walter Mickens against these serious charges.[5]

Things did not go well from the start. Bryan Saunders did a positively mediocre job defending Walter Mickens.[6] Perhaps that was part of the problem: was Bryan Saunders so convinced Walter Mickens would be acquitted he did not begin to prepare for the mitigation phase

* Partner, Drinker, Biddle & Reath LLP. In his capacity as Chair of the ABA Death Penalty Representation Project, Mr. Fox made the motion to the House of Delegates that the revised Guidelines be approved. Mr. Fox dedicates this Article to Robin Maher, Executive Director of the ABA Death Penalty Representation Project, without whose leadership and insight the Guidelines would never have been promulgated.

1. *See generally* Mickens v. Taylor, 535 U.S. 162 (2002).
2. *See* Mickens v. Commonwealth, 442 S.E.2d 678, 681 (Va. 1994).
3. *See id.* at 682.
4. *See* Mickens v. Taylor, 227 F.3d 203, 208 (4th Cir. 2000).
5. *See id.*
6. *See* Petitioner's Brief at 7-8, Mickens v. Taylor, 227 F.3d 203 (4th Cir. 2000) (No. 00-04).

of the trial until after the jury surprised Mr. Saunders by returning a verdict of guilty of capital murder?[7]

In any event, Bryan Saunders failed Walter Mickens completely in the penalty phase of the trial and the jury returned a verdict of execution against poor Walter Mickens.[8] Bryan Saunders continued to represent Walter Mickens, ultimately with no more success.[9] Walter Mickens' appeal was denied,[10] and he languished on Virginia's death row until Robert Wagner undertook his petition for habeas relief.[11]

That is when Walter Mickens got the surprise of his life. Wagner went to the court in search of Walter Mickens' juvenile records, something Bryan Saunders had not bothered to investigate.[12] As a result of a clerk's error, Wagner was handed the otherwise sealed juvenile records of Timothy Hall.[13] He only had them for fifteen minutes when the clerk's error was discovered.[14] However, in that time, Wagner learned one shocking fact: up until the moment of Timothy Hall's death, Bryan Saunders had represented Hall on juvenile charges alleging assault and carrying a concealed weapon.[15]

Subsequent investigation revealed that Bryan Saunders' appointment to represent the victim had been terminated on Friday, April 3rd, by Judge Aundria Foster—the very same judge who appointed Bryan Saunders to represent Walter Mickens on the murder charge.[16] While the court knew Bryan Saunders' role on behalf of Timothy Hall, Walter Mickens did not know until Wagner uncovered it. Only then did

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7. *Cf.* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.10.1, text accompanying notes 104-05, 257 (rev. ed. 2003) [hereinafter GUIDELINES] ("For counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.").

8. *See* Mickens v. Taylor, 535 U.S. 162, 164 (2002).

9. The Supreme Court vacated Mr. Mickens' sentence and remanded for further consideration in light of its then recent decision in *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole eligible"). *See* Mickens v. Virginia, 513 U.S. 922, 922 (1994). Upon remand, the Virginia Supreme Court granted Mr. Mickens a new sentencing hearing, *see* Mickens v. Commonwealth, 457 S.E.2d 9, 10 (Va. 1995), at which he was again sentenced to death. *See* Mickens v. Commonwealth, 478 S.E.2d 302, 303 (Va. 1996). Mr. Mickens' appeal from that sentence was denied. *See id.* at 307.

10. *See* Mickens v. Commonwealth, 478 S.E.2d 302, 307 (Va. 1996).

11. *See generally* Mickens v. Greene, 74 F. Supp. 2d 586 (E.D. Va. 1999).

12. *See* Mickens v. Taylor, 227 F.3d 203, 207 (4th Cir. 2000).

13. *See id.*

14. E-mail from Robert Wagner, counsel to Walter Mickens on petition for habeas relief (September 15, 2003, 12:10:25 EST) (on file with Hofstra Law Review).

15. *See* Mickens v. Taylor, 227 F.3d 203, 207-08 (4th Cir. 2000).

16. *See id.* at 208.

Walter Mickens realize that his entitlement to one true champion in the defense of these charges had produced a champion with a glaring conflict of interest, a conflict of interest whose effect on Walter Mickens' defense had to be profound.

When confronted with the undisclosed truth, however, Bryan Saunders was not only unrepentant, he insisted that (a) there was no conflict and (b) his performance was not affected in any way by his prior representation of Timothy Hall.[17] Indeed, he asserted that his continuing loyalty to his former client ended with his death.[18] This loyalty was apparently no greater than the loyalty he had shown to Walter Mickens in concealing a key fact, a concealment that permitted Saunders to retain this relatively lucrative appointment, one that paid far more than the juvenile cases, like Timothy Hall's, that Bryan Saunders had been handling previously.

The uncovering of this astonishing information did not save Walter Mickens' life. The idea that a lawyer, who up until the date of the victim's death had represented the victim, could, consistent with the rules of professional conduct, represent the person accused of murdering his former client, is astonishing. Indeed, the representation presents one of the most disabling conflicts of interest, a conflict whose effect no one—not even Bryan Saunders—could appreciate.

Yet in the end, the Supreme Court, in a 5-4 decision, affirmed the en banc Fourth Circuit opinion,[19] reversing the Fourth Circuit Panel's granting of a new trial,[20] concluding that while it certainly was a conflict, an undisclosed conflict, and a conflict known to the judge who appointed Bryan Saunders, Walter Mickens had failed to prove prejudice.[21] Since Walter Mickens failed to prove the impossible to prove—that the result would have been different if he had been represented by an unconflicted lawyer—the Supreme Court affirmed the denial of habeas relief.[22] In reaching this startling conclusion, the Court relied quite heavily on the district court's findings in the habeas proceeding that Saunders' representation of Timothy Hall did not affect his defense of Walter Mickens in any way. This rendered all of the evidence habeas counsel was able to point to as effects of the conflict

17. *See* Petitioner's Brief at 10-11, Mickens v. Taylor, 227 F.3d 203 (4th Cir. 2000) (No. 00-04).

18. *See* Mickens v. Greene, 74 F. Supp. 2d 586, 605 (1999).

19. *See* Mickens v. Taylor, 240 F.3d 348, 351 (4th Cir. 2001).

20. *See* Mickens v. Taylor, 227 F.3d 203, 206 (4th Cir. 2000).

21. Mickens v. Taylor, 535 U.S. 162, 174-76 (2002).

22. *See id.* at 174.

mere tactical decisions, decisions made by a lawyer who was so tone deaf he did not understand the ethical implications of his misconduct at all.

While it is clear that Bryan Saunders breached his ethical duties to Walter Mickens at trial and first appeal, the case also raises, in a disturbingly stark way, the question whether Bryan Saunders did not also breach his ethical duties to Walter Mickens during the habeas phase of the case. You might say he was then no longer Walter Mickens' lawyer, and that would be a true statement. But the thesis of this paper—after this long-winded introduction—is that lawyers who have represented clients in capital murder cases at trial and appeal—not unlike all criminal trial and initial appeal counsel, but more urgently because of the circumstances—continue to owe important obligations to their former clients.

These obligations have been just recently included in the latest version of the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases:

> In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with *successor counsel*. This duty includes, but is not limited to:
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> A. maintaining the records of the case in a manner that will inform *successor counsel* of all significant developments relevant to the litigation;
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> B. providing the client's files, as well as information regarding all aspects of the representation, to *successor counsel*;
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> C. sharing potential further areas of legal and factual research with *successor counsel*; and
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> D. cooperating with such professionally appropriate legal strategies as may be chosen by *successor counsel*.[23]

It is my hope that this article will demonstrate that these Guidelines reflect not just best practice, but actual ethical mandates that trial

23. GUIDELINES, *supra* note 7, at Guideline 10.13 (emphasis added).

counsel, like Bryan Saunders, owe their former clients as those clients negotiate the jurisprudential maze known as habeas corpus.[24]

I. THE CONFLICTS FORMER COUNSEL MUST OVERCOME

Any realistic assessment of the duties of former counsel to a former capital client must begin with recognition of the conflicts that may well have developed between these two since the representation ended. Only an honest recognition of these conflicts can permit former counsel to treat the former client fairly as the client negotiates the next steps in the judicial process.

First, and in some ways the most important, is the conflict between predecessor counsel's obligation to help the former client and the desire and inevitable reflex of predecessor counsel to wish to defend counsel's conduct. No one wants to be accused of being ineffective.[25] No one ever wants to be second-guessed. Everyone wants to defend his or her conduct by asserting that it was in fact effective and that the judgments that were made were defensible if not sound. Certainly the fact that the former client is questioning former counsel's conduct will elicit scorned feelings. This human reaction is an overwhelming presence in the habeas context because of the likelihood that ineffective assistance will be raised both because it is a claim with important constitutional underpinnings and because this is often the first time it can be raised.[26] Moreover, the state's defense to the habeas claim, of course, will be that habeas counsel is simply second-guessing, with the benefit of hindsight, strategic decisions made by trial counsel.[27]

Second, the lawyer may feel that it is the client's fault that the client is in this position. The lawyer may have urged the client not to testify, to plead guilty to a lesser charge, or accept life imprisonment without

24. In other words, on the issue of the duties of former counsel, as on all the issues they address, the Guidelines "set forth a national standard of practice." *Id.* at Guideline 1.1(A). They are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." *Id.* History of Guideline 1.1.

25. "While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims." David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 90-91 (1998).

26. *See generally* Massaro v. United States, 123 S. Ct. 1690 (2003) (holding that failure to raise an ineffective assistance of counsel claim on direct appeal does not result in its procedural default).

27. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (mandating "the wide latitude counsel must have in making tactical decisions . . . [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . .").

parole.[28] The client may have failed to cooperate in the preparation of the defense. The client and the lawyer may have had a general falling out or a personality clash. These occurrences are perfectly normal and that predecessor counsel has developed antipathy toward the former client is neither unusual nor something for which the lawyer should be condemned.

That having been said, it is critical that predecessor counsel put those feelings aside to determine how they can help with the habeas proceedings. After all, counsel has not been "replaced" for this proceeding necessarily because of a dim view of counsel's performance. It is simply that the last person who can determine whether there is an ineffective assistance claim and then assert it is original trial counsel.

Third, there is another impediment to cooperation that cannot be ignored. Predecessor counsel probably was paid little enough to handle the trial and perhaps the direct appeal. He or she will be paid nothing for the time spent rehashing the prior experience. This is obviously a huge disincentive to cooperation, yet it is one more thing predecessor counsel must set aside. Of course, predecessor counsel can and will be compelled to testify as a witness with a $20 witness fee, the only remuneration for that time. One incentive predecessor counsel may have is that if he or she cooperates with successor counsel perhaps the deposition time may be shortened. That aside, the predecessor lawyer is an officer of the court and the former client faces the ultimate sanction. The predecessor lawyer simply must overcome this disincentive to help habeas counsel—who is also badly compensated or not compensated at all—to help cut down the time new counsel must devote to developing their case and to make successor counsel as effective as possible in preparing the habeas case.

II. PREDECESSOR COUNSEL'S OBLIGATION TO MAINTAIN CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

A lawyer's duty to maintain confidentiality and to protect the attorney-client privilege and the work product doctrine survives termination of the representation and, in fact, survives the death of the client.[29] Predecessor counsel, in fact, has the same duties in this regard

28. *See* Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA L. REV. 1157, 1161-64, text accompanying notes 15-21 (2003) (commenting that counsel must develop a trust relationship with the client in order to get him or her to follow the attorney's advice on plea recommendations).

29. *See* Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (stating that it is "generally, if not universally, accepted . . . that the attorney-client privilege survives the death of the

with respect to his former client as he did when he was representing him in his capital trial.[30] These duties impose specific obligations on the predecessor counsel.

Thus, predecessor counsel, it might surprise some to learn, may not consult with successor counsel at all unless the former client consents.[31] This is because our rules governing confidentiality do not contain an exception covering that situation.[32] Once that consent is obtained, however, former counsel can proceed to share everything with his or her successor and in my view is required to do so. Full cooperation should be the watchword of the relationship.

What former counsel may do if called as a witness requires a different analysis. If counsel is permitted to testify, this means that the former client has either voluntarily or been found to have waived the privilege. However, this does not mean counsel is free to tell all in the deposition conference room or from the witness stand. First, the client may have waived the privilege in a way that is circumscribed and therefore only some of the privileged information possessed by predecessor counsel is subject to proper inquiry.[33] Second, even if the waiver is total, this only means that former counsel is permitted to testify in response to proper questions and no more.[34] The waiver of the privilege does not permit former counsel to meet with the other side, nor does it permit former counsel to talk to the press or to volunteer any information when testifying.[35] Moreover, counsel must conduct him or herself in a way that provides present counsel with the opportunity to raise all appropriate objections, including those addressing the scope of the waiver.[36]

Too many lawyers fail to appreciate the critical difference between what is protected by the attorney-client privilege and what is

client"); Federal Trade Comm'n v. Grolier Inc., 462 U.S. 19, 25-27 (1983); *Id.* at 29-31 (Brennan, J., concurring).

30. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1999) [hereinafter MODEL RULES] ("The duty of confidentiality continues after the client-lawyer relationship has terminated.").

31. *See id.* R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation.").

32. *See generally id*. R. 1.6.

33. *See* Waldrip v. Head, 532 S.E.2d 380, 387 (Ga. 2000); *In re* Dean, 711 A.2d 257, 259 (N.H. 1998); State v. Taylor, 393 S.E.2d 801, 805 (N.C. 1990).

34. *See* MODEL RULES, *supra* note 31, R. 1.6, comment at 12; *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, top. 2, tit. C, introductory note (2000) ("Application of waiver or exception to a communication does not relieve a lawyer of the legal duty otherwise to protect the communication against further disclosure or use adverse to the client.").

35. *See id.*

36. *See id.*

confidential: they confuse the fact that the former only applies when the lawyer is called to testify, and the latter governs how the lawyer conducts herself off the witness stand.[37] As a result, when the privilege has been waived, too many lawyers are too quick to respond to informal inquiries—from the prosecution (of all people), the press, or others—failing to recognize that such uncompelled responses are only permissible when the former client has given his permission.

Indeed, it is impermissible under our rules for the prosecution to seek privileged or confidential information from the former counsel. Rules 1.6 and 3.4 make it quite clear that this may not be done. [38] And the case law is to the same effect.[39] The rule governing the confidentiality that must be maintained by former counsel can be simply stated: even under oath, predecessor counsel may volunteer no information without the express consent of the former client or former client's present counsel.

III. WITHDRAWING AND PROTECTING THE CLIENT

By definition, former counsel has withdrawn from the representation. If one thinks about it in terms of the ethics rules, the lawyer has been forced to withdraw because the lawyer who represented the client at trial and first appeal, by definition, has a conflict of interest: the lawyer cannot argue his own ineffectiveness. Ineffective assistance of counsel is an issue that every habeas counsel must thoroughly explore,[40] if not assert; even the mere exploration of such a claim is not an inquiry to which trial counsel can bring the necessary objectivity.

37. *See* MODEL RULES, *supra* note 30, R. 1.6 cmt. ("The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.").

38. *See id.* R. 1.6(a); *id.* R. 1.6 cmt. ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); *id.* R. 3.4 (discussing counsel's obligation to be fair to opposing party and counsel); *see generally id.* R. 8.4(d) ("It is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice.").

39. *See* Ackerman v. Nat'l Prop. Analysts, 887 F. Supp. 510, 518-19 (S.D.N.Y. 1993); *In re* Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992), *amended and reconsidered on other grounds*, 144 F.R.D. 73 (E.D. La. 1992); Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F. Supp. 651, 654-57 (M.D. Fla. 1992); MMR/Wallace Power & Indus., Inc. v. Thames Assoc., 764 F. Supp. 712, 724-28 (D. Conn. 1991).

40. *See* GUIDELINES, *supra* note 7, at Guideline 10.7(B)(1) ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.")

This is an institutional and inevitable conflict, and therefore it is one that gives particular meaning, in my view, to the obligation contained in Rule 1.16 for the lawyer to take steps to protect the client's interest to the extent reasonably practicable.[41] This rule requires, inter alia, reasonable notice to the client, surrendering the client's papers and property, and returning unearned fees.[42] While the first and last are unlikely to be an issue in a capital representation, the duty to surrender the files springs from and is informed very much by the former lawyer's original obligation to maintain the files during the representation.

A. Maintaining Files During the Representation

The duties of trial counsel to his client when the client will become a former client start—as they do for every lawyer in every client relationship—on the very first day of the engagement. One of the fundamental duties under the general heading of competence enshrined in Model Rule 1.1 is maintaining the file in a way that will not only provide effective services during the representation, but also permits the file to be transferred to successor counsel at any time.[43] While no lawyer wants to begin a representation thinking of its timely or untimely demise, lawyers must recognize that: (1) no lawyer can carry it all in her head; (2) the client can switch lawyers at any time for any reason; (3) lawyers may terminate the representation at any time, even for no reason, so long as there is no material adverse effect on the client; (4) lawyers retire or pass away; and (5) the client may need the file long after the representation is terminated.

In capital cases, the foregoing is not simply a possibility. There is virtual certainty that if the capital representation ends in a sentence of death, new counsel will (one would hope) be obtained to press whatever avenues of relief a habeas proceeding might offer. Thus, the capital defense lawyer has an even heightened obligation beyond that in the run of the mill matter, to maintain an orderly file, permitting anyone who follows to know what steps the lawyer considered, what steps the lawyer took, what information was available, what motions were contemplated,

41. *See generally* MODEL RULES, *supra* note 31, R. 1.16 ("Declining or Terminating Representation").

42. *See id.* R. 1.16(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 that has not been earned.").

43. *Cf. id.* R. 1.1 ("Competence") ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

what motions were filed, what areas of inquiry and research were suggested, which were pursued and which were rejected, who was interviewed (and who was not), how jury selection was conducted, and every other material step counsel undertook.[44] These files should not only be complete, they should be well-organized so that with little effort all of this can be accomplished.

This is undoubtedly a massive undertaking, but its scope is no excuse for its not being undertaken. Indeed, it is all the more reason why it must be done in a complete and orderly way. A former client and his habeas counsel start off with enough of a handicap in trying to overturn a sentence of death to have the representation further hampered by a sloppy and incomplete file.

To put a fine point on this obligation, just consider two of the most common habeas challenges and how they relate to maintenance of proper files. The first is the claim for ineffective assistance of counsel. While surely no one handling a capital case at trial wants to think about the need for such a claim, it is also not difficult to imagine how the failure to maintain a complete and well-organized file can make successor counsel's task far more difficult. This file is the record of what has been considered and what has been done. If the file is deficient, successor counsel will be left with baffling question marks. The incomplete file will also arm the prosecution with an argument that in fact, though the file is silent, counsel surely was effective.

Second, the failure of the prosecution to share exculpatory information with the defense often leads to *Brady* claims by habeas counsel.[45] Oftentimes, the defense to such claims will be that the information was made available.[46] An incomplete or sloppily kept file will make it more difficult for habeas counsel to refute this assertion.

B. Former Counsel's Duty When Files Are Incomplete

Let us assume that beleaguered counsel, underpaid and understaffed, did not maintain the files in a pristine condition. Successor

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44. *See* GUIDELINES, *supra* note 7, at Guideline 10.13, commentary ("All members of the defense team must anticipate and facilitate the duty of successor counsel . . . to investigate the defense presentation at all prior stages of the case . . . [As] there may be issues as to whether the government produced certain evidence[,] counsel's files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation . . . .").

45. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

46. *See, e.g.*, Castillo v. Johnson, 141 F.3d 218, 233 (5th Cir. 1998); Norris v. Schotten, 146 F.3d 314, 333-35 (6th Cir. 1998); Mills v. Singletary, 63 F.3d 999, 1015-16 (11th Cir. 1995).

counsel is confronted with unlabeled boxes, files haphazardly arranged, and stacks of disorganized papers randomly scattered in a conference room. Does this situation place any ethical obligation on former counsel? In my opinion, the former counsel has a clear ethical obligation to take whatever time is required to organize the files and help successor counsel understand what is available and what it reflects. Quite simply, trial counsel has violated a fundamental aspect of the duty of competence. Counsel was required to properly maintain the files under Model Rule 1.1. Counsel failed to do so, and no complaints about overwork and undercompensation can serve as an excuse for this dereliction.

What happens next? A malpractice action against predecessor counsel may be appropriate. Similarly, a meritorious disciplinary complaint could be filed. The problem is that neither of those provides any real relief to the death row defendant. What is needed, and what I believe is ethically mandated, is for predecessor counsel to spend all the time that is necessary to bring habeas counsel up to speed. The former client's injury is being suffered right now and must be corrected immediately. It is no consolation to know the former client's estate may have a cause of action three years from now.

IV. COOPERATION ON STRATEGY

Must predecessor counsel fall on his or her sword, admit ineffectiveness and suffer the ignominy and shame that follows? That is a great question. A couple of points are clear. First, counsel is required to communicate with a client or former client regarding legal malpractice. While it comes as a surprise to lawyers to learn this is so, in fact there is ample authority that concludes a lawyer, as a fiduciary, must put the client's interest ahead of his or her own and inform the client of the failing, because in large part the differential in expertise between the lawyer and the client means that the client will rarely be aware that that is what has occurred.[47] The conscientious lawyer must consider the extent to which his or her conduct fell below the standard of care and act accordingly.

Moreover, counsel, at least in a capital case, should consider how rare it is among all the homicides that take place each year in any given state that an accused actually ends up on death row. For example, in

47. *See generally* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421 (Cal. l971); McClung v. Johnson, 620 S.W.2d 644 (Tex. App. 1981); *cf. In re* Tallon, 86 A.D.2d 897 (N.Y. App. Div. 1982).

2001, with 15,980 homicides,[48] 155 condemned joined the population of death row.[49] Given that circumstance, it is fair at least to wonder why that tragic result happened in this case and whether some soul-searching is not in order to determine whether constitutionally cognizable error in counsel's performance did not play some role, particularly when a recognition of one's failings may not only make one a better lawyer next time around but provide one's former client with an opportunity to escape a date with the executioner.

The question then arises whether this obligation to protect the client does not mean something more in the context of a criminal prosecution and in particular for a defendant under a sentence of death. Should this requirement not be read to require full, not grudging, cooperation with successor counsel? This may be what the California Bar was trying to assert when it concluded:

> [T]he Rules of Professional Conduct impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client.[50]

As one observer has noted, "the strategic thinking of the lawyer, and learning this strategic thinking is absolutely critical to the thorough presentation of a postconviction claim[,] . . . should be routinely and openly presented to the postconviction counsel."[51]

This is not a plea for counsel to lie or make it up. Lawyers, of course, are forbidden from that and indeed have a duty of candor to the tribunal under Rule 3.3.[52] It is, however, a plea to set aside natural

48. FBI, CRIME IN THE UNITED STATES 2001 UNIFORM CRIME REPORTS 19 (2002) (reporting number of murders and non-negligent manslaughters, defined as "the willful (nonnegligent) [sic] killing of one human being by another," as reported to the Bureau's Uniform Crime Reporting System for the year 2001), *available at* http://www.fbi.gov/usr/cius_01/01crime.pdf.

49. TRACY L. SNELL & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS BULLETIN CAPITAL PUNISHMENT 2001 9 (2002) (reporting number of prisoners under sentence of death received by state and federal prison systems in 2001), *available at* http://www.ojp.usdog.gov/bjs/pub/pdf/cp01.pdf.

50. State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1992-127 (1992), *available at* http://www.calbar.ca.gov/calbar/html_unclassified/ca92-127.html.

51. *See* Siegel, *supra* note 25, at 114 ("While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.")

52. *See generally* MODEL RULES, *supra* note 30, R. 3.3 ("Candor Toward the Tribunal").

feelings and ego to help the former client and successor counsel in this difficult process.

Does this cooperation become an ethical mandate? It is hard to assert that a lawyer who honestly believes that he or she made the proper decision has some ethical or other obligation to confess to an error the lawyer did not commit. Indeed, Rules 3.3 and 4.1 require a contrary result.[53] Short of that, a lawyer whose former client faces the ultimate sanction should cooperate fully, within the Rules' limitations, in order to give real meaning to Rule 1.16's injunction to protect the client upon withdrawal.

V. CONCLUSION

A lawyer represents a client in jeopardy of capital punishment. It all ends badly. Now the client's last clear chance for relief lies in the granting of a writ for habeas corpus. Even if former counsel is not prepared to move heaven and earth to save the former client, the new ABA Guidelines officially recognize an idea that has already been commonly acknowledged in practice—that the former lawyer has a significant obligation to help extricate the former client from his present plight.[54] And once it is understood that this long-standing obligation has a firm foundation in the mandates of our profession's rules of professional conduct, the former counsel should recognize that what he or she has is not merely a hortatory goal, but a firm obligation. An obligation which, if left unfulfilled, might well result in a violation of the applicable rules, a disciplinary sanction, and guilt that the lawyer failed to do everything he or she could to save a former client.

53. *See generally id.*; MODEL RULES, *supra* note 30, R. 4.1 ("Truthfulness in Statements to Others").

54. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE at 485 n.20 (4th ed. 2001).