



Dealing With Trial Counsel in the Investigation of IAC Claims

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What every trial attorney facing an IAC claim wants to know:

- Why is this happening (to me)?
- What is going to happen?



Why is this happening (to me)?

- Post-Conviction Counsel = Monday morning quarterback!
- Post-conviction counsel has ethical obligation to review entire trial/plea process for errors, including errors of trial counsel
- The ultimate goal of post-conviction counsel is the same as that of trial counsel – to achieve a just result for the client. Thus, they should work together.



Why IAC rather than SRMJ?

- The most common reason – to preserve federal habeas relief
 - If there is no objection to an error it is generally deemed waived as a matter of state law
 - A waived error – even a constitutional error - will be treated as “procedurally defaulted” in federal habeas litigation
 - An IAC claim is a 6th amendment claim that provides “cause and prejudice” excusing procedural default



Why IAC prior to direct appeal?

- The most common reason: to expand the record for the appeal.
- If there are good facts that were not brought out at trial, and that can be developed in a new trial motion, it is usually to the defendant's advantage to file the new trial motion prior to the direct appeal and then consolidate the appeal of the denial of the new trial motion with the direct appeal of trial.



What is going to happen?

- 1. Assemble and produce the entire file
- 2. Speak to P/C Counsel
- 3. Draft and Sign Affidavit
- 4. Testify at Evidentiary Hearing



1. Assemble and Produce Entire File

- There is no “work product” exception applicable to a defendant’s request for trial counsel’s file
- Produce everything to post conviction counsel, including notes, running sheets and yes... all e-mails!
- Good news: you can bill CPCS for the time spent complying with this request!



2. Speak to Post Conviction Counsel

- If I plan to raise an IAC claim, I ALWAYS contact and try to speak to trial counsel first
- Trial counsel has a ethical obligation to cooperate with post-conviction counsel
- If p/c counsel calls you and leaves a message, call her back ASAP!
- Do NOT speak to the ADA without a waiver of the a/c privilege from the client



Ethical Obligations Persist Even in the Face of IAC Claim

- The attorney-client privilege continues to apply even if the defendant raises an IAC claim
- Only the client can waive the privilege
- Therefore, before trial counsel may speak to the prosecutor, he must get a waiver from the client
- While a trial judge can order trial counsel to testify to privileged communications relevant to an IAC claim, counsel should not breach the privilege until the judge has ordered him to do so and even then, the order should be limited to only those communications relevant to the claim



3. Draft and Sign Affidavit

- If p/c counsel plans to file an IAC claim, it is absolutely crucial that he get an affidavit from trial counsel establishing his actions and explaining why he did or failed to do that which is the focus of the IAC claim
- Trial counsel and p/c counsel should work together to serve the best interests of the client – to draft the best affidavit possible for the client within the bounds of the law and ethics
- If trial counsel refuses to provide an affidavit, p/c counsel must draft her own affidavit summarizing any conversation and documenting her efforts



4. Testify at Evidentiary Hearing

- The primary purpose of trial counsel's affidavit is to secure an evidentiary hearing
- If p/c counsel gets an evidentiary hearing, she will call trial counsel as a witness
- Trial counsel should expect to testify to the content of his affidavit
- The point is to explain that any alleged failings were not tactical decisions but rather were simple oversights.