THE PERVERSE EFFECTS OF MANDATORY JUDICIAL REPORTING TO BAR AUTHORITIES OF INEFFECTIVE ASSISTANCE OF COUNSEL DETERMINATIONS

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ABSTRACT

California Business & Professions Code § 6086.7(a)(2) provides that a court shall notify the State Bar "[w]henever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney." Some California judges now interpret this provision as mandating referral to the State Bar in any case in which a new trial or withdrawal of a plea is granted due to ineffective assistance of counsel. This interpretation directly conflicts with an attorney's continuing duty to her former client. It is unnecessary and has profoundly deleterious consequences to the integrity of the criminal process.

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INTRODUCTION

When a criminal defense lawyer's work is examined in a post-conviction action, there is an inherent conflict between the interests of their former client and the lawyer's own interests. Providing the lawyer's strategic thinking and decision making to successor counsel[1] is essential to evaluating and (if warranted) making a claim of ineffective assistance of counsel (IAC). However, these disclosures may harm the lawyer's own reputation (or even possibly licensure). Predecessor counsel uniquely has the information necessary for the former client to vindicate their rights, and their refusal to cooperate with successor counsel largely dooms IAC claims. Thus, over thirty-five years ago, national practice standards identified

1. "Successor counsel" refers to the lawyer who evaluates and (if warranted) seeks to demonstrate that the defendant's prior counsel (often called "predecessor counsel") was ineffective under the Sixth Amendment to the United States Constitution. *See generally* David M. Siegel, *The Continuing Duty Then and Now*, 42 HOFSTRA L. REV. 447 (2013) [hereinafter Siegel, *Then and Now*].

cooperating with successor counsel as part of a lawyer's "continuing duty" to their former clients.[2]

This continuing duty reflects a normative choice: As between the former client's right to a fair trial and the lawyer's professional reputation, the right to a fair trial wins. This choice is implemented through procedures that manage the conflict, by directing when, how, to whom, and on what showing the lawyer can make disclosures concerning the representation.[3] In contrast to this nuanced approach to the conflict, California judges are mandated by law to report to Bar authorities *all* findings of IAC that result in a reversal or modification of judgment.[4] This mandate ignores the conflict addressed by the continuing duty and exacerbates the collision between the interests of the former client and those of the lawyer. This legal obligation disincentivizes cooperation with successor counsel and reduces successor counsel's ability to assess and (if merited) bring a claim for IAC—which thereby reduces the information available to a judge considering such a claim and perversely reduces the likelihood that defendants who did not receive effective assistance will obtain relief. Because of self-serving reasoning processes[5] that lawyers and judges—like everyone—inevitably employ, mandatory reporting will likely identify the most effective, rather than the least effective, lawyers. A more nuanced reporting requirement that limits mandatory reporting to specific egregious conduct, with a discretionary ability to report beyond those, would better address the conflict and the likelihood that defendants who did not receive effective assistance will be identified and obtain relief.[6]

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2. The earliest standard of practice setting forth this obligation to cooperate was in the National Legal Aid & Defender Association's STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Standard 11.9.1(d) (NAT'L LEGAL AID & DEF. ASS'N 1988) ("Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies."). The following year this obligation was incorporated into Guideline 11.9.1.D of the American Bar Association's (ABA) GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS'N 1989). *See infra* notes 34–35. For a discussion of the historical antecedents of the continuing duty, see Siegel, *Then and Now*, *supra* note 1, 449–58; *see also infra* Section II.B.

3. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456 (2010) (concluding that predecessor counsel will rarely be justified in speaking to a prosecutor to adjudicate a claim of ineffective assistance of counsel prior to initiation of formal judicial proceedings).

4. CAL. BUS. & PROF. CODE § 6086.7(a)(2) (West 2024).

5. For a discussion of these reasoning processes, see *infra* Section IV.

6. *See infra* Section V.

I. NOT A HYPOTHETICAL

The California State Bar has created an online attorney discipline referral portal exclusively for use by judicial officers and court staff that specifically includes mandatory reporting requirements under § 6086.7(a)(2).[7] The portal has a dropdown menu of "reportable actions" including "modification or reversal of a judgment based in whole or in part on attorney misconduct or incompetence," and requests identifying information about the attorney and attachment of relevant documents. While only a handful of such reports have been received in the past six years,[8] the perverse effects of California's mandatory judicial reporting are not speculative. A California criminal defense lawyer contacted one of us to explain that her successful post-conviction action, in which she identified her own IAC, had triggered an investigation by the State Bar authority.[9]

A. Who Does Mandatory Reporting Catch?

The lawyer represented a client charged with violating a restraining order in a one-day jury trial. During the prosecution's case-in-chief, no witness identified the defendant as the person who allegedly violated the restraining order. The lawyer realized this only after the jury went to deliberate, when the judge ruled it was too late to consider a motion for a judgment of acquittal. After the guilty verdict, the lawyer explained that she could prepare a motion for a new trial with an affidavit detailing that this error was not an unsuccessful strategic decision but simply an oversight during trial. The client authorized filing the motion.

After the lawyer testified at the post-conviction hearing, the trial judge shook her head. Acknowledging the lawyer as one of the ablest in her courtroom, the judge also acknowledged the client had been entitled to a judgment of acquittal, and that if she granted the motion, she would have to

7. *See Discipline Referral*, STATE BAR OF CAL., https://apps.calbar.ca.gov/complaint/DisciplineReferral/Index [https://perma.cc/X99L-CCNR].

8. *See infra* Section II.A.i.

9. This description is based on a situation that was reported to one of us by the defense lawyer at issue. We have simplified the facts to highlight the issue. In the actual matter, there were numerous alleged bases of ineffective assistance but one substantial ground. As in our example, the lawyer responded in detail to each of the alleged errors. Counsel admitted several, explained why others were not errors, and clarified the Bar authority's understanding.

report the lawyer to the bar authorities under California's mandatory reporting regime. The judge ruled that there was no record identification of the client as the perpetrator, and that the failure to move for a judgment of acquittal before the close of the evidence was ineffective. She set aside the verdict, ordered the entry of a dismissal with prejudice, and advised the lawyer that she would report this to the State Bar and of the lawyer's obligation to do the same. The judge's report included a recommendation commending the lawyer's exemplary work.

The lawyer received an inquiry from the State Bar's Office of Chief Trial Counsel requesting a response to the basis for the finding of IAC. The lawyer compiled and submitted a lengthy response. The Bar Counsel closed the matter without further investigation. Does this make any sense? A diligent lawyer made a mistake during trial that they recognized slightly too late. Taking the first opportunity to rectify the situation and avoid the client facing this harm, counsel forthrightly acknowledged the error and sought relief for the client, which the judge recognized was appropriate and dismissed the case.

B. Who Does Mandatory Reporting Miss?

No harm, no (ethical) foul, so what is the problem? The answer lies in what else *might have* happened if the lawyer (and the judge) had not both been ethically attuned. Predecessor counsel could have advised the client of their right to appeal, including bringing an IAC claim, and forwarded the file to successor counsel. Counsel's duty of loyalty to the client required cooperating with inquiries from successor counsel, but as a practical matter flagging the issue for successor counsel would ensure it is recognized. Ethical counsel might conclude that a dispositive issue, which would provide relief to the former client, should be highlighted for successor counsel.

Or predecessor counsel could have provided the file without calling attention to the error, thinking successor counsel may or may not find it, and thought, "I don't need more headaches. And I certainly don't need a bar inquiry." Or predecessor counsel could have thought, "If this is granted, there will be a bar inquiry. Maybe there was some testimony recognizing the defendant that I heard but have forgotten. I don't have time to go through the transcript; it will be someone else's problem."

Or predecessor counsel could have thought, "I'm sure I wouldn't have missed an issue as obvious as the failure to identify the defendant. If it's not in the transcript, it must have been so brief that the court reporter missed it, or it was that part of the transcript noted as 'unintelligible.' I'm comfortable testifying to that. And I surely don't need a bar inquiry."

These reactions by predecessor counsel are classic instances of the type of self-serving biased reasoning that can occur, either consciously or unconsciously, motivated here by the operation of § 6086.7(a)(2).[10] Mandatory reporting of discretionary determinations unavoidably influences those determinations and the fact finding upon which those determinations are based. This concern led to the development of the continuing duty for criminal defense counsel that acknowledges the conflict between a defense lawyer's unique possession of information necessary to ensure their former client received effective assistance of counsel and the defense lawyer's own interest in their reputation and licensure.

II. THE CONFLICT BETWEEN THE CONTINUING DUTY OF FORMER COUNSEL AND A MANDATORY JUDICIAL REPORTING REGIME FOR FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL

California has an extensive regime of mandatory reporting for lawyers concerning their own conduct and for third parties (principally judges) to report lawyers' conduct. The available data on reporting by third parties suggests its direct impact—i.e., the instances of reported misconduct—is trivial.[11] In contrast, the indirect effects of this regime, through the prospect (or threat) of reporting, may be much more significant. Given the ways that people are motivated to make self-serving judgments,[12] it is these indirect effects that may well drive behavior.

A. California's Mandatory Reporting Regime

As relevant to ineffective assistance, § 6086.7(a)(2) of the California Business and Professions Code requires that a court notify the State Bar of

10. *See infra* Section IV.
11. *See infra* notes 19–26.
12. *See infra* Section IV.

any "modification or reversal of a judgment in a judicial proceeding [ ] based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."[13] Incompetent representation is defined in California caselaw to mean constitutionally ineffective assistance.[14] This regime of mandatory reporting is an outlier, imposing (as of 2012) the "most extensive set of requirements" in the country.[15]

Lawyers in California also have an analogous self-reporting requirement, requiring them to report their own IAC that results in modification or reversal of a judgment, which can be satisfied through submission of an online form.[16] The form simply tracks the provision's language, asks for identifying information concerning the case and court, the reason for reversal, and gives an opportunity to attach any "explanatory statement."[17] The decision reversing the judgment must also be attached.[18]

i. Available Data Suggest that Mandatory Reporting Rarely Occurs

Compliance with these reporting obligations is not easy to track. One study conducted in 2007 reviewed ten years of data on IAC cases and concluded that, of more than 2500 cases where IAC was alleged, relief was granted in only 104 of them, producing a success rate of 4%.[19] Whether any

13. CAL. BUS. & PROF. CODE § 6086.7(a)(2) (West 2024).

14. *See* People v. Anderson, 185 Cal. Rptr. 3d 75, 80–82 (Cal. Ct. App. 2015). The court noted that in an ineffective assistance claim, based on lawyer's stipulated conduct in another case which would subject him to bar discipline, that lawyer's "guilt of this conduct does not necessarily establish his incompetence when he represented Anderson at the preliminary hearing," and pointing out that "Anderson does not contend that the record of Comstock's performance at the preliminary hearing demonstrates any lack of professional competence." *Id.* at 81 n.8, 82.

15. Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 467 (2012).

16. CAL. BUS. & PROF. CODE § 6068(o)(7) (West 2024) ("It is the duty of an attorney . . . [t]o report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of . . . [r]eversal of judgment in a proceeding based in whole or in part upon misconduct [or] grossly incompetent representation" by an attorney).

17. Forms are available at: *Attorney's Report of Reversal of Judgment Upon Findings of Attorney Misconduct*, STATE BAR OF CAL., https://www.calbar.ca.gov/Portals/0/documents/forms/Attorneys-report-of-reversal-of-judgment-upon-findings-of-attorney-misconduct.pdf [https://perma.cc/JSJ2-VGBF].

18. *Id.*

19. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 72 (2008), https://digitalcommons.law.scu.edu/ncippubs/1/ [https://perma.cc/R3J9-P9AU]. For further discussion of this data, see Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 266 n.4, 323–24 (2009).

of those decisions were reported to the State Bar, as required by § 6086.7(a)(2), is unknown.

More recent data fills in some of the details. According to data collected and reported by the State Bar of California's Office of Chief Trial Counsel, the State Bar received a total of seventy-six judicial referrals under § 6086.7(a)(2) between Fiscal Years (FY) 2019 and 2024, producing an average of approximately thirteen referrals per year.[20] Because this data is not disaggregated by type of matter or attorney, it is not possible to determine how many of these referrals involved adjudications in criminal cases and (if so) whether these were referrals for IAC as opposed to some other form of lawyer misconduct.[21]

Moreover, the data is helpful in another important respect: Only one lawyer received *any* form of bar discipline from FY 2019–2024 based on a referral required by § 6086.7(a)(2), demonstrating that mandatory judicial referrals rarely result in the imposition of formal bar discipline.[22] Less formal non-disciplinary action, which can include action such as a warning letter sent by the State Bar to a lawyer, occurs more frequently.[23]

The degree to which judges may face sanction for not complying with the mandatory requirement seems minimal based on available data. California's State Commission on Judicial Performance reports both public and private discipline of judges, although the latter are anonymized.[24]

20. STATE BAR OF CAL., ANNUAL DISCIPLINE REPORT: FISCAL YEAR ENDING JUNE 30, 2024, at SR-4 (2024) [hereinafter 2019–2024 BAR DISCIPLINE REPORT] (reporting data regarding discipline for mandatory referrals under § 6086.7(a)(2)).

21. None of these referrals involved findings of bad faith intentional withholding of exculpatory evidence by prosecutors. *Id.* This inference can be made because California has a separate reporting requirement for judicial findings of bad faith withholding by prosecutors of exculpatory evidence. *See* CAL. BUS. & PROF. CODE § 6086.7(a)(5) (West 2024) ("A court shall notify the State Bar of any of the following: A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense."). In the six-year period from 2019–2024, only one such report was received. 2019–2024 BAR DISCIPLINE REPORT, *supra* note 20, at SR-4.

22. 2019–2024 BAR DISCIPLINE REPORT, *supra* note 20, at SR-4 ("Cases Closed with Discipline Imposed").

23. *Id.* (noting seventeen cases of non-disciplinary action resulting from § 6086.7(a)(2) referrals between FY 2019–2024).

24. Relevant data are available on the State of California Commission on Judicial Performance website: STATE OF CAL. COMM'N ON JUD. PERFORMANCE, https://cjp.ca.gov/ [https://perma.cc/JKG2-R78C].

Searching this database for decisions involving the judicial obligation to take appropriate corrective action in response to an attorney's ethical misconduct, which can include a referral to bar authorities,[25] or keywords "refer," "State Bar," or "corrective," yields a single case in which a judge was disciplined (in part) for failure to take appropriate corrective action to an attorney's misconduct.[26]

ii. An Alternative Explanation for the Dearth of Mandatory Reports

While one conclusion from these data might be that lawyers virtually *never* commit the sort of misconduct that requires reporting, it is also possible that the data do not accurately describe the reality of defense lawyer conduct. Other studies of specific types of misconduct, most significantly prosecutorial misconduct, which used data from court decisions, find dramatically higher levels of misconduct than are reported.[27] Perhaps more telling, the paltry number of reports concerning events significant enough to merit mandatory reporting in the nation's largest court system[28]—which in FY 2022–2023 processed 4.5 million cases at the trial level[29]—suggests that the data does not reflect the ground truth.

The question is: What is *really* happening? Are so few mandatory referrals proof that defense lawyers rarely engage in conduct that would

25. *See* CAL. CODE JUD. ETHICS Canon 3D(2) (2018) ("Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.").

26. *See generally* Matter Concerning Judge Derek W. Hunt, State of Cal. Comm'n on Jud. Performance (Aug. 31, 2023), https://cjp.ca.gov/wp-content/uploads/sites/40/2023/08/Hunt_DO_Pub_Adm_8-31-2023.pdf [https://perma.cc/BMX6-VJVK] (ethics commission evaluation of judge's failure to address a plaintiff's ethical violation, in improperly seeking default judgment, when the defendant had never been properly served).

27. *See* KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 16 (2010), http://digitalcommons.law.scu.edu/ncippubs/2 [https://perma.cc/TX34-DMCY] (reporting 707 California cases in which prosecutorial misconduct was found by state or federal courts in the period 1997–2009); *see also* CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 19, at 71 (noting that in all fifty-four identified cases, a mandatory report should have been made to the State Bar, yet none were made).

28. *About California Courts*, CAL. CTS., https://www.courts.ca.gov/2113.htm [https://perma.cc/6QMT-HQ77].

29. JUD. COUNCIL OF CAL., 2024 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2013–14 THROUGH 2022–23, at 1 (2024), https://www.courts.ca.gov/documents/2024-Court-Statistics-Report.pdf [https://perma.cc/77QT-XA93].

require mandatory judicial reporting of IAC? Or is a better explanation from the data that defense counsel are deterred from complying with their ethical obligations owed to their former clients by the prospect of a disciplinary referral to the State Bar under § 6086.7(a)(2), making it less likely that judges will find them ineffective in the first place? The answer to this open question, which we address in the sections that follow, is our primary concern about California's mandatory reporting regime.

B. History and Development of the Continuing Duty of Counsel

After representing a client in a criminal matter, a lawyer has certain continuing ethical obligations to the former client.[30] Foremost among these is loyalty to the former client. Beyond simply holding confidential information and privileged communications, loyalty has long meant not using this information against the former client.[31] Modern standards of criminal practice explicitly extend this obligation of loyalty to the former client.[32] Beyond holding the information, modern ethics rules prohibit representing another client in the same or a substantially related matter where that client's interests are materially adverse to the former client's.[33]

30. CRIM. JUST. STANDARDS FOR THE DEFENSE FUNCTION Standard 4-1.3 (AM. BAR ASS'N, 4th ed. 2017) [hereinafter ABA CRIM. JUST. STANDARDS] ("Some duties of defense counsel run throughout the period of representation, and even beyond."). Apart from these general duties, defense counsel has a specific obligation to provide the former client or successor counsel a copy of the lawyer's file. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(d) (AM. BAR ASS'N 2024) ("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."). *See generally* David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, THE CHAMPION, Feb. 2009, at 18–20.

31. *See generally* Siegel, *Then and Now*, *supra* note 1, at 450 n.16 (citing Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 677 n.4 (1997) (referencing a 1282 English pleading raising the issue)).

32. ABA CRIM. JUST. STANDARDS, *supra* note 30, at Standard 4-1.3(a) ("These duties include . . . a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends.").

33. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2024); ABA CRIM. JUST. STANDARDS, *supra* note 30, at Standard 4-1.7(f) (noting that to avoid a conflict of interest, "[d]efense counsel who has formerly represented a client should not thereafter use information related to the former representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply, and should not take legal positions that are substantially adverse to a former client.").

But what is the lawyer's duty of loyalty when the lawyer, perhaps uniquely, holds information about the representation that is essential to vindicating the former client's rights? Loyalty in this situation requires providing this information to successor counsel and cooperating with successor counsel, even when it may suggest the lawyer's work may have been constitutionally ineffective.

Over the past twenty-five years, courts, bar authorities, and practice organizations have increasingly recognized a continuing duty on the part of criminal defense lawyers to their former clients in the particular context of post-conviction claims of IAC.[34] In the post-conviction context, predecessor counsel is a prospective witness in the proceeding rather than a lawyer. While the duty of loyalty is typically framed as an obligation not to represent other clients with conflicting interests or using information relating to the former representation, now counsel is in a different role. As a critical source of information concerning the prior representation, loyalty in this context requires providing information counsel may have concerning the representation to successor counsel and, if called, testifying.[35] While loyalty as a duty is typically discharged by not acting, in this context loyalty demands cooperating with successor counsel and making disclosures concerning the former representation.

This particular application of the duty of loyalty was first recognized as a practice standard for capital practitioners. The National Legal Aid and Defender Association's 1988 Standards for the Performance of Counsel in Death Penalty Cases specifically set forth an obligation to cooperate with successor counsel.[36] "Cooperation" with successor counsel in the post-conviction context was further elucidated, first in 1989 and then more fully in 2003, in the American Bar Association's (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[37]

34. *See generally* Siegel, *Then and Now*, *supra* note 1; 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) [hereinafter Eldred, *Motivation Matters*].

35. *See generally* Siegel, *Then and Now*, *supra* note 1; Eldred, *Motivation Matters*, *supra* note 34.

36. STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Standard 11.9.1(d) (NAT'L LEGAL AID & DEF. ASS'N 1988) ("Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.").

37. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.13 (AM. BAR ASS'N 2003), *in* 31 HOFSTRA L. REV. 913, 1074 (2003) [hereinafter

Because counsel has unique knowledge about both what was and was not done in a case, and why, and because these questions are uniquely significant in the post-conviction setting, "cooperation" means more than just providing the file to successor counsel—it also means providing the information concerning the case that is not in the file, as well as "potential further areas of legal and factual research."[38] Beyond simply providing information or strategic thinking, counsel has an obligation to "cooperat[e] with such professionally appropriate legal strategies as may be chosen by successor counsel."[39] This has been the ethical obligation of California lawyers since 1992.[40]

C. The Connection Between the Continuing Duty and Reifying the Guarantee of Effective Assistance of Counsel

The concern that predecessor counsel would respond to mandatory reporting by withholding information about their work is not new. It was raised before the California Commission on the Fair Administration of Justice in its 2007 hearings by John Wesley Hall, then First Vice President of the National Association of Criminal Defense Lawyers.[41] Hall, author of a national treatise on criminal defense ethics,[42] set forth the Association's position in response to this question:

> Should the rule that criminal defense lawyers be reported for ineffective assistance claims 'based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney be modified to require a

ABA GUIDELINES]. The original version of the guidelines, adopted in 1989, stated, "[t]rial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies." GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.9.1(D) (AM. BAR ASS'N 1989).

38. ABA GUIDELINES, *supra* note 37, § 10.13D (*in* 31 HOFSTRA L. REV. at 1075 n.327) (obligation to volunteer absences in the record and counsel's strategic thinking).

39. *Id*.

40. State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Formal Op. 1992-127 (1992).

41. The "Fair Commission was established by the California State Senate to 'study and review the administration of criminal justice in California, to determine the extent to which that process has failed in the past' and to examine safeguards and improvements." Benner, *supra* note 19, at 266 n.4 (quoting CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 19).

42. JOHN WESLEY HALL, PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (Thomson-West, 3d ed. 2005).

> court to notify the State Bar whenever a finding is made that an attorney in a criminal proceeding engaged in misconduct, incompetent representation or willful misrepresentation, regardless of whether the misconduct, incompetence or misrepresentation results in the modification or reversal of a judgment?'[43]

Hall explained:

> Criminal defense lawyers have a duty to cooperate with post-conviction counsel and a duty of candor to the court. Yet, under the question as posed, these duties would, we submit, be subconsciously or consciously subverted because every criminal defense lawyer whose conduct has been challenged will be far less likely to cooperate or be candid because any admission would be used against the lawyer to cause a disciplinary referral or be used in a disciplinary proceeding. The post-conviction process should be designed to promote the search for truth and produce correct results, even if it is at the expense of not disciplining every lawyer who was found to have failed in some duty to the client.[44]

This concern was also raised by California courts as early as 2010.[45] And in 1999, it was raised as a basic conflict in the post-conviction context by one of us.[46]

The continuing duty of criminal defense counsel is now recognized in several parts of the of the ABA's Criminal Justice Standards for the Defense Function.[47] The basic conflict in the post-conviction context between the obligation of confidentiality and self-interest of counsel is addressed first in

43. John Wesley Hall, Testimony of the National Association of Criminal Defense Lawyers before the California Commission on the Fair Administration of Justice 15 (Los Angeles, California, July 11, 2007) (internal citation omitted) (copy on file with authors).

44. *Id.* at 15–16.

45. Greenbaum, *supra* note 15, at 480 (citing People v. Lane, No. C059605, 2010 WL 2892715, at *18 (Cal. Ct. App. July 26, 2010)).

46. *See generally* 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 (1999) [hereinafter Siegel, *My Reputation or Your Liberty*].

47. ABA CRIM. JUST. STANDARDS, *supra* note 30.

Standard 4-1.3(a), which clarifies that the "duty of confidentiality regarding information relevant to the client's representation . . . continues after the representation ends."[48] These Standards implicitly acknowledge the potential reticence to pursue a claim of ineffective assistance that may accompany allegations concerning another lawyer.[49] They impose an obligation to advise a current client when counsel did not provide effective assistance in an earlier phase of the case to seek withdrawal unless the client clearly wishes otherwise, and if the client does not wish counsel to continue the representation to seek withdrawal, providing an explanation to the court consistent with the continuing duty of confidentiality.[50] As previously noted, the continuing duty explicitly requires cooperating with subsequent counsel by providing "such assistance as is possible" in the evaluation and briefing of potential post-conviction issues.[51]

The recognition of the potential conflict between the former client and the lawyer is addressed directly in the ABA Standards. When former counsel's representation is examined, the duty of confidentiality continues, allowing the lawyer to respond and disclose the truth about matters raised by the former client. But again, this must be done consistent with applicable confidentiality rules, and there are both substantive and procedural limits to these disclosures.[52] Most clearly, "[i]n a proceeding challenging counsel's performance, counsel should not rely on the prosecutor to act as counsel's lawyer in the proceeding, and should continue to consider the former client's best interests."[53]

D. A Reporting Regime that is Both Over- and Underinclusive

Mandatory reporting based on a determination of ineffectiveness that results in reversal or modification of a judgment is overinclusive given the wide range of circumstances in which counsel may be legally ineffective.

48. *Id.* at Standard 4-1.3(a).

49. *Id.* at Standard 4-9.6(a) ("If appellate or post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.").

50. *Id.* at Standard 4-9.6(b).

51. *Id.* at Standard 4-9.4(c).

52. *Id.* at Standard 4-9.6(c) (explaining that defense counsel whose representation is the subject of a claim for ineffective assistance "ordinarily may not reveal confidences unless necessary for the purposes of the proceeding and under judicial supervision.").

53. *Id.* at Standard 4-9.6(d).

Counsel can be ineffective in a potentially infinite number of ways, despite their best professional efforts. While counsel can be ineffective by not investigating or litigating a case, counsel may also be ineffective because their work has been stymied by prosecutorial misconduct or judicial resistance. For instance, a lawyer who is forced by a judge to go to trial in a criminal case in which they have had inadequate time or resources to prepare a defense may be found to have provided ineffective assistance. Indeed, they may resist going to trial on the ground that doing so would constitute ineffective assistance. [54] Reporting this situation as a reversal of a judgment based on "incompetent representation" seriously misconstrues what happened, but the form of relief in this case would be based upon ineffective assistance. Similarly, the lawyer who negotiated a very favorable resolution of a case for a client based on showing the prosecutor a pretrial motion the lawyer intended to file might have provided highly effective assistance, yet the court file might show no litigation prior to the plea. Of course, such a strategy would require thorough investigation and discovery but looking only at these—or at the absence of defense pleadings—would seriously misunderstand what had occurred.

There is an additional problem with the connection between deficient lawyering and ineffective assistance due to the Supreme Court's ineffective assistance jurisprudence. A lawyer may have provided deficient representation in the sense that their work fell below an objective standard of reasonableness, yet this may not legally amount to ineffective assistance because there was no prejudice to the defendant.[55] The many such cases[56]

54. In one well-known case, Ohio defense lawyer Brian Jones was held in contempt for refusing to proceed to trial on a case that he had just been assigned and where he had not been afforded a meaningful opportunity to prepare a defense. In reversing the contempt citation, the appellate court noted, "[i]t would have been unethical for [Jones] to proceed with trial as any attempt at rendering effective assistance would have been futile. [Jones] properly refused to put his client's constitutional rights at risk by proceeding to trial unprepared." State v. Jones, No. 2008-P-0018, 2008 WL 5428009, at *4 (Ohio Ct. App. Dec. 31, 2008); *see also* Tigran W. Eldred, *Moral Courage in Indigent Defense*, 51 NEW ENG. L. REV. 97, 98–99 (2017) (describing *Jones* in more detail). Jones's courage is most notable as an exception to the standard response by many lawyers when facing judicial pressure to process cases quickly, which can lead to the systematic denial of the right of effective assistance of counsel that so many have noted. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1586–88 (2018) (describing appointed counsel and public defenders in jurisdictions around the country handling over 1000 cases per year, and defenders who refused to accept appointments exceeding national standards being held in contempt).

55. Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (setting forth the constitutional standard for ineffective assistance of counsel, including that the defendant must prove prejudice).

56. *See, e.g.*, Benner, *supra* note 19, 324–31 (describing cases where deficient performance was

would not trigger the reporting requirement.[57]

III. REPORTING REGIMES

A. Voluntary, Record-Retention, and Mandatory

Reporting systems exist in a wide range of industries and sectors of the United States and consist of an equally wide range of formulations. One approach is voluntary reporting. For instance, the field of aviation has set up the Aviation Safety Reporting System (ASRS), which has created a database to which pilots, controllers, and others with relevant information are encouraged (but not required) to report dangerous hazards and other incidents, such as when two planes come dangerously close to each other (known as a "near miss").[58] The purpose of this voluntary system is to promote flight safety and to collect and disseminate information to identify and help address systemic deficiencies within the aviation industry.[59] An important feature of the ASRS is that information in its database is stored anonymously, meaning that reported information cannot be publicly attributed to conduct committed by an identifiable individual.[60]

Another form of reporting requires entities to maintain internal records, which are not reported externally but can be made available upon request, such as during a regulatory audit. An example of this form of reporting is the system established by the Occupational Safety and Health Administration (OSHA), which requires certain employers to maintain records of serious work-related injuries or illness and to make them available for onsite inspections, but does not require them to be submitted

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not deemed to be prejudicial).

57. Jud. Ethics Comm. of Cal. Judges Ass'n, Formal Op. 74 (2018) (hypothetical in which a judge notices that "a deputy public defender is consistently late for court, is unprepared when cases are called, and seems to have poor relationships with his clients," and the judge concludes that this amounts to ineffective assistance, so the "appropriate corrective action" which the judge "must" take is either speaking directly with the attorney or with the attorney's supervisor).

58. *See Aviation Safety Reporting System*, NASA, https://asrs.arc.nasa.gov [https://perma.cc/TV8Z-RJ48]. For a full description of the Aviation Safety Reporting System (ASRS), see COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 95–97 (Linda T. Kohn et al. eds., 2000) [hereinafter TO ERR IS HUMAN].

59. TO ERR IS HUMAN, *supra* note 58, at 95–97.

60. *Id.* When created, ASRS was initially administered by the Federal Aviation Administration (FAA), but since then has been moved to the National Aeronautics and Space Administration (NASA) because of the reluctance of pilots to report incidents to a regulatory authority. *Id.*

to OSHA unless requested.[61]

Then there is mandatory reporting, the type of system most relevant to the current discussion. This approach has been used extensively within the medical field, which is covered by mandatory reporting obligations under both state and federal law. For instance, nearly every state has a medical procedure act that requires hospitals and other health care organizations to report a wide range of information to its state medical board, the entity responsible for physician licensure and discipline.[62] While there are variations in the exact contours of what must be reported, typically the obligation includes "any possible violation of the [state medical practice] act or of the [state medical board's] rules and regulations by a licensee," including "any information that indicates a licensee is or may be dyscompetent, guilty of unprofessional conduct, or mentally or physically unable to engage safely in the practice of medicine; and any restriction, limitation, loss or denial of a licensees [sic] staff privileges or membership that involves patient care."[63]

Federal law also imposes a more limited form of reporting obligations in the medical field. Pursuant to the Health Care Quality Improvement Act (HCQIA), hospitals and other health care entities must report any "'professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days,' as well as instances where a physician has surrendered clinical privileges in connection with a pending or proposed investigation of 'possible incompetence or improper professional conduct.'"[64] These reports are maintained in a national data

61. *OSHA Injury and Illness Recordkeeping and Reporting Requirements*, OCCUPATION SAFETY & HEALTH ADMIN., https://www.osha.gov/recordkeeping [https://perma.cc/7NXY-6H7N] (requiring mandatory reporting for certain severe work-related injuries, such as injuries that cause death, amputation, loss of an eye, and in-patient hospitalization); *see also* TO ERR IS HUMAN, *supra* note 58, at 97. A recent OSHA rule imposes additional reporting requirements for employers in certain industries. *See* Press Release, Occupation Safety & Health Administration, Department of Labor Announces Rule Expanding Submission Requirements for Injury, Illness Data Provided by Employers in High-Hazard Industries (July 17, 2023), https://www.osha.gov/news/newsreleases/national/07172023 [https://perma.cc/M2TD-69VC].

62. Nadia N. Sawicki, *State Peer Review Laws as a Tool to Incentivize Reporting to Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 97, 98 (2021).

63. *Id.* at 99 (quoting FED'N OF STATE MED. BDS., ESSENTIALS OF A STATE MEDICAL AND OSTEOPATHIC PRACTICE ACT 26–27 (2015)).

64. *Id.* at 99–100 (quoting the relevant statutory language); *see also* Elizabeth Pendo et al., *Protecting Patients from Physicians Who Inflict Harm: New Legal Resources for State Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 7, 28 (2021).

bank, a repository of information that is available for review by state medical boards, hospitals, and others who are seeking to assess the professional competence of physicians.[65] Information contained in the database is not anonymous.[66]

B. Low Compliance with Mandatory Reporting

Notwithstanding these mandatory reporting obligations, non-compliance with state and federal law mandating such reporting is pervasive. As for obligations imposed by state law, underreporting has been "repeatedly identified . . . as a serious obstacle to effective [state medical board] oversight of physicians that severely limits the ability of [state medical boards] to protect patients."[67] According to one report, hospitals and health organizations "regularly ignore reporting requirements, find ways to circumvent them, or provide reports that are too brief and general to equip the board with relevant information."[68] Compliance with federal law seems to fare no better, with hospitals regularly failing to report adverse review actions taken against physicians despite their legal obligation to do so.[69]

Many explanations have been offered for the high rates of non-compliance. These include what has been described as "cultural reasons," a reference to the aversion doctors have to reporting on each other.[70] There are also disincentives, especially for hospitals that can face the threat of legal challenges by doctors who seek to deter being reported for professional misconduct.[71] Other significant reasons for non-compliance include the opacity of state laws that provide lack of guidance or clarity of what conduct must be reported, by whom, and based on which evidentiary standards.[72] Lax enforcement and the absence of meaningful sanctions for violations of reporting duties can further disincentivize compliance with

65. *See* Sawicki, *supra* note 62, at 100.
66. *Id.*
67. Pendo et al., *supra* note 64, at 28.
68. FED'N OF STATE MED. BDS., POSITION STATEMENT ON DUTY TO REPORT 2 (2016), https://www.fsmb.org/siteassets/advocacy/policies/position-statement-on-duty-to-report.pdf [https://perma.cc/PY8Y-FM89]; *see also* Pendo et al., *supra* note 64, at 28.
69. *See* Sawicki, *supra* note 62, at 101–02.
70. *Id.* at 102, n.23.
71. *Id.*
72. *Id.* at 103–04.

mandatory laws.[73] The bottom line: The human tendency to avoid mandatory reporting is on full display in the medical field, making the current system of oversight a weak antidote to physician error and misconduct. Similar considerations are relevant when considering the effectiveness, or lack thereof, of mandatory reporting of findings of lawyer ineffectiveness.

IV. PSYCHOLOGICAL CONSIDERATIONS OF REPORTING REGIMES

Mandatory reporting regimes such as § 6086.7(a)(2) assume that requiring judges to report findings of IAC to bar authorities will help protect the public from lawyer malfeasance. In theory this makes sense: Referral of a lawyer who may have violated the rules of professional conduct to the state bar provides authorities with an opportunity to investigate and, where appropriate, to sanction a lawyer for ethical violations that have occurred. To be sure, there are situations where a lawyer's ineffective representation also constitutes a sufficiently egregious violation of legal ethics to warrant professional discipline.[74]

But there also can be significant drawbacks to mandatory reporting that derive from the disincentive structure that § 6086.7(a)(2) creates, which can be distilled into two categories: conscious and unconscious. Starting with conscious disincentives, lawyers who face claims of IAC must decide whether to cooperate with successor counsel, as they are ethically required to do.[75] Even without mandatory reporting regimes, some lawyers may decide that the personal costs of being found ineffective, which can be significant,[76] are simply too high to risk such cooperation, and thus may

73. *Id*.

74. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 19, at 75.

75. *See supra* Section II. As we have argued elsewhere, lawyers should prioritize the continuing duty they owe to former clients over any potential personal costs that can accrue from being found ineffective. *See* Siegel, *My Reputation or Your Liberty*, *supra* note 46, at 88–89; Eldred, *Motivation Matters*, *supra* note 34, at 486–87.

76. Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Claims of Ineffective Assistance*, CRIM. JUST., Winter 2011, at 44 ("A defense lawyer has reputational interests at stake, and also may face negative professional and financial consequences if there is a finding of ineffective assistance of counsel."); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456 (2010) (noting that a finding of ineffectiveness "may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer.").

look for ways to minimize the possibility of being found ineffective, even if it means harming a former client's chances at successfully challenging their conviction. Indeed, the common response of many lawyers accused of ineffectiveness is to develop an adversarial relationship with the former client, even to the point of assisting the prosecution in its efforts to defeat the former client's ineffectiveness claim.[77]

Section 6086.7(a)(2) compounds the situation. After all, a lawyer who knows that a court has a mandatory duty to report the lawyer's ineffective representation to the bar, thereby increasing the chances that a disciplinary sanction will result, may be less inclined to assist their former clients than they otherwise would be. Even if the chance of bar discipline is low,[78] the conscious cost-benefit analysis would be straightforward: Despite the continuing duty, it may be more prudent as a matter of self-interest for the lawyer to stay silent to reduce the risk of professional discipline, or even to avoid the reputational concerns and inconvenience of having to defend against such a claim. Situations may occur where lawyers who otherwise would be inclined to comply with their continuing duty to a former client—for instance, by volunteering information to successor counsel about mistakes that were made during representation, or by accurately testifying in a post-conviction proceeding about those mistakes—may be deterred from doing so to protect themselves from being referred to the state bar, with all the negative consequences that such a referral can entail.[79]

Unconscious disincentives add to this concern. As one of us has argued elsewhere, lawyers who are accused of ineffectiveness may in good faith believe that they will meet their continuing duties to former clients, unaware of the many psychological reasons they may fall short of those obligations.[80]

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77. Eldred, *Motivation Matters*, *supra* note 34, at 486–87. Such concerns have prompted a significant amount of discussion, as well as ABA and state ethics opinions on point. *See generally* Siegel, *Then and Now*, *supra* note 1; Siegel, *My Reputation or Your Liberty*, *supra* note 46; *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456 (2010). For additional resources on this topic, see THE CONTINUING DUTY, https://thecontinuingduty.wordpress.com [https://perma.cc/QD5M-GSFW].

78. *See supra* notes 22–23 and accompanying text.

79. Fear on the part of a lawyer of the consequences of a bar referral is well-recognized in the profession. *See* Decision and Order Removing Judge Tony R. Mallery from Office, State of Cal. before the Comm'n Jud. Performance (May 2, 2024) (judge's threatened sanction of at least $1000 for lawyer's appearance by phone "was serious enough to strike fear in [the lawyer], as sanctions in that amount would need to be reported to the State Bar.").

80. *See generally* Eldred, *Motivation Matters*, *supra* note 34; *see also* Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 351 (2012) (describing the various adverse effects motivated reasoning can

Lawyers, like everyone, are subject to the process of motivated reasoning, a psychological phenomenon that describes a constellation of cognitive biases that operate below the level of consciousness that increase the chance that a person will make decisions that align with their own self-interest.[81] The result is that lawyers may consciously believe that they are complying with the continuing duty owed to former clients, unaware of the extent to which self-interest is coloring their judgment to the contrary.

One can imagine many ways that the process of motivated reasoning might come into play when considering mandatory judicial reporting of lawyer ineffectiveness. For instance, a lawyer who is concerned about the possibility of bar discipline, or even the reputational damage that might arise from merely being accused of ineffectiveness, may decide not to disclose facts to successor counsel that may be important in establishing the ineffectiveness claim; not because the lawyer is venal but rather because the lawyer has convinced themself that the former client's ineffectiveness claim lacks merit. Or the lawyer may become adversarial with the former client because she has convinced herself through motivated reasoning that the claim of ineffectiveness is unwarranted, maybe even by going so far as to assist the prosecution in its defense of the conviction. Unlike the cost-benefit analysis that can occur during conscious deliberation, here the process would be more subtle, occurring with little awareness of how self-interest is affecting the decision-making process.

The bottom line is that it is hard enough to encourage lawyers to place their duties to former clients over their own self-interest, even without the additional disincentives created by a mandatory reporting regime. Laws like § 6086.7(a)(2), while well intentioned, may actually make matters worse, creating perverse incentives that discourage rather than encourage lawyers from acting as they should when confronted with the prospect of being found ineffective.

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produce in indigent defense).

81. Eldred, *Motivation Matters*, *supra* note 34, at 492–98.

V. A BETTER APPROACH: MANDATORY REPORTING OF DEFINED EGREGIOUS BEHAVIOR WITH DISCRETIONARY REPORTING

The *possibility* of judicial reporting, however, is an important safeguard for identifying, rectifying, and preventing IAC by lawyers who repeatedly provide it.[82] We thus advocate a more narrowly focused reporting obligation by judges in certain circumstances that follows the 2008 recommendations of the California Commission on the Fair Administration of Justice.[83] For instance, it may be appropriate in egregious cases of lawyer misconduct to impose some form of mandatory reporting, given the stakes involved, when there is reason to believe that the lawyer will again jeopardize the right to effective representation of future clients. Connecting the reporting obligation to the deficient quality of representation rather than the reversal of a judgment would better identify those instances of inadequate lawyering that nevertheless do not result in a finding of ineffective assistance because they did not prejudice the defendant.[84]

Such a modification to the California statutory regime would not hamper the ability of judges to take other corrective action when appropriate. Under the California Code of Judicial Ethics, judges are required to take "appropriate corrective action" whenever the judge has

82. We recognize that discretionary reporting, like any exercise of discretion, is capable of abuse. A judge may inappropriately threaten a lawyer with a referral to bar authorities, and the California Commission on Judicial Ethics notes instances of both public and private discipline for such threats. *See, e.g.*, Matter Concerning Judge Gregory J. Kreis, State of Cal. before the Comm'n Jud. Performance (May 1, 2024) (after lawyer informed the judge she would be seeking his recusal, the judge's warning that the lawyer should look at Professional Rule of Conduct 5.1 before seeking recusal would reasonably be interpreted as a threat to report the lawyer to the State Bar in retaliation, which was prejudicial misconduct); COMM'N. ON JUD. PERFORMANCE, PRIVATE DISCIPLINE SUMMARIES 56 (citing COMM'N ON JUD. PERFORMANCE, ANNUAL REPORT 25 (2012) (Advisory Letter 7)) ("In the presence of an attorney's client, a judge criticized the attorney and threatened to refer the attorney to the State Bar, in a manner that appeared to interfere with the attorney-client relationship") and at 95 (citing COMM'N ON JUD. PERFORMANCE, ANNUAL REPORT 27(2012) (Advisory Letter 25)) ("A judge made harsh comments to an attorney, in the presence of the attorney's client, including inviting the attorney to admit that the attorney was inept and making references to sanctions and a possible referral to the State Bar. The nature of the judge's comments created the appearance of embroilment.").

83. CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 19, at 75–77.

84. The Commission's Report recommended that seven categories of "egregious misconduct" be identified as circumstances in which the "appropriate corrective action" is a report to the Bar Counsel. *Id.* at 75–77. These include conduct such as such as appearing in a judicial proceeding under the influence of illicit drugs or alcohol or engaging in willful unlawful discrimination in a proceeding. *Id.* We leave to others to determine whether these are the appropriate categories. *Id.*

"personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct."[85] In cases where a judge concludes that the defense counsel engaged in egregious misconduct, the corrective action would be the mandated report to the State Bar pursuant to our recommended revision to § 6086.7(a)(2). But for less serious forms of misconduct that result in IAC, a judge could always take other corrective action that fit the circumstances.[86] And while such action short of referral to the State Bar can also risk deterring defense counsel cooperation, adopting such an approach will inject flexibility into the fact-finding process, allowing a case-by-case determination based on the circumstances presented, a more effective approach than the current overly expansive mandatory regime.

CONCLUSION

Every system involving repeated application of skill and judgment needs mechanisms for ensuring that deficiencies are rectified. Deficiencies in skill or judgment must be recognized, their consequences corrected, and their shortcoming remedied. But when the recognition of the deficiencies depends on participation by the potentially deficient party, the mechanisms for identifying the deficiencies must account for the conscious and unconscious motives of the party. Mandatory judicial reporting of all reversals of judgments based on ineffective assistance of counsel has the unavoidable effect of reducing the likelihood of identifying ineffective lawyering in the first place.[87] A more carefully drawn (or interpreted)

85. *See* CAL. CODE JUD. ETHICS Canon 3D(2).

86. The California Supreme Court Committee on Judicial Ethics recently issued an ethics opinion identifying examples of such lesser corrective action, such as "(1) public or private admonition of the attorney; (2) reporting to the attorney's superior or employer if done after the conclusion of the case; (3) instruction to the attorney and/or the jury; (4) addressing the misconduct in a judicial decision; (5) declaring a mistrial; (6) referral to a substance abuse or mental health program, if appropriate under the circumstances." Cal. Sup. Ct. Comm. on Jud. Ethics, Formal Op. 2024-025 (2024).

87. One scholar has suggested a similar approach of disciplinary immunity for lawyers who recognize their former clients may have been wrongfully convicted, sentenced, or were actually factually innocent. *See* Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 681, 725–26 (2016) (recommending disciplinary immunity for self-report of ineffective assistance when lawyer discovers evidence of innocence). The author explains: "There is no cure for the reputational injury that defense counsel will suffer if a court makes a finding of ineffectiveness. Still, eliminating the threat of suspension or disbarment will ensure that defense counsel can continue to practice law." *Id.*

reporting requirement, as has been suggested before, could avoid this risk, enabling a more accurate assessment of IAC and perhaps improved quality of counsel overall.