

## The Continuing Duty in Reality: A Preliminary Empirical Look

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### ABSTRACT

The continuing duty of criminal defense counsel to their former clients, even when those former clients bring post-conviction actions alleging ineffective assistance of counsel, has existed as a national practice standard in capital cases since at least 1987. In addition to its inclusion in the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases since 1989, duties to former clients exist in state ethics rules as well as the ABA Model Rules of Professional Conduct. The duty has been further operationalized in non-capital litigation through a 2010 ABA formal ethics opinion concerning disclosures by trial counsel to prosecutors in ineffective assistance of counsel (IAC) claims, case law and scholarship. There are no empirical data concerning its operation in practice, and these are difficult to obtain because much of the continuing duty operates through informal practices. This paper describes the results of a brief survey intended to develop these data.

### INTRODUCTION

The continuing duty of criminal defense counsel to their former clients, even when those former clients bring post-conviction actions alleging ineffective assistance of counsel, has existed as a national practice standard since at least 1987.<sup>1</sup> Since then, the contours of the duty have been defined with greater precision. For instance, guideline 10.13 of the American Bar Association's (ABA's) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases states:

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:

- A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- C. sharing potential further areas of legal and factual research with successor counsel; and

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<sup>1</sup> STANDARDS FOR THE PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Standard 11.9.1(d) (NAT'L LEGAL AID AND DEF. ASS'N, 1987) ("Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies."). The normative justification for the continuing duty of defense lawyers, especially those who are accused of ineffective assistance of counsel, is described in many places, including David M. Siegel, *What (Can) (Should) (Must) Defense Counsel Withhold from the Prosecution in Ineffective Assistance of Counsel Proceedings?*, 35 THE CHAMPION 18 (Dec. 2011).

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.<sup>2</sup>

Other recitations of duties owed to former clients exist in state ethics rules,<sup>3</sup> as well as the ABA Model Rules of Professional Conduct.<sup>4</sup> The duty has been further operationalized in a 2010 ABA Formal Ethics Opinion concerning disclosures by trial counsel to prosecutors in ineffective assistance claims,<sup>5</sup> case law,<sup>6</sup> and scholarship.<sup>7</sup> The duty has also been included in the most recent version of the ABA's Criminal Justice Standards for the Defense Function,<sup>8</sup> applicable to non-capital as well as capital cases, but their publication post-dates by seven months the collection of these data.

To date, however, there has been no empirical data concerning the operation of the continuing duty in practice, a result that is hardly surprising given that discussions about the continuing duty tend to occur informally between lawyers and often without documentation. This paper is the first to provide some data concerning how the continuing duty operates in practice.

## I. METHODOLOGY

The attached survey (Appendix 1) was administered as a convenience sample at a national training conference of invited capital litigators on July 17–20, 2014.<sup>9</sup> The survey was distributed at the conference registration desk and attendees were reminded throughout the conference to complete the survey. Finally, the last conference presentation addressed the continuing duty and the presenter (one author) reminded attendees to complete the survey, copies of which were left at each seat. Attendees were informed that the survey was anonymous, that no case-specific or client-

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<sup>2</sup> GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 10.13 (AM. BAR ASS'N, Rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter "ABA GUIDELINE 10.13"]. The original version of the guidelines, adopted in 1989, stated, "Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies." GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 11.9.1.D (AM. BAR ASS'N, 1989).

<sup>3</sup> *See, e.g., Ethics Materials, THE CONTINUING DUTY*, <https://thecontinuingduty.wordpress.com/ethics-opinions> (last visited March 16, 2018) (describing and providing links to statutes and ethics opinions in Alabama, Arizona, California, District of Columbia, Florida, Georgia, Louisiana, Nevada, North Carolina, Ohio, Oregon, Tennessee, Texas and Virginia).

<sup>4</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.15, 1.16 (AM. BAR ASS'N, 2016).

<sup>5</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (regarding the disclosure of information to a prosecutor when a lawyer's former client brings an ineffective assistance of counsel claim) ([https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/ethics\\_opinion\\_10\\_456.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf)).

<sup>6</sup> Case law regarding the continuing duty, often conflicting, has expanded in recent years. *See, e.g., Kluge v. United States*, No. C12-4018-LRR, 2013 WL 4779187 at \*2 (N.D. Iowa Sept. 5, 2013) (following ABA Opinion 10-456 and directing counsel to file "an affidavit that responds only to the movant's specific allegation(s) of ineffective assistance of counsel . . . [with] all of the information that counsel reasonably believes is necessary to respond to the movant's specific allegation(s). In addition, counsel shall be directed to attach to, or include with, his or her affidavit all of the documents that he or she reasonably believes are necessary to respond to the movant's allegation(s)"); *Melo v. United States*, 825 F.Supp.2d 457, 463 n.2 (S.D.N.Y. 2011) (finding ABA Opinion 10-456 does not prohibit affidavits and recognizing waiver of attorney-client privilege within the context of some IAC claims).

<sup>7</sup> *See, e.g., Tigran W. Eldred, Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473 (2013); Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775 (2008); David M. Siegel, *supra* note 2.

<sup>8</sup> CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION, §§ 4-1.3, 4-9.5, 4-9.6 (AM. BAR ASS'N 2015).

<sup>9</sup> The NAACP Legal Defense and Educational Fund, Inc. Annual Capital Training at Airlie Conference Center in Warrenton, Virginia.

specific information would be sought, and that only aggregate data would be reported. Thus, the survey includes no questions involving narrative responses and seeks no identifying information about respondents (e.g., geographic or jurisdictional information).

Conference registrations totaled about 200 participants, and attendees at the final presentation were about 150. Thirty-three completed surveys were submitted. The survey included four sections: Section I addressed the experience of state court capital trial counsel; Section II addressed the experience of federal court capital trial counsel; Section III addressed the experience of state capital post-conviction counsel; and Section IV addressed the experience of federal capital habeas counsel. Survey respondents were instructed to complete a section if it was applicable to their practice experience since 2003; otherwise they were to proceed to the following section.

The first question for each section asked how many clients in the relevant category had the respondent represented since 2003. 2003 was chosen as the start date because this was the year of the introduction of the ABA's performance guidelines, which first formalized the continuing duty.

#### *Areas of Insufficient Data*

While we report data on capital trial counsel, responses showed that each capital trial counsel had only handled one capital case that had gone to the post-conviction phase since 2003. Thus, the experience of these respondents cannot be meaningfully seen as representative, and no frequency can be estimated. While respondents indicated handling only six cases as state court capital trial counsel, one respondent indicated the prosecutor had sought to communicate with counsel about the case on matters other than scheduling. Thus, while it is impossible to tell the frequency of this phenomenon, it is at least nonzero. No respondents in this category indicated an effort by prosecutors to obtain a file outside of discovery. As no respondents completed the section for Federal Court capital trial counsel (Section II), these data are omitted.

## II. ANALYSIS

The remaining three foci of practice experience (state capital trial counsel, state capital post-conviction counsel and federal habeas capital counsel) were not unique, i.e., some respondents had experience with more than one type of practice. There were six responses to Section I (state capital trial practice), 22 to Section III (state capital post-conviction practice) and 22 to Section IV (federal capital habeas proceedings).<sup>10</sup>

The responses to both Sections III (for counsel handling state capital post-conviction cases) and IV (counsel handling federal capital habeas proceedings) showed respondents had handled a median of 6 to 10 capital cases on post-conviction or habeas since 2003. The 22 respondents who had handled at least one capital state post-conviction case since 2003 had a range of experiences with trial counsel. While 41% reported trial counsel "never" refused to provide their file to post-conviction counsel when given a signed release from the client, 36% reported that trial counsel refused "rarely," and 23% refused "about half the time."<sup>11</sup> Access by post-conviction counsel to trial counsel's file in practice is thus clearly not a given despite the existence of guideline 10.13.<sup>12</sup>

Access to trial counsel's strategic thinking also appeared inconsistent. Only 18% of respondents indicated that trial counsel "never" refused to discuss their former client's case with

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<sup>10</sup> There were twenty-three responses to Section IV. However, one response (survey #33) was all "zeros," indicating this respondent should have omitted this section.

<sup>11</sup> See *infra* Table 1.

<sup>12</sup> See ABA GUIDELINE 10.13, *supra* note 3.

post-conviction counsel after being provided a written waiver from their former client. Moreover, 45% of respondents indicated trial counsel rarely refused to discuss a former client’s case, and 18% indicated that trial counsel refused to discuss a former client’s case “about half the time.” Additionally, 14% of respondents indicated that prior counsel refused to discuss the former client’s case with post-conviction counsel “often,” and 5% of post-conviction counsel indicated that prior counsel “always” refused to discuss former client’s case. Given the small number of respondents, distinguishing frequencies is not possible. However, given that guideline 10.13 clearly indicates a duty to provide strategic thinking to post-conviction counsel, it is troubling that 82% of respondents indicated this occurred less than all the time (i.e., anything other than “never”), and 37% indicated that it happened about half the time *or more*.

Post-conviction counsel’s experience with the continuing duty in federal habeas corpus proceedings is similar.<sup>13</sup> While 48% of habeas counsel reported that prior counsel “never” refused to provide habeas counsel their file given a written release from the former client, 38% indicated that prior counsel “rarely” did so and 14% indicated that prior counsel did so “about half the time.” Readiness to discuss the case with habeas counsel appeared somewhat better than in the state post-conviction context, with 27% of respondents indicating that prior counsel “never” refused, and 50% indicating prior counsel “rarely” refused. Only 23% of respondents indicated that prior counsel refused to discuss the case with federal habeas counsel “about half the time” or more.

Finally, reports of some prior counsel refusing to discuss a case without the prosecutor present (which would be inconsistent with the ABA’s Formal Opinion 10-456<sup>14</sup>), although measurable, appear uncommon. That said, 86% of both state post-conviction counsel and federal habeas respondents reported “never” having experienced this.

**Table 1: State Post-Conviction Counsel Experience**

N=22

Reported Phenomenon Frequency	Former counsels refuse to provide file with signed release from client?	Former counsels direct you to prosecutor for file?	Former counsels refuse, after written request, to discuss case?	Former counsels refuse to discuss case without prosecutor present?
Never	(.41) 9	(.73) 16	(.18) 4	(.86) 18
Rarely	(.36) 8	(.23) 5	(.45) 10	(.05) 1
About ½ time	(.23) 5	(.05) 1	(.18) 4	(.05) 1
Often	(.00) 0	(.00) 0	(.14) 3	(.05) 1
Always	(.00) 0	(.00) 0	(.05) 1	(.00) 0

<sup>13</sup> See *infra* Table 2.

<sup>14</sup> See *supra* note 7.

**Table 2: Federal Habeas Counsel Experience**

N=22

Reported Phenomenon Frequency	Former counsels refuse to provide file with signed release from client?	Former counsels direct you to prosecutor for file?	Former counsels refuse, after written request, to discuss case?	Former counsels refuse to discuss case without prosecutor present?
Never	(.48) 10	(.82) 18	(.27) 6	(.86) 18
Rarely	(.38) 8	(.18) 4	(.50) 11	(.15) 2
About ½ time	(.14) 3	(.00) 0	(.18) 4	(.05) 1
Often	(.00) 0	(.00) 0	(.05) 1	(.00) 0
Always	(.00) 0	(.00) 0	(.05) 1	(.00) 0

### CONCLUSION

Although this survey cannot be considered a nationally representative sample, as it was a convenience sample administered to attendees at an invitation-only conference, it is the first effort to empirically measure the operation of the continuing duty. While case law addressing efforts to implement the duty clearly suggests the duty is not self-executing, no extant data suggests the magnitude of this effect. These data show that, at least as experienced by leading capital practitioners from around the country, successor counsel face difficulty obtaining trial files from prior counsel, even with a release from the client, in a small but measurable share of cases. While the phenomenon appears rare, it is not unknown—14-23% of respondents experienced it about half the time.

A more significant problem seems to be gaining prior counsel’s strategic thinking through direct communication with successor counsel. While both state and federal successor counsel most often report that prior counsel “rarely” refuses to communicate, 28–37% report it occurring at least half the time or more. This experience seems more frequent in state than in federal practice. Directing successor counsel to the prosecutor for the file or requesting the presence of the prosecutor for discussion with successor counsel were not reported as frequently. While the continuing duty is established in law and ethical guidance, it is still not universally operationalized.

## Appendix 1

### Continuing Duty Survey

We have authored several articles addressing the operation of the continuing duty of counsel from legal, ethical and cognitive psychology perspectives. We have heard anecdotal accounts from trial and post-conviction counsel of the implementation of the duty, but we are unaware of any empirical data on the topic. We would greatly appreciate your assistance by completing this survey.

**Description:** This research survey measures the experience of state and federal capital trial counsel whose former clients have brought post-conviction actions alleging ineffective assistance of counsel (IAC) [Sections I and II] and the experience of litigators handling capital post-conviction proceedings involving allegations of IAC in state or federal court [Sections III and IV]. Please complete all applicable sections. *Please circle only one response for each question.*

**Confidentiality:** This survey is anonymous. It does not seek any personal or professional information beyond the number of capital trials or capital post-conviction cases in which you have been involved. **Only aggregate data will be reported. This survey does not involve client-specific or case-specific information.**

**Time Requirement:** This survey has 19 (nineteen) questions and should take about 10 (ten) minutes to complete.

#### Terminology:

“Former counsel” is any lawyer who represented a defendant before you did, whether at trial, in a guilty plea, on appeal or in prior post-conviction litigation.

“IAC” means ineffective assistance of counsel.

**Voluntary Participation:** Your participation in this survey is wholly voluntary and will in no way affect your involvement in or attendance at this conference. You may end participation at any time.

**Contact Information:** If you have any questions concerning this survey, please contact either of its authors: **Professor David Siegel (dsiegel@nesl.edu) or Professor Tigran Eldred (teldred@nesl.edu) of New England Law | Boston.**

**PLEASE RETURN COMPLETED SURVEYS TO THE CONFERENCE REGISTRATION DESK.**

## Section I: For State Court Capital Trial Counsel

If you represented a person in *state court* who received a death sentence during your representation, who has alleged your IAC in any post-conviction proceeding since 2003, please complete this section. *Otherwise, go to Section II.*

1. Since 2003, how many clients who received a death sentence during your representation in state court have since brought post-conviction proceedings in *state court* alleging your IAC?

1      2      3-5      6-10      Over 10

2. When death-sentenced former clients have brought post-conviction proceedings in state court alleging your IAC, how often has the prosecutor sought to *communicate with you without post-conviction counsel present* about the case on matters other than scheduling?

Never      Rarely      About half the time      Often      Always

3. When death-sentenced former clients have brought post-conviction proceedings in state court alleging your IAC, how often has the prosecutor sought to *obtain your file by means other than the formal discovery process*?

Never      Rarely      About half the time      Often      Always

4. Since 2003, how many clients who received a death sentence during your representation in state court have since brought habeas corpus proceedings in *federal court* alleging your IAC?

0      1-2      3-5      6-10      Over 10

5. When death-sentenced former clients have brought habeas corpus proceedings in federal court alleging your IAC, how often has the prosecutor sought to *communicate with you without post-conviction counsel present* about the case on matters other than scheduling?

Never      Rarely      About half the time      Often      Always

6. When death-sentenced former clients have brought habeas corpus proceedings in federal court alleging your IAC, how often has the prosecutor sought to *obtain your file by means other than the formal discovery process*?

Never      Rarely      About half the time      Often      Always

## Section II: For Federal Court Capital Trial Counsel

If you represented a person in *federal court* who received a death sentence during your representation, who has alleged your IAC in any post-conviction proceeding since 2003, please complete this section. *Otherwise, go to Section III.*

7. Since 2003, how many clients who received a death sentence during your representation in federal court have since brought habeas corpus proceedings in federal court *alleging your IAC*?

1      2      3-5      6-10      Over 10

8. When death-sentenced former clients have brought habeas corpus proceedings in federal court alleging your IAC, how often has the prosecutor sought to *communicate with you without post-conviction counsel present* about the case on matters other than scheduling?

Never      Rarely      About half the time      Often      Always

9. When death-sentenced former clients have brought habeas corpus proceedings in federal court alleging your IAC, how often has the prosecutor sought to *obtain your file by means other than the formal discovery process*?

Never      Rarely      About half the time      Often      Always

## Section III: For State Capital Post-Conviction Litigators

If you represented a person in *state post-conviction proceedings* since 2003 who was under a sentence of death, please complete this section. *Otherwise, go on to Section IV.*

10. Since 2003, how many clients sentenced to death have you represented in state post-conviction proceedings?

1      2      3-5      6-10      Over 10

11. In representing death-sentenced defendants in state post-conviction proceedings since 2003, how often do former counsels *refuse to provide you the defendant's file* when given defendant's signed, written consent to release?

Never      Rarely      About half the time      Often      Always

12. In representing death-sentenced defendants in state post-conviction proceedings since 2003, how often do former counsel(s) *direct you to the prosecutor for the defendant's file*?

Never      Rarely      About half the time      Often      Always

13. In representing death-sentenced defendants in state post-conviction proceedings since 2003, how often do former counsel(s) *refuse, after written request, to discuss the defendant's case* with you?



Never Rarely About half the time Often Always

14. In representing death-sentenced defendants in state post-conviction proceedings since 2003, how often do former counsel(s) refuse to discuss the defendant's case with you *without the prosecutor present*?

Never Rarely About half the time Often Always

#### **Section IV: For Federal Capital Habeas Litigators**

If you have represented a person in federal habeas corpus litigation since 2003 who was under a sentence of death, please complete this section. *Otherwise, this completes the survey.*

15. Since 2003, how many clients sentenced to death have you represented in federal habeas corpus proceedings?

1 2 3-5 6-10 Over 10

16. In representing death-sentenced defendants in federal habeas corpus proceedings since 2003, how often do former counsel(s) *refuse to provide you the defendant's file* when given defendant's release?

Never Rarely About half the time Often Always

17. In representing death-sentenced defendants in federal habeas corpus proceedings since 2003, how often do former counsels *direct you to the prosecutor for the defendant's file*?

Never Rarely About half the time Often Always

18. In representing death-sentenced defendants in federal habeas corpus proceedings since 2003, how often do former counsel(s) *refuse, after written request, to discuss the defendant's case* with you?

Never Rarely About half the time Often Always

19. In representing death-sentenced defendants in federal habeas corpus proceedings since 2003, how often do former counsel(s) refuse to discuss the defendant's case with you *without the prosecutor present*?

Never Rarely About half the time Often Always

**THIS COMPLETES THE SURVEY. PLEASE RETURN IT TO THE CONFERENCE REGISTRATION DESK. THANK YOU.**