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Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel

I. INTRODUCTION

Allen Aldrich made two mistakes. First, while intoxicated, he drove his pickup truck through a crosswalk and slammed into a disabled woman in a wheelchair.[1] She died in the hospital shortly thereafter.[2] Second, Aldrich hired a terrible attorney.

Not only did Aldrich's attorney fail to convey a plea bargain under the mistaken belief that it was unethical to discuss the plea bargain with his client,[3] but he also repeatedly recognized the need for defense experts yet failed to timely designate a single one.[4] What is more, Aldrich's counsel lacked a basic understanding of simple discovery procedures.[5] For example, despite repeated correction from both the prosecutor and the court, he persisted in his assertion that he did not have to do any investigation, perform any witness interviews, or make any attempt to obtain discovery under the misguided belief that that was all the State's responsibility.[6]

But things got much worse once the trial began. Aldrich's counsel did not know how to question witnesses.[7] He did not understand the rules of evidence.[8] And the defense theories that he presented were strange and offensive.[9] For instance, the bulk of

1. Aldrich v. State, 296 S.W.3d 225, 229 (Tex. App. 2009).

2. *Id.*

3. *Id.* at 243 ("Aldrich argues that trial counsel failed to adequately convey the twenty-year plea bargain to him. The record before us contains defense counsel's letter rejecting the plea bargain, and it supports Aldrich's position. The letter specifically sets forth defense counsel's belief that it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain with Aldrich.").

4. *Id.* at 245.

5. *Id.* at 233.

6. *Id.* at 245 ("Instead, even after receiving the benefit of multiple continuances, defense counsel undertook little or no investigation—until just a few weeks before the July 25, 2005 trial setting—based on the unreasonable decision that *Kyles* required the State to perform an investigation for him . . . .").

7. *Id.* at 251 ("The record reflects that defense counsel had great difficulty questioning witnesses.").

8. Among other problems, Aldrich's counsel repeatedly asked to have jurors removed from the courtroom to make simple objections to leading questions. *Id.* at 252.

9. *Id.* at 247.

defense counsel's cross-examination consisted of eliciting testimony that the victim's death was not an accident caused by a drunk driver, but was an assisted suicide attempt—that the victim was trying to kill herself or that the victim's husband had intentionally pushed his wife into the path of the speeding car.[10]

Not surprisingly, on appeal the court found Allen Aldrich's counsel constitutionally ineffective and Aldrich received a new trial.[11] But what is surprising is that nothing happened to Aldrich's counsel.[12] There was no disciplinary hearing, no formal reprimand, nor any consequence for the defense attorney's extremely deficient and "bizarre" performance.[13] In fact, the deficient attorney was never

10. *Id*. at 256. One of the bizarre cross examinations of a police officer went as follows:

> Q. The thing that she was riding in had four wheels?
> A. Yes, sir, I believe it would have.
> Q. She was not afoot. She was riding and it was propelled by an electric motor, was it not?
> A. Yes, sir.
> Q. And is that—do you know that that's the definition of a motor vehicle?
> A. A motor vehicle—
> . . . .
> Q. Well, let me ask you this. Did you believe in your initial investigation that the—Mr. Hudson and Mrs. Hudson had made a left turn and started walking across the crosswalk, that they would have seen the oncoming—this oncoming traffic, the one that before and during and after my client was—that ultimately hit her, that they deliberately made a left-hand turn to walk across the place where they knew that these cars were going to come? Did you realize that the night you were out there?
> A. Do I believe they deliberately stepped in front of your client?
> Q. That's for the jury to decide. I'm just asking you, did it—in your investigation as the senior officer out there, people with long debilitating injuries, sometimes they commit suicide, don't they?
> A. In Texas, the people in the crosswalk have the right-of-way.
> Q. Well, that's the wrong law, but if that's what you believe, you're incorrect.
> . . . .
> Q. All right. Now, did you, taking in the scene, the lighting, the ability to see a person that was coming as the Hudsons were, to see oncoming traffic, the realization that they walked right in front of this oncoming car, did you make sure and say, Hey, be sure to question Mr. Hudson about why he did such a thing? Did you mention, suggest, gosh, this guy had the opportunity, looks like he just walked her out there in front of the cars. Did anything like that happen?

Id. at 247–48.

11. *Id*. at 260.

12. *Find a Lawyer: Paul W. Leech*, ST. B. TEX., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=224590 (last visited Dec. 25, 2014).

13. *See Aldrich*, 296 S.W.3d 225; *Find a Lawyer: Paul W. Leech*, *supra* note 12.

even named in the appellate court opinion.[14] The attorney continued to practice and continued to give incompetent representation in other cases.[15]

This scenario is not uncommon.[16] Rarely, if ever, are defense attorneys reprimanded after being found constitutionally deficient.[17] Rarely, if ever, are defense attorneys named by the court that finds the counsel ineffective.[18] As a result, the practice of law sets its "sights on the embarrassing target of mediocrity."[19] And when mediocrity becomes the "prevailing standard of practice,"[20] society loses faith in the system itself. So what can be done?

This Comment explores this question. Part II discusses the standard of ineffectiveness, as established by *Strickland*, and how the Supreme Court inadvertently created the framework for the current

14. *See Aldrich*, 296 S.W.3d 225. The trial attorney's name, Paul Leech, was only discovered after searching the Denton County Court Records. DENTON COUNTY RECORDS INQUIRY, http://justice1.dentoncounty.com/PublicAccessDC/ (follow "District Clerk Criminal Case Records" hyperlink under "Case Records"; then search by defendant for last name "Aldrich" and first name "Allen"; then follow "F-2004-1128-E" hyperlink under "Case Number") (last visited Jan. 23, 2016).

15. In 2007, Paul W. Leech was publicly reprimanded for violating Rule 1.01 (competence) of the Texas Rules of Professional Conduct for failing to attend a hearing while also failing to notify his client of the hearing, which resulted in a default judgment against his client. *Disciplinary Actions*, 70 TEX. B.J. 726, 730 (2007).

16. *See* Burdine v. Johnson, 262 F.3d 336, 340 (5th Cir. 2001) (noting that defense counsel slept through major portions of the trial, but no disciplinary hearings or claims were brought against the attorney for seventeen years). By the time the Fifth Circuit found counsel ineffective, seventeen years after the original trial, counsel was already deceased. But in that seventeen-year period, there is no record of any disciplinary hearings or claims against that attorney. It was also not the first time counsel had fallen asleep during a trial. *See* David R. Dow, *The State, the Death Penalty and Carl Johnson*, 37 B.C. L. REV. 691, 693–95 (1996). For a discussion of cases of ineffective assistance of counsel post *Wiggins v. Smith*, see Teresa L. Norris, *Summaries of Published Successful Ineffective Assistance of Counsel Claims Post-*Wiggins v. Smith, CAP. DEF. NETWORK (Jul. 26, 2013), https://www.capdefnet.org/hat/uploadedFiles/Public/Helpful_Cases/Ineffective_Assistance_of_Counsel/IAC%20PostWiggins%2072613.pdf.

17. *See* Utah State Bar, Ethics Advisory Op. 13-04 para. 16 (Sept. 30, 2013) (Tenney, dissenting) ("The *Utah Bar Journal* publishes a monthly summary of all attorneys who have been professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.").

18. *Id.* para. 15.

19. *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1472 (1999) (quoting Stephen B. Bright, *Glimpses at a Dream Yet to Be Realized*, CHAMPION, Mar. 1998, at 65).

20. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 135 (2004).

lack of any remedy against ineffective counsel. Part III develops the issues that *Strickland* raised and discusses the lack of any real or substantive repercussions against a constitutionally deficient attorney, explores the reasons why that is, and discusses why a remedy beyond that of a new trial is important. Part III also discusses why the available "remedies"—the fear of malpractice claims or the fear of harming professional reputation—are unrealistic, difficult to prove, and unlikely to affect an attorney's performance. Part IV then examines the beginning of the solution and the central thesis—that a violation of *Strickland* is a violation of the Model Rules. To arrive at this conclusion, this Comment first explores the link between a defendant's right to effective assistance and a lawyer's duty under the Model Rules of Professional Conduct. Specifically, it looks at how courts have used the Model Rules to define the *Strickland* standard itself. As a result of that link, Part V suggests a solution—make it a mandatory requirement to report an attorney to the bar when a court finds that counsel has been constitutionally deficient. Part VI concludes.

II. *STRICKLAND V. WASHINGTON*—THE BEGINNING OF THE PROBLEM

To understand how ineffective assistance of counsel is applied today and why ineffective attorneys face no real repercussions, it is first necessary to understand the seminal case that defined the rule for determining ineffective assistance—*Strickland v. Washington*. In *Strickland*, David Leroy Washington planned and committed three groups of gruesome crimes including three brutal stabbings, murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft.[21] But against the advice of his court appointed attorney, William Tunkey,[22] Washington confessed to the first two murders, waived his right to a jury trial, and pleaded guilty to all charges.[23] As a result, Tunkey "experienced a sense of hopelessness."[24] After Washington pleaded guilty, his counsel further advised him to invoke his right under Florida law to an advisory jury

21. Strickland v. Washington, 466 U.S. 668, 671–72 (1984).

22. Washington v. Strickland, 693 F.2d 1243, 1247 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

23. *Strickland*, 466 U.S. at 672.

24. *Id.*

at his capital sentencing hearing.[25] But again, Washington rejected the advice and waived the right.[26]

All Tunkey did to prepare for the sentencing hearing was to speak a single time with Washington's mother and wife on the telephone after making one unsuccessful effort to meet with them.[27] But he did not otherwise seek out character witnesses, request a psychiatric examination, or look for further evidence concerning Washington's character or emotional state.[28] The judge sentenced Washington to death on each of the three counts of murder along with prison terms for the other crimes.[29]

On appeal and in collateral proceedings Washington challenged his counsel's assistance in several respects.[30] He asserted various claims of ineffective assistance and "submitted 14 affidavits from friends, neighbors, and relatives, stating that they would have testified if asked to do so."[31] He also submitted a psychiatric report and a psychological report, both of which stated that Washington was "chronically frustrated and depressed because of his economic dilemma" when the crimes were committed.[32]

The Supreme Court denied Washington relief. In doing this, the Court also established the now well-recognized two-part test for determining whether an attorney was so ineffective and incompetent as to have violated a defendant's constitutional rights. First, the defendant must have shown that his "counsel's representation fell below an objective standard of reasonableness."[33] Second, the Court

25. *Id.*

26. *Id.*

27. *See id.* at 672–73. One scholar has even suggested that "counsel did virtually nothing with respect to the sentencing hearing." William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 115 (1995).

28. *Strickland*, 466 U.S. at 673.

29. *Id.* at 675.

30. *Id.*

31. *Id.*

32. *Id.* at 675–76.

33. *Id.* at 688. The Court also stated that in determining the objective standard of reasonableness, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. Further, the Court stated that this would require a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

stated that the "defendant must show that the deficient performance prejudiced the defense."[34] Applying this standard, the Court held that Tunkey's strategy choices were within the range of professionally reasonable judgments and the choice not to seek more character evidence was reasonable.[35] The Court went on to say that there was no reasonable probability that the evidence the defendant said his trial counsel should have offered would have altered the outcome of the trial and sentencing hearing.[36]

Washington was executed July 13, 1984, two months after the decision.[37]

William Tunkey continued to practice.[38] Tunkey's name was never even mentioned in the Supreme Court decision.[39] As far as the author can tell, no malpractice claims or formal complaints against Tunkey were ever filed.[40] Thus began the days of *Strickland*. And its critics.[41] But while many have criticized the standard itself in that it

34. *Id*. at 687. In other words, the defendant had to show that his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

35. *Id*. at 699.

36. *Id*. at 699–700.

37. *Killer Apologizes Before His Execution*, TELEGRAPH, July 13, 1984, at 21, http://news.google.com/newspapers?nid=2209&dat=19840713&id=ZqcrAAAAIBAJ&sjid=9vwFAAAAIBAJ&pg=6811,2282489.

38. *William R. Tunkey*, ROBBINS TUNKEY ROSS ANSEL RABEN & WAXMAN P.A. (June 19, 2014), http://www.crimlawfirm.com/employee/william-r-tunkey/.

39. *Compare Strickland*, 466 U.S. 668, *with* Washington v. Strickland, 693 F.2d 1243, 1247 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

40. *William R Tunkey*, FLA. B., http://www.floridabar.org/wps/portal/flbar/home/attysearch/mprofile/!ut/p/a1/jc_LDoIwEAXQT-pthRaWo6mkRazxgdCNYUWaKLowfr_42LioOrtJzs3cYZ41zA_dLfTdNZyH7vjYvTxACM3dBrawxEHlOl3ZqgSEHEE7girnxJMMNktoDlOr2qgtF7RM_8sjMoRf-T3zn8RJNQO5BXKtp0AxeYNIRTj-HTx_eJ2Il7ycdg2C6e8_WXgh/dl5/d5/L2dBISEvZ0FBIS9nQSE h/?mid=125153 (last visited Aug. 31, 2015).

41. *See, e.g.*, Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441 (2004) ("If there is a problem with the *Strickland* analysis, it is that the test fails to assure even a minimal level of competence or effectiveness."); Jimmy E. Tinsley, *Ineffective Assistance of Counsel*, *in* 5 AM. JUR. 2D *Proof of Facts* 267 § 2 (1975) ("One judge, in harshly criticizing the standard, has suggested various reasons for the reluctance of appellate courts to adopt a more realistic standard of effectiveness. Among these reasons are the belief that if truly effective assistance were required, half the cases on appeal would require reversal, there would not be enough competent lawyers to provide effective assistance, and the court system would grind to a halt."); Kelly Green, *"There's Less in This Than Meets the Eye": Why* Wiggins *Doesn't Fix* Strickland *and What the Court Should Do Instead*, 29 VT. L. REV. 647, 647 (2005) ("Criticism of *Strickland* appeared as soon as the ink of the opinion dried and continues today . . . ."); Bennett L. Gershman, *Judicial Interference with Effective Assistance of Counsel*, 31 PACE L. REV. 560, 560 (2011) ("However, the standard for 'effective assistance' in defending a client is complex and controversial.").

creates an almost impossible hurdle for defendants to overcome, few have addressed the hidden issue—one *Strickland* also failed to address—what happens to an attorney who is found constitutionally ineffective.[42]

III. INEFFECTIVE ATTORNEYS FACE NO REAL REPERCUSSIONS

As the system stands, a criminal defendant has no real remedy against an attorney who has violated his Sixth Amendment right. As one Assistant Attorney General in Utah stated, "If a defendant demonstrates that his trial counsel was ineffective, the defendant does not receive *anything* from the lawyer as a remedy. Rather, what the defendant receives is a reversal of his criminal conviction or sentence."[43] Certainly, no reasonable attorney would want to be found constitutionally ineffective, especially after having put in the substantial amount of time, effort, and resources required to defend a client. But the increasing number of successful ineffective assistance claims demonstrates that whatever reasons attorneys currently may have to not be found ineffective are not enough to have any actual impact.[44]

This Part begins by establishing that there is no real remedy against the ineffective attorney beyond that of a new trial. Further, it will explore how the available "remedies" of malpractice claims, harm to professional reputation, and court sanctions are not realistic and are difficult to prove.[45] Next, this Part will discuss the increase in ineffective assistance claims, the increase in their success, and possible explanations for that increase. Following that discussion, it will then explore why a remedy is needed as well as the many problems that arise because of the lack of a remedy. These problems include an

42. Few scholars have addressed the issue or repercussions against the attorney. However, some scholars have at least mentioned it in passing. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 9–10 (1995) ("The lawyer may experience some degree of humiliation, assuming peers read the court decision reversing the defendant's conviction. But that is it."); *see also* Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089, 1093 (2001) (citing several examples where counsel "failed to prepare any strategy, arguments were incoherent and that the lawyers failed to attend hearings and call witnesses" and stating that "[t]o the extent that this is true, what is startling is that convictions and death sentences were all affirmed and no one said or did a thing about the lawyers involved").

43. Utah State Bar, *supra* note 17, para. 10 (emphasis added).

44. *See infra* Section III.B.

45. *See infra* Section III.C.

increase in frivolous claims, a decrease in professional norms due to attorneys falling on their sword, and a rise in ineffective attorneys who continue to practice. Finally, this Part will explore possible reasons for a lack of any real repercussion from the state bar.

A. No Real Remedy Exists

Today, there are no real repercussions or remedies against the constitutionally ineffective attorney. As one scholar has noted:

> Assuming the criminal defendant succeeds in securing a new trial, having shown that the lawyer was so negligent that even *Strickland*'s presumptions could not whitewash the incompetence, how do the courts deal with the lawyer? Is malpractice presumed? Is the lawyer automatically subject to some disciplinary action? Is the attorney required to undergo continuing peer review and supervision? Is the lawyer barred from handling criminal cases or required to attend classes? Anything? No.[46]

To be sure, some have disagreed and claimed that there are repercussions and remedies against the ineffective attorney. These so-called "repercussions" come in three forms: harm to the attorney's professional reputation, legal malpractice claims, and court sanctions. But as discussed below, none of these "repercussions" are effective or realistic.

The first claimed "repercussion" is that the attorney who is declared constitutionally ineffective may face humiliation and his professional reputation may be harmed.[47] That "harm" to the attorney's reputation may take several forms including losing credibility in front of the judge who finds them ineffective or possibly losing credibility in front of that judge's colleagues. On the other hand, it may take the form of embarrassment in the presence of other attorneys who may be aware of the court's finding of ineffectiveness. As a result, the ineffective attorney may lose clients, social standing, and prestige. Thus it is claimed that these professional consequences would deter an attorney from giving sub-standard legal assistance to a criminal defendant.

46. Koniak, *supra* note 42, at 9.

47. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1191 (2003) (stating that when defense counsel is found ineffective he will "suffer the ignominy and shame that follows").

However, the idea that losing an ineffective assistance claim harms the attorney's reputation is implausible. It rests on the assumption that peers will read the court decision,[48] but it also assumes that anyone reading the decision could identify the defense lawyer who had been accused of being ineffective. Yet, it is not the practice of appellate courts to publicly identify defense lawyers in written decisions.[49] In fact, one survey of Tenth Circuit opinions over a five-year period showed that hundreds of opinions were issued in criminal cases, but only between three and five of the opinions a year ever named the trial lawyer as part of an ineffective assistance claim.[50]

Another claimed "repercussion" is the possibility of the defendant filing a malpractice claim against his counsel. The fear of a malpractice suit would arguably deter a defense attorney from unprofessionally representing a client. But while fear of malpractice may have some minimal impact on an attorney's behavior, it is not a realistic remedy. Eighty percent of defendants in criminal cases do not have funds to hire a defense attorney.[51] Thus it is idealistic to assume that after years of trial and appeals a defendant would have the funds or even be willing to hire a civil attorney, pay court fees, attorney fees, and risk losing simply to file a malpractice claim. But even if a civil attorney takes a malpractice claim on a contingency fee,[52] winning is unrealistic. Many states have granted public defenders qualified immunity from suit for acts or omissions made in the course of "executing their official duties" regardless of whether the attorney had been found ineffective.[53]

48. Koniak, *supra* note 42, at 9–10.

49. *Ethics Advisory Opinion 13-04*, *supra* note 17, paras. 14–15.

50. *Id*. para. 14.

51. Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html (finding that "at least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel").

52. One website notes that when an attorney charges a contingency fee for legal malpractice claims, it is usually between forty and fifty percent. This is much higher than other types of negligence cases because of the difficulty in proving malpractice. *Suing Your Lawyer*, LAWYERS.COM, http://legal-malpractice.lawyers.com/suing-your-lawyer.html (last visited Jan. 23, 2016).

53. Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 784, 806 (1996) (stating that several states "shield indigent-defense attorneys from malpractice suits brought by their indigent clients"); *see also* Mooney v. Frazier, 693 S.E.2d 333, 345 (W. Va. 2010) ("[A]n attorney appointed by a federal court to represent a criminal defendant, in a federal criminal prosecution in West Virginia, has absolute immunity from purely state law claims of legal malpractice that derive

A further difficulty to any civil malpractice suit as a result of a criminal case is that the majority of courts also require proof of "actual innocence."[54] Some states have even gone far enough to state that a legal malpractice claim cannot succeed unless "the person's conviction has been reversed, whether on appeal or through post-conviction relief, or the person otherwise has been exonerated."[55] Thus, even if an attorney has been declared constitutionally deficient, if the conviction holds, the defendant has no real remedy for a deficient attorney.

One last possible "remedy" would be the court imposing sanctions on the ineffective attorney.[56] When a judge receives information that indicates a substantial likelihood that a lawyer has committed a violation of the rules, he may take "appropriate action" against that attorney.[57] Many courts' local rules are similar.[58] As a result, courts enjoy broad discretion when it comes to determining who may practice before them as well as regulating the conduct of those who appear before them.[59] This power is inherent within the courts.[60] Thus, along with specific statutes that grant authority,[61]

from the attorney's conduct in the underlying criminal proceedings."); Coyazo v. State, 897 P.2d 234, 238 (N.M. Ct. App. 1995) (discussing state statutes that "provide complete immunity from suit").

54. *See* Wiley v. Cnty. of San Diego, 966 P.2d 983, 985 (Cal. 1998) (citing cases where states have required "actual innocence" before filing a malpractice claim).

55. Stevens v. Bispham, 851 P.2d 556, 561 (Or. 1993).

56. For example, in the case of *In re Warren*, 321 F. App'x 369, 370 (5th Cir. 2009), the court issued sanctions after granting relief on ineffective assistance of counsel grounds.

57. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(D) (AM. BAR ASS'N 2011).

58. *See, e.g.*, Local Crim. R. N.D. Tex. 57.8(b), http://www.txnd.uscourts.gov/pdf/CRIMRULES.pdf ("A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for: (1) conduct unbecoming a member of the bar; (2) failure to comply with any rule or order of this court . . . ."); D.U. R. Practice Civ. R. 83-1.5.1(b), (stating that the court may initiate disciplinary proceedings against attorneys accused of a violation of an ethical or professional standard of conduct.).

59. *See* United States v. Nolen, 472 F.3d 362, 371 (5th Cir. 2006).

60. Resolution Trust Corp. v. Bright, 6 F.3d 336, 340 (5th Cir. 1993) (citing *In re* Snyder, 472 U.S. 634, 643–44 (1985) ("It is beyond dispute that a federal court may suspend or dismiss an attorney as an exercise of the court's inherent powers."); *accord* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (recognizing the inherent power of the court to impose sanctions when "neither the statute nor the Rules are up to the task").

61. *See* RONALD E. MALLEN & ALLISON MARTIN RHODES, 1 LEGAL MALPRACTICE § 11:4 (2015 ed.) ("A federal court's power to sanction also arises out of the legislative grant to promulgate its own rules."); *see also* Waguespack v. Halipoto, 633 S.W.2d 628, 629 (Tex. App. 1982) ("The Rules provide a trial judge with the tools to facilitate the litigation of lawsuits

courts impose sanctions for various offenses including improper certification,[62] improper claims and motions,[63] filing frivolous appeals,[64] and misbehavior,[65] among others.[66] The sanctions themselves may include forcing the attorney to give up the fee he received to represent the client,[67] imposing restitution,[68] limiting the attorney's practice,[69] or requiring the attorney to take remedial classes on how to be an effective attorney.[70] But in practice, rarely, if ever, are attorneys sanctioned after being found constitutionally deficient.[71] In fact, in one study over five years in Utah, the courts did not sanction a single attorney who had been found ineffective under the Sixth Amendment.[72]

and, to a certain extent, to prevent abuse of the legal process. This discretion is therefore appropriately broad.").

62. FED. R. CIV. P. 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

63. FED. R. CIV. P. 11(c). Rule 11(c)(3) also notes that the court may bring these claims on its own initiative.

64. *See* United States v. Najera-Gandara, 438 F. App'x 338 (5th Cir. 2011) (stating that filing frivolous appeals "may subject counsel to sanctions"). Courts have also recognized that sanctions for filing frivolous appeals should only apply in egregious cases so as not to chill the right to appeal. *See* Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988).

65. *See* 18 U.S.C. § 401 (2012) (granting a court power to punish by fine or imprisonment for contempt of its authority, including misbehavior).

66. *See, e.g.*, FED. R. CIV. P. 37(a)(3)(A) (violating disclosure rules); FED. R. CRIM. P. 16(d)(2) (failure to comply).

67. For example, in *In re Warren*, 321 F. App'x 369, 371 (5th Cir. 2009), the court disbarred counsel and required him to disgorge the $3,500 fee he received to represent the defendant.

68. UTAH CTS. JUD. COUNCIL R. JUD. ADMIN. R. 14-603(i)(1), https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch14/06%20Standards%20for%20Lawyer%20Sanctions/USB14-603.html.

69. *Id.* R. 14-603(i)(3).

70. *In re* Hawver, 339 P.3d 573, 586 (Kan. 2014) (noting how an attorney and the respondent participated in the attorney diversion program, under Kansas Supreme Court Rule 203(d), for having violated Kansas Rules of Professional Conduct 1.1 (competence)); *see also* KAN. SUP. CT. R. 203(d) (allowing courts to enroll incompetent counsel into an Attorney Diversion Program). "The purpose of the program is to protect the public by improving the professional competency of, and providing educational, remedial, and rehabilitative programs for, the members of the bar of Kansas." *Id.*

71. *See* Jonathan H. Adler, *When Ineffective Assistance Becomes Malpractice*, VOLOKH CONSPIRACY (Nov. 5, 2009, 9:47 AM), http://volokh.com/2009/11/05/when-ineffective-assistance-becomes-malpractice/ (stating that "it is rare that defense attorneys are sanctioned for providing inadequate assistance").

72. *See supra* note 17.

In sum, professional reputation, malpractice claims, and court sanctions are ineffective and unrealistic as remedies because they do not really affect the ineffective attorney. Thus, an attorney faces no repercussions for violating his client's Sixth Amendment rights.

B. The Increase in Successful IAC Claims

The sharp increase in ineffective assistance claims as well as the increase in constitutionally deficient attorneys further demonstrates the need for a remedy. Today, ineffective assistance of counsel claims are the most frequently filed claim in both federal and state post-conviction proceedings.[73] And the number of ineffective assistance claims is rising.[74] As "such claims have become more and more prevalent, claims about other constitutional deprivations have fallen by the wayside,"[75] causing scholars to suggest that these claims predominate because petitioners "perceive[] that courts are receptive to them."[76] To be sure, because the bar has been set so low, it is not difficult for an attorney to meet the *Strickland* standard. Not surprisingly then, in relation to how many claims are filed, only a relative few actually succeed.[77] For example, the Supreme Court of Wyoming noted that between 1986 and 1993, only three cases were overturned because of ineffective assistance of counsel.[78] And in another study of ineffective assistance claims from California, New York, Texas, and Alabama, it was demonstrated that "although defendants raised ineffective assistance of counsel in 41% of state post-conviction petitions in the targeted years of 1990 and 1992, state courts granted relief in only 8% of the cases."[79]

73. Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999). Further, reports have stated that "'ineffective assistance of counsel' was the most frequently cited reason for habeas corpus petitions filed by State inmates." *Id.*

74. Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 433 (2011).

75. *Id.*

76. *Id.* at 449.

77. *See* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 n.10 (2013) (noting that in a survey of 3,605 federal habeas petitions from 2005 to 2010 in Michigan, only 100 were granted relief, 45 of those were because of ineffective assistance of counsel and of that 45, 17 of those that had granted relief were overturned on appeal or, in other words, a success rate of 1.3%).

78. Calene v. State, 846 P.2d 679, 693 n.5 (Wyo. 1993).

79. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 684 n.23 (2007) (citing Victor E.

But these numbers are dramatically changing in some states. For example, in Utah during the seven-year period between 1998 and 2005, there were only a total of two reported cases where the courts reversed for ineffective assistance.[80] However, in the following seven-year period between 2006 and 2013, the Utah courts found that an attorney's conduct was both prejudicial and constitutionally deficient in at least fifteen cases.[81] Similarly, in Kansas, in the period between 1984 and 2003, there were only a total of three reported cases where the courts reversed for ineffective assistance.[82] But in the following ten-year period between 2004 and 2014, the Kansas courts found that an attorney's conduct was both prejudicial and deficient in at least fourteen cases.[83] One of the most impressive increases comes from the state of Washington. Between 1982 and 1992, there were only four successful claims of ineffective assistance.[84] But in the following ten years, between 1993 and 2003, that number increased to fourteen successful claims.[85] And in the

Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 247 tbl.4, 259 tbl.12 (1995)).

80. *See* State v. Maestas, 984 P.2d 376, 382 (Utah 1999); State v. Finlayson, 994 P.2d 1243, 1249 (Utah 2000).

81. *See* State v. Larrabee, 321 P.3d 1136, 1146 (Utah 2013); Gregg v. State, 279 P.3d 396 (Utah 2012); State v. Moore, 289 P.3d 487 (Utah 2012); State v. Ott, 247 P.3d 344 (Utah 2010); Housekeeper v. State, 197 P.3d 636 (Utah 2008); State v. Eyre, 179 P.3d 792 (Utah 2007); State v. Hales, 152 P.3d 321 (Utah 2007); Menzies v. Galetka, 150 P.3d 480 (Utah 2006); State v. Ekstrom, 316 P.3d 435, 444 (Utah Ct. App. 2013); State v. Charles, 263 P.3d 469 (Utah Ct. App. 2011); State v. Fowers, 265 P.3d 832 (Utah Ct. App. 2011); State v. Sellers, 248 P.3d 70 (Utah Ct. App. 2011); State v. King, 248 P.3d 984 (Utah Ct. App. 2010); State v. Moore, 223 P.3d 1137 (Utah Ct. App. 2009); State v. Perez-Avila, 131 P.3d 864 (Utah Ct. App. 2006).

82. State v. Washington, 68 P.3d 134 (Kan. 2003); State v. Carter, 14 P.3d 1138 (Kan. 2000); Mullins v. State, 46 P.3d 1222 (Kan. Ct. App. 2002).

83. Miller v. State, 318 P.3d 155, 164 (Kan. 2014); State v. Brooks, 305 P.3d 634, 636–37 (Kan. 2013); State v. Cheatham, 292 P.3d 318 (Kan. 2013); *In re* Ontiberos, 287 P.3d 855 (Kan. 2012); Albright v. State, 251 P.3d 52 (Kan. 2011); State v. Stovall, 312 P.3d 1271, 1273 (Kan. 2009); State v. Overstreet, 200 P.3d 427 (Kan. 2009); State v. Hemphill, 186 P.3d 777 (Kan. 2008); State v. Patton, 195 P.3d 753 (Kan. 2008); Laymon v. State, 122 P.3d 326 (Kan. 2005); State v. Davis, 85 P.3d 1164 (Kan. 2004); Wilson v. State, 340 P.3d 1213, 1230 (Kan. Ct. App. 2014); Shumway v. State, 293 P.3d 772 (Kan. Ct. App. 2013) King v. State, 154 P.3d 545 (Kan. Ct. App. 2007).

84. *See* State v. Thomas, 743 P.2d 816 (Wash. 1987) (en banc); State v. Tarica, 798 P.2d 296 (Wash. Ct. App. 1990); State v. Carter, 783 P.2d 589 (Wash. Ct. App. 1989); Matter of Frampton, 726 P.2d 486 (Wash. Ct. App. 1986).

85. *See In re* Brett, 16 P.3d 601 (Wash. 2001); *In re* Fleming, 16 P.3d 610 (Wash. 2001) (en banc); State v. Aho, 975 P.2d 512 (Wash. 1999); *In re* Maxfield, 945 P.2d 196 (Wash. 1997) (en banc); State v. Horton, 68 P.3d 1145 (Wash. Ct. App. 2003); State v.

next ten years, between 2004 and 2014, the numbers jumped to over twenty-nine successful claims of ineffective assistance of counsel.[86] This same pattern is seen in several other states ranging from California[87] to Alabama.[88]

Shaver, 65 P.3d 688 (Wash. Ct. App. 2003); State v. Lopez, 27 P.3d 237 (Wash. Ct. App. 2001), *aff'd on other grounds*, 55 P.3d 609 (Wash. 2002); State v. Wicker, 20 P.3d 1007 (Wash. Ct. App. 2001); State v. S.M., 996 P.2d 1111 (Wash. Ct. App. 2000); State v. Klinger, 980 P.2d 282 (Wash. Ct. App. 1999); State v. Klinger, 980 P.2d 282 (Wash. Ct. App. 1999); State v. Saunders, 958 P.2d 364 (Wash. Ct. App. 1998); State v. Doogan, 917 P.2d 155 (Wash. Ct. App. 1996); State v. Stowe, 858 P.2d 267 (Wash. Ct. App. 1993).

86. *See In re* Morris, 288 P.3d 1140 (Wash. 2012) (en banc); State v. Cardwell, 257 P.3d 1114 (Wash. 2011); State v. Sandoval, 249 P.3d 1015 (Wash. 2011); State v. A.N.J., 225 P.3d 956 (Wash. 2010) (en banc); State v. Kyllo, 215 P.3d 177 (Wash. 2009) (en banc); State v. Sutherby, 204 P.3d 916 (Wash. 2009) (en banc); State v. Thiefault, 158 P.3d 580 (Wash. 2007) (en banc); *In re* Pers. Restraint Petition of Dalluge, 100 P.3d 279 (Wash. 2004) (en banc); *In re* Davis, 101 P.3d 1 (Wash. 2004) (en banc); *In re* Orange, 100 P.3d 291 (Wash. 2004) (en banc); State v. Reichenbach, 101 P.3d 80 (Wash. 2004) (en banc); State v. Fedoruk, 339 P.3d 233, 242 (Wash. Ct. App. 2014); State v. Hamilton, 320 P.3d 142 (Wash. Ct. App. 2014); State v. Hassan, 336 P.3d 99, 105 (Wash. Ct. App. 2014); *In re* D'Allesandro, 314 P.3d 744 (Wash. Ct. App. 2013); State v. Phuong, 299 P.3d 37 (Wash. Ct. App. 2013); *In re* Wilson, 279 P.3d 990 (Wash. Ct. App. 2012); State v. Martinez, 253 P.3d 445 (Wash. Ct. App. 2011); State v. Adamy, 213 P.3d 627 (Wash. Ct. App. 2009); *In re* Pers. Restraint Petition of Crawford, 209 P.3d 507 (Wash. Ct. App. 2009); State v. Powell, 206 P.3d 703 (Wash. Ct. App. 2009); State v. Smith, 223 P.3d 1262 (Wash. Ct. App. 2009); *In re* Dependency of G.A.R., 150 P.3d 643 (Wash. Ct. App. 2007); State v. Hendrickson, 158 P.3d 1257 (Wash. Ct. App. 2007), *aff'd on other grounds*, 198 P.3d 1029 (Wash. 2009); *In re* Hubert, 158 P.3d 1282 (Wash. Ct. App. 2007); State v. Horton, 146 P.3d 1227 (Wash. Ct. App. 2006); State v. Meckelson, 135 P.3d 991 (Wash. Ct. App. 2006); State v. Pittman, 166 P.3d 720 (Wash. Ct. App. 2006); State v. Saunders, 86 P.3d 232 (Wash. Ct. App. 2004).

87. California's successful ineffective assistance claims increased from six reported cases between 1993 and 2003 to fourteen reported cases between 2004 and 2014. *See In re* Hardy, 163 P.3d 853 (Cal. 2007); *In re* Lucas, 94 P.3d 477 (Cal. 2004); *In re* Sanders, 981 P.2d 1038 (Cal. 1999); *In re* Jones, 917 P.2d 1175 (Cal. 1996); *In re* Neely, 864 P.2d 474 (Cal. 1993); People v. Hussain, 179 Cal. Rptr. 3d 679, 686 (Ct. App. 2014); People v. Speight, 174 Cal. Rptr. 3d 454, 469 (Ct. App. 2014); *In re* Brown, 160 Cal. Rptr. 3d 822, 824 (Ct. App. 2013); People v. Smith, 152 Cal. Rptr. 3d 142 (Ct. App. 2013); *In re* Hill, 129 Cal. Rptr. 3d 856 (Ct. App. 2011); People v. Roberts, 125 Cal. Rptr. 3d 810 (Ct. App. 2011); People v. Peyton, 98 Cal. Rptr. 3d 243 (Ct. App. 2009); *In re* Edward S., 92 Cal. Rptr. 3d 725 (Ct. App. 2009); People v. Gayton, 40 Cal. Rptr. 3d 40 (Ct. App. 2006); People v. Le, 39 Cal. Rptr. 3d 146 (Ct. App. 2006); People v. Thimmes, 41 Cal. Rptr. 3d 925 (Ct. App. 2006); People v. Callahan, 21 Cal. Rptr. 3d 226 (Ct. App. 2004); People v. Donaldson, 113 Cal. Rept. 2d 548 (Ct. App. 2001); People v. Burnett, 83 Cal. Rptr. 2d 629 (Ct. App. 1999);People v. Denison, 79 Cal. Rptr. 2d 524 (Ct. App. 1998).

88. In Alabama, successful claims of ineffective assistance of counsel increased from five between 1993 and 2003, to twelve between 2004 and 2014. *See Ex parte* Pierce, 851 So. 2d 618 (Ala. 2002); State v. Ziegler, 159 So. 3d 96, 104 (Ala. Crim. App. 2014); Frost v. State, 76 So. 3d 862 (Ala. Crim. App. 2011); Stith v. State, 76 So. 3d 286 (Ala. Crim. App. 2011); State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010); State v. Smith, 85 So. 3d 1063 (Ala. Crim. App. 2010); Powers v. State, 38 So. 3d 764 (Ala. Crim. App. 2009); McCombs v. State,

There are several possible reasons for the increase in successful ineffective assistance claims. A pessimist might say that attorneys are just getting worse. To be sure, over the years scholars have argued that often many indigent defendants do not receive effective assistance.[89] Indeed some scholars have estimated that from one-third to one-half of the lawyers who appear in court are not qualified to render the assistance guaranteed by the Sixth Amendment.[90] But bad lawyering is nothing new and cannot reasonably explain the large increases over several different states.[91] Other possible reasons to explain the increase in successful claims may include that courts are simply misinterpreting *Strickland* or that new judges are appointed with more lenient ideas of what makes up *Strickland*'s "prevailing professional norms." But again, the fact that in the past twenty years the number of successful ineffective assistance claims is almost universally rising would seem to demonstrate that a newly appointed judge would not be the only answer.[92]

But regardless of the reason, the sharp increase in successful ineffective assistance claims illustrates the need for society to have some remedy against the ineffective attorney—more than what currently exists. With the increase in successful claims and with no remedy against the deficient attorney, outcomes become less accurate and society loses confidence in the system. It has been said that the adversarial system assumes that "the truth can be served best only if each side is represented by a competent attorney."[93] But what if one

3 So. 3d 950 (Ala. Crim. App. 2008); Nickens v. State, 981 So. 2d 1165 (Ala. Crim. App. 2007); Reeves v. State, 974 So. 2d 314 (Ala. Crim. App. 2007); State v. Hamlet, 913 So. 2d 493 (Ala. Crim. App. 2005); Bargeron v. State, 895 So. 2d 385 (Ala. Crim. App. 2004); Cobb v. State, 895 So. 2d 1044 (Ala. Crim. App. 2004); Strickland v. State, 771 So. 2d 1123 (Ala. Crim. App. 1999); Grace v. State, 683 So. 2d 17 (Ala. Crim. App. 1996); State v. Williams, 679 So. 2d 275 (Ala. Crim. App. 1996); Walker v. State, 684 So. 2d 170 (Ala. Crim. App. 1996).

89. Primus, *supra* note 79, at 684 n.23 (citing David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("[A] great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.")).

90. *See id.* (citing Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973) (stating that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation" and some judges have even claimed that number is "as high as 75 percent")).

91. *See* Burger, *supra*, note 90 at 234.

92. *See supra* notes 80–88.

93. Kelly, *supra* note 42, at 1096.

side is represented by a terrible and incompetent attorney? Will the truth really come out? A further issue is that, like the attorney in *Aldrich*,[94] there is nothing to stop the attorney from acting incompetently again. As a result, society loses confidence in the system.

C. The Problems with No Real Remedy

The problems created by a lack of any repercussions and any real deterrent include that the State is overburdened with frivolous claims, outcomes become less reliable because of defense counsel falling on his sword, and inadequate counsel continues to offer inadequate assistance.

First, one of the major problems with a lack of repercussion against the "ineffective" attorney is that there is no deterrent for filing a frivolous claim against that attorney. Ineffective assistance of counsel is the most common issue raised in habeas petitions and a non-habeas appeal is a "very common—if not the most common—claim for relief."[95] Yet only a fraction of those claims actually win.[96] The ninety-two percent fail-rate for ineffective assistance claims illustrates that there are many attorneys filing frivolous claims.[97]

A further negative outcome of not having any real repercussions against the offending attorney comes in the form of defense counsel "falling on its sword" with no fear of any professional consequences. Falling on the sword refers to the tactic of trial counsel admitting and then arguing that they were constitutionally ineffective in order to have their client receive a new trial.[98] And this tactic is well known

94. *See supra* Part I.

95. Aaron K. Friess, *Soothsaying with a Foggy Crystal Ball: A Critique of the U.S. Supreme Court's Remedy for Ineffective Assistance of Counsel When a Criminal Defendant Rejects a Plea Bargain [*Lafler v. Cooper*, 132 S. Ct. 1376 (2012)]*, 52 WASHBURN L.J. 147, 168 (2012); *see also supra* notes 34–36.

96. *See* Primus, *supra* note 79, at 682 n.13; State v. Finlayson, 994 P.2d 1243, 1249 (Utah 2000); State v. Maestas, 984 P.2d 376, 382 (Utah 1999).

97. *See supra* note 81.

98. *See* Hendricks v. Calderon, 70 F.3d 1032, 1039–40 (9th Cir. 1995) ("To support this conclusion, Hendricks cites Berman's admission at the evidentiary hearing that he would have presented Dr. Carson's testimony in the guilt phase if he had done a more thorough investigation."); Boyle v. United States, No. 13 Cv. 7958(CM), 2014 WL 1744256, at *1 (S.D.N.Y. Apr. 28, 2014) ("Boyle's motion is supported by self-critical affidavits from his three trial attorneys: Marc Fernich, Martin Geduldig and Diarmuid White; each attorney falling on his sword—claiming that the failure to pursue the statute of limitation defenses was not strategic, but oversight.").

to judges.[99] But even though it has been heavily criticized,[100] there are still those who support and even encourage this practice.[101] As a result, because counsel suffers few if any consequences for being declared ineffective or constitutionally deficient, attorneys may "see no harm in"[102] or "even see it as their duty"[103] to "fall on their sword."

But regardless of whether this is a commendable practice, this tactic has a negative impact on ineffective assistance jurisprudence by seriously distorting what in fact makes an attorney "ineffective."[104] In other words, counsel who otherwise would be found competent, are found incompetent because they admit ineffectiveness in order to help out a client.[105] The effect is that our jurisprudence fills up with what Judge Kozinski labeled "descriptions of perfectly adequate performance that is assumed to be deficient."[106]

99. *See* Pinholster v. Ayers, 590 F.3d 651, 701 n.10 (9th Cir. 2009) (Kozinski, J., dissenting) (describing the act of falling on one's sword as "something trial counsel are known to do to help their clients on habeas"), *rev'd sub nom.* Cullen v. Pinholster, 131 S. Ct. 1388 (2011); *see also* Schmitt v. State, 779 A.2d 1004, 1012 (Md. Ct. Spec. App. 2001) (criticizing defense counsel for "falling on his sword" and being "unduly self-abasing"); Becker v. State, 232 P.3d 376, 379 (Mont. 2010) (Nelson, J. concurring) ("Appellate counsel's gratuitously falling on his sword is self-serving . . . ."); Commonwealth v. McSharry, 942 N.E.2d 1018 (Mass. App. Ct. 2011) (describing counsel's affidavit admitting ineffective assistance as "falling on his sword"); LaGrand v. Stewart, 133 F.3d 1253, 1276 (9th Cir. 1998) (discussing remedies for counsel who "in falling on his sword, had admitted he was ineffective").

100. Gideon, *The Sword: Fall on It*, PUB. DEFENDER, (Dec. 1, 2014, 5:29 PM) http://apublicdefender.com/2010/10/05/the-sword-fall-on-it/ (advocating defense attorneys to admit ineffective assistance in order "to assist our clients in any way possible and to remedy any constitutional violation that occurs due to our mishandling of a case").

101. *See* Fox, *supra* note 47, at 1192 (encouraging defense counsel to admit wrongdoing "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"); *see also* Jeff Gamso, *Especially When It's Hard: Falling on One's Sword*, GAMSO – FOR DEF., (July 16, 2014, 12:15 AM), http://gamso-forthedefense.blogspot.com/2014/07/especially-when-its-hard-falling-on.html (advocating that defense attorneys should "[f]all on their sword" and "fess up" when they have done "a terrible job").

102. *Pinholster*, 590 F.3d at 701 n.10.

103. *Id.*

104. *Id.*

105. *Id.*; *see also* Kelly, *supra* note 42, at 1089, 1092 ("In some of these cases, the defendant's trial or appellate counsel will furnish an affidavit essentially admitting the allegations, and equally disconcerting is the fact that the allegations, if true, reflect lawyering totally devoid of that high sense of public service described by Dean Pound" when he described the practice of law as "the pursuit of a learned art, a common calling in the spirit of public service, no less a public service because it is incidentally the means of a livelihood.").

106. *Pinholster*, 590 F.3d at 701 n.10.

A final problem with the lack of repercussions is that counsel may continue to represent future defendants and continue to give less than effective assistance to those defendants. As Justice Maura D. Corrigan from Michigan stated, "[T]o protect future defendants, it is important . . . to identify attorneys who may consistently provide ineffective assistance, in order to take any appropriate disciplinary action."[107] Yet without any real remedy against the incompetent counsel, the attorneys, judges, and especially the general public are not really aware of the offending attorney's conduct. Thus the "ineffective" attorney will likely represent other clients. And he may very well give the same quality of assistance that he previously gave.

D. Why Are There No Repercussions from the State Bar?

But why are there no repercussions from the state bar against an attorney who has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"?[108] There are several possible answers. Among those are: (1) the difficulty in creating a one-size-fits-all solution, (2) the fear of ruining collegial relationships, and (3) simply a weak and underfunded state bar. But each of these explanations fails. Ultimately, there are no repercussions from the state bar because no one reports ineffective attorneys.

First, one possible reason that there currently are no repercussions from the state bar associations is the difficulty of a one-size-fits-all solution. There are many different types of ineffective assistance of counsel. Thus, there may be a difference between what has been called "personal ineffectiveness" and "structural ineffectiveness."[109] For example, there are the attorneys who fall asleep during trial,[110] are under the influence of alcohol or drugs while representing a client,[111] or "are out in the courthouse parking lot while key prosecution witnesses testify."[112] On the other hand,

107. People v. Henderson, 776 N.W.2d 906, 907 (Mich. 2010) (Corrigan, J., concurring).

108. Strickland v. Washington, 466 U.S. 668, 687 (1984).

109. Primus, *supra* note 79, at 686.

110. Burdine v. Johnson, 262 F.3d 336, 372 (5th Cir. 2001).

111. Gershman, *supra* note 41 at 560 ("A lawyer who is drunk or sleeping during a trial may be unable to render effective advocacy.").

112. Primus, *supra* note 79, at 686 (discussing many instances where defendants have claimed ineffective assistance).

there may be ineffective assistance that comes as a direct result of public defender offices that are simply overworked and understaffed.[113] The argument is that because of the huge caseloads, there simply is not enough time to give the attention and effort that is necessary to provide the minimal assistance required by the Constitution. And in recognition of these "structural" problems, courts and legislatures simply turn a blind eye to such problems.

To be sure, because of these differences, state bars may find it difficult to create a blanket one-size-fits-all solution to the problem. Neither sanctions, discipline, nor other repercussions may be appropriate in every case. But the one-size-fits-all approach has its advantages. Whether the attorney fell asleep during trial or was simply overworked, the defendant's Sixth Amendment rights have been violated. And in both cases, an attorney has acted so incompetently so as to violate that right.

A second possible reason that there are no real repercussions from the state bar against an ineffective attorney is that attorneys and judges may feel that if they report another attorney, it would interfere with their professional relationships. As one scholar noted, "Lawyers may fear being considered a tattletale by their peers within the legal community."[114] Of course there may be the occasional attorney who would be happy to report certain defense attorneys, but because in many respects lawyers depend on their reputation within the community and among members of the bar, the potential negative effects of "being labeled a snitch" could cause many problems in their professional lives.[115] These problems may include collateral effects in subsequent cases that involve the "ineffective" attorney. If one attorney has reported another, it is possible, and even likely, that the reported attorney would feel hostile towards the other.

113. *See Indigent Defense*, U.S. DEP'T JUST.: OFF. JUST. PROGRAMS (Dec. 2011), http://ojp.gov/newsroom/factsheets/ojpfs_indigentdefense.html (citing a study that found that in 2007, 964 public defender offices nationwide received nearly 6 million indigent defense cases); *see also* Voigts, *supra* note 73, at 1119 ("Court-appointed lawyers are often under-experienced and over-burdened, and frequently the measures courts have adopted to address both those problems have not been particularly successful.").

114. Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 752 (2003).

115. *Id.* at 753; *see also* Primus, *supra* note 79, at 732 ("Whatever the reason, members of the Bar seldom report instances of attorney misconduct.").

But while reporting might carry some social and professional costs, and even may be uncomfortable to do, "the benefits of reporting may often outweigh the costs."[116] Reporting ineffective attorneys would raise the bar for what is a "reasonable" attorney. And assuming the bar did anything after the attorney was reported, it would deter attorneys who have been found ineffective from continuing to give sub-par assistance to yet another defendant. Further, it would increase the public's faith in other attorneys and the system itself.

The third and most viable reason that there may not be any current repercussions against the offending attorney is the inherent weaknesses of state bar associations in regulating attorney conduct. In fact, over the years there have been many critics of the state bar's capacity to prosecute potential rule violations.[117] And although attorneys are required to "conform their behavior to these state codes,"[118] one commentator has noted the following:

> [S]tudy after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.[119]

However, at least in theory, a criminal defense attorney's actions and violation of state rules could lead to disciplinary action and proceedings to address the alleged misconduct.[120] In reality, it does not happen.[121] But it is unfortunate that it does not happen. The

116. *See* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 285 (2003).

117. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 649 (1981) ("Lawyers can hardly present their travesty of a penal system as an effective deterrent.").

118. Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 154 (2009).

119. Abel, *supra* note 117, at 648–49 (footnotes omitted).

120. Roberts, *supra* note 118, at 154 (discussing potential sanctions for alleged misconduct including sanctions "ranging from 'no action,' to private reprimand, to disbarment").

121. Utah State Bar, *supra* note 17, para. 16 ("The *Utah Bar Journal* publishes a monthly summary of all attorneys who have been professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal

state bar associations seem the ideal place to begin ensuring competence among lawyers. State bars already have established rules and guidelines for attorney conduct. State bars already have established means for enforcing those guidelines. And state bar associations are already accessible to anyone—anyone can file a claim.[122] In fact, state bar associations have even been labeled as "the most easily accessible means by which criminal defendants can begin to be protected against bad lawyering."[123] And while some critics have stated that "state bar associations seem loathe to recommend any meaningful sanction,"[124] state bar associations impose over 5,600 sanctions annually.[125] But if so many sanctions are imposed each year, how is it that the bar association could be perceived as weak? And why would ineffective attorneys not be sanctioned?

One of the major weaknesses of state bars is that the disciplinary boards generally rely on complaints before taking action.[126] Seldom do state bars initiate independent investigations.[127] Further, defendants file relatively few complaints against trial attorneys in

defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.").

122. *See Office of Professional Conduct Frequently Asked Questions*, UTAH ST. B., http://www.utahbar.org/opc/office-of-professional-conduct-frequently-asked-questions/ (last visited Jan. 26, 2016) (complaints may be filed by a member of the public or by the Bar itself).

123. Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 43 (2002).

124. Roberts, *supra* note 118, at 154–55.

125. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007). While the number of complaints alleged against the 1.3 million lawyers in the United States far outnumbers the amount where the state bars actually impose sanctions, the fact that many thousands are sanctioned each year illustrates that the bar is not totally defunct.

126. David L. Dranoff, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 NW. U. L. REV. 633, 647 (1982) ("[B]oards generally refuse to conduct independent investigations, and instead rely almost exclusively on complaints as a basis for action. Because the boards take a passive role, the system is dependent on the existence of incentives for outside parties to file complaints.") (footnote omitted).

127. *Id.*

criminal cases.[128] And even fewer judges and lawyers file complaints.[129]

The solution, therefore, rests on establishing a vehicle by which claims of ineffective assistance of counsel can be reported and corrected.

IV. A VIOLATION OF A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE IS A VIOLATION OF A LAWYER'S DUTY UNDER THE PROFESSIONAL RULES TO PROVIDE COMPETENT ASSISTANCE.

The vehicle by which claims of ineffective assistance of counsel can be reported and corrected comes from the inherent relationship between the ABA Rules of Professional Conduct and a defendant's right to effective assistance under the Sixth Amendment. Because of that relationship, a violation of *Strickland* implies a violation of the Professional Rules. The idea that there is a link between the two is not difficult to see. Nor is the idea novel. In fact, in 1986 even the Supreme Court recognized the increasing need to rely on this relationship and the potential need to rely more on these standards. The Supreme Court stated that in "some future case . . . we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct."[130] And since that date, many courts began to define the scope and limits of effective assistance by looking to the canons of ethics and the professional codes.[131]

128. Primus, *supra* note 79, at 700 ("[V]ery few complaints get filed against trial attorneys in criminal cases. Judges and other lawyers rarely file complaints, and criminal defendants have little incentive to file them, particularly given that defendants are not compensated for lodging complaints.") (footnote omitted).

129. *See id.*; Dranoff, *supra* note 126, at 669 n.79 ("A Michigan study indicated that members of the legal profession filed 8.1% of complaints and that only 1.8% were filed by lawyers who were not involved in some sort of professional relationship with the respondent.").

130. Nix v. Whiteside, 475 U.S. 157, 165–66 (1986).

131. *See infra* Section IV.A; *see also* Ramseyer *ex rel.* Harris v. Blodgett, 853 F. Supp. 1239, 1254 (W.D. Wash. 1994), *aff'd sub nom.* Ramseyer *ex rel.* Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (noting that ABA standards "are regularly used by courts as guidelines in determining whether an attorney's performance falls below reasonable professional standards").

This inherent link between the ABA standards and *Strickland* demonstrates that a violation of the defendant's right to effective assistance is also a violation of the professional rules to provide competent assistance. This Part will first discuss how over the years the ABA Standards have come to define *Strickland*'s "prevailing professional norms." Following that discussion, it will examine the idea that because of the inherent link and because so many courts rely on the ABA standards, a violation of a constitutional right necessarily implies a violation of the Rules of Professional Conduct. Finally, this Part will explore how the link between the ABA standards and *Strickland*'s "professional norms" has been applied to cases outside the Sixth Amendment. These cases will further enforce that a violation of *Strickland* violates the Rules sufficiently for the attorney to be reported to the state bar.

A. The ABA Standards Help Define Strickland*'s "Professional Norms"*

The Supreme Court has "long . . . recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.'"[132] Thus, because they "reflect the . . . norms of the legal profession,"[133] the ABA standards "act as guides in determining the reasonableness of counsel's assistance."[134] And these standards are frequently cited by courts in determining whether counsel's representation was objectively unreasonable.[135] Thus, "the use of ethical standards to illuminate whether a lawyer has provided ineffective assistance is not novel or overreaching, but well established."[136]

132. Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (citing Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam); Florida v. Nixon, 543 U.S. 175, 191 & n.6 (2004); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000)).

133. State v. Clay, 824 N.W.2d 488, 495 (Iowa 2012).

134. Alvord v. Wainwright, 469 U.S. 956, 960 (1984); *see also* State v. Vance, 790 N.W.2d 775, 785 (Iowa 2010) ("The Supreme Court indicates the American Bar Association standards and like documents reflect the prevailing norms of practice."); Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

135. *See* Paul V. Vapnek et al., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY Ch. 6-G (2015); *Harris*, 853 F. Supp. at 1254 ("These standards are regularly used by courts as guidelines in determining whether an attorney's performance falls below reasonable professional standards.").

136. *Clay*, 824 N.W.2d at 502.

For example, courts have used the ABA standards to evaluate counsel's "duty to investigate"[137] and to determine whether counsel's "pretrial investigation and preparation" was sufficient.[138] Courts have used the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct in determining ineffective assistance of counsel regarding "multiple representation,"[139] zealous representation,[140] false statements,[141] and whether counsel was obligated to challenge the search of a vehicle.[142]

Moreover, courts have often considered and invoked these ethical standards "recognizing that fidelity to those standards implicates not only the interests of the defendants, but the credibility of the system, its integrity, and the institutional interests in the rendition of just verdicts."[143] These standards and professional norms "illuminate" the question of whether a lawyer has provided effective assistance.[144] And using these guidelines, standards, and rules has the positive effect of "draw[ing] lawyers attention to specific duties and tasks which are integral to effective representation."[145]

B. A Violation of Strickland *Implies a Violation of the Rules*

Because so many courts have looked to the ABA's standards to determine the "professional norms" relevant to ineffective assistance claims, when an attorney is found ineffective under *Strickland*, it necessarily implies a violation of the Model Rules. The ABA Model Rules of Professional Conduct, which every state has adopted in one form or another specifically state that "[a] lawyer shall provide

137. *Smith*, 539 U.S. at 522.

138. People v. Jones, 111 Cal. Rptr. 3d 745, 761 (Ct. App. 2010).

139. Wheat v. United States, 486 U.S. 153, 159–60 (1988).

140. People v. Cropper, 152 Cal. Rptr. 555, 557 (Ct. App. 1979).

141. *In re* Seelig, 850 A.2d 477, 490 (N.J. 2004) ("The Supreme Court held that a criminal defendant's right to assistance of counsel does not include the right to cooperation in the commission of perjury in violation of the ethical standards established by states to govern attorney conduct.").

142. State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010) ("In our own analysis of whether counsel was ineffective, we have relied on our Code of Professional Responsibility for Lawyers to measure counsel's performance.").

143. People v. DeFreitas, 630 N.Y.S.2d 755, 759 (App. Div. 1995).

144. State v. Clay, 824 N.W.2d 488, 502 (Iowa 2012).

145. *See* Roberts, *supra* note 118, at 161 n.174 (quoting John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith *and* Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 159 (2007)).

competent representation to a client."[146] And "competent representation" requires that an attorney act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[147] Or, in other words, competent representation means that an attorney will act with at least the minimal ability of a reasonable practitioner.[148] The official comments further clarify that "competent handling" of a matter includes analysis of the factual and legal elements of an issue, sufficient preparation, and use of methods and procedures that meet the standards of other competent practitioners.[149]

Based on the same language of ABA Rule 1.1, courts have determined in disciplinary hearings that attorneys were not competent for repeatedly filing and then dismissing cases when responses were due,[150] "failing to address a potential bar to any patent in a patentability opinion,"[151] failing to consult with a client and inform him of a plea agreement,[152] filing frivolous claims,[153] failing to examine title or record documents,[154] failing to obtain training to defend a capital murder case,[155] failing to conduct a thorough investigation of the facts,[156] failing to investigate alibi witnesses,[157] failing to submit a judgment of default to the court for several months,[158] failing to file an appropriate and sufficient post-conviction petition,[159] failing to examine the physical evidence,[160]

146. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015).

147. *Id.*

148. *Id.* cmt. [5]. While the official comments are not authoritative, they do offer additional insight into the intent of the drafts of the Model Rules.

149. *Id.*

150. State *ex rel.* Okla. Bar Ass'n v. Young, 175 P.3d 371, 377 (Okla. 2007).

151. *In re* Discipline of Peirce, 128 P.3d 443, 445 (Nev. 2006), *reinstatement granted sub nom. In re* Reinstatement of Peirce, No. 62091, 2014 WL 4804214 (Nev. Sept. 24, 2014).

152. *In re* Disciplinary Action against Wolff, 810 N.W.2d 312, 315 (Minn. 2012).

153. *Id.*

154. *In re* Boyce, 613 S.E.2d 538, 539–40 (S.C. 2005).

155. *In re* Hawver, 339 P.3d 573, 577 (Kan. 2014). The attorney was also incompetent for various other reasons, including that the attorney told the jury that they ought to execute the killer. *See id.* at 578.

156. *Id.*

157. *Id.*

158. Baker v. Ky. Bar Ass'n, 935 S.W.2d 612, 613 (Ky. 1996).

159. *In re* Bash, 880 N.E.2d 1182, 1183 (Ind. 2008). The court further stated that this was "because of his lack of understanding of fundamental requirements for obtaining post-conviction relief. As a result, his client may have lost a potentially meritorious challenge to his confinement conviction." *Id.* at 1184.

failing to interview witnesses who may have been helpful to the defense,[161] and failing to produce evidence that would have reduced a sentence.[162]

Just as the Professional Rules define competence in terms of what is "reasonable" representation, so too *Strickland* defines "competent assistance" as "*reasonableness* under prevailing professional norms."[163] And "reasonableness" under *Strickland* means that an attorney cannot be ineffective unless the court finds that no other attorney would have made the same tactical decisions at trial or on appeal.[164] Further, *Strickland*'s "prevailing professional norms" are guided by the Professional Rules themselves.[165] Thus, even though the Professional Rules are "guides, and not inexorable commands,"[166] when an attorney has acted in such a manner that no other attorney would act, and the court has determined that the attorney has fallen below the "prevailing professional norms," he has necessarily failed to act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[167] In other words, when an attorney has violated *Strickland*, he has also violated the Model Rules' standard of competence. That being said, one scholar has noted that "ethical violations and ineffective assistance of counsel are not usually seen as one and the same."[168] But because courts have consistently used the ABA Guidelines and Rules of Professional Responsibility in establishing what in fact makes an attorney ineffective, when a court

160. *In re* Wolfram, 847 P.2d 94, 96 (Ariz. 1993). The attorney also failed to interview witnesses, read the transcript of the grand jury proceeding that resulted in his client's indictment, interview prospective witnesses disclosed in the police reports, consult with his client on whether the case should go to the jury on lesser included offenses, and challenge venire persons who stated that they would be uncomfortable sitting as a juror in a child abuse case. *Id.*

161. Matter of Murray, 709 P.2d 530, 532 (Ariz. 1985).

162. *In re* Pankowski, 947 A.2d 1122 (Del. 2007), *reinstatement granted*, 956 A.2d 642 (Del. 2008). Counsel also failed to meet with the defendant before filing the motion and did not investigate the defendant's medical condition. *Id.*

163. Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

164. *See, e.g.*, Harvey v. Warden, Union Corr. Inst., 629 F.3d 1228, 1243 (11th Cir. 2011) ("An attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions.").

165. *See supra*, Section IV.A.

166. Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (internal citation omitted).

167. MODEL RULES OF PROF'L CONDUCT r. 1.1.

168. Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 356 (2009).

finds an attorney so incompetent so as to violate his client's Sixth Amendment rights, the court has also necessarily determined that the attorney has violated his duties under the Professional Rules.

However, the relationship or link between constitutionally effective assistance and the Professional Rules does not necessarily go both ways.[169] Just because an individual has violated an ethical rule does not necessarily mean he has violated the right to effective counsel. For example, in *Smith v. State* an attorney had been suspended for failing to pay his bar dues but had still represented a defendant, thus subjecting the attorney to professional discipline.[170] On appeal the defendant claimed that because his attorney had violated a Rule of Professional Conduct, he was constitutionally ineffective.[171] But the court held that a violation of a Professional Rule was not a per se violation of the defendant's right to counsel.[172] What was important was whether the "representation was sufficiently incompetent to violate the client's right to effective assistance of counsel."[173]

Thus, it is possible to violate a professional rule without raising a question of ineffective assistance of counsel. But that does not change the fact that a violation of a client's Sixth Amendment right would be a violation of the Rules. To be sure, the Supreme Court has also stated that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."[174] But as one scholar has stated, "[w]hile the Sixth Amendment may not have been designed to improve the quality of legal representation, neither should it serve to lessen the quality of that representation."[175] Thus, even though there may be some differences between the Sixth Amendment ineffectiveness and the

169. *See* Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.").

170. Smith v. State, 243 S.W.3d 722, 724 (Tex. App. 2007).

171. *Id*.

172. *Id*.

173. *Id*. at 725.

174. Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.").

175. Kelly, *supra* note 42, at 1093.

Professional Rules, it would be naïve to think that the former does not impact the latter.[176]

Certainly, there are some differences between competence as defined by *Strickland* and competence under the Professional Rules. For example, while a violation of the Professional Rules is a claim against the attorney, an ineffective assistance claim is technically against the State.[177] Even though ineffective assistance claims may rise on direct appeal or in a collateral attack based on a state or federal statute, in both cases the parties are the government and the defendant—not the defendant and his prior "ineffective" counsel.[178] Thus, what a defendant is alleging when he raises an ineffective assistance claim is that the government unconstitutionally convicted him because he did not receive effective assistance of counsel as guaranteed by the Constitution.[179] Because an ineffective assistance claim is not technically a claim against the defendant's attorney, there are procedural differences that arise. For example, a lawyer has a right to participate in his own disciplinary counsel, whereas he does not necessarily have that right in an ineffective assistance claim.[180] Therefore, under a claim arising out of a violation of the Professional Rules, the attorney has the right to defend himself, whereas that is not necessarily the case in an ineffective assistance claim.

But all that is required for a judge to report an attorney to a state bar association is knowledge that the attorney has violated a Professional Rule.[181] Thus, even though there may be differences that might impact the nature of a disciplinary sanction, the differences do not change whether or not a judge has sufficient knowledge to report an attorney for violating the Rules of Professional Conduct.

A further difference between the Rules and a defendant's Sixth Amendment right to counsel is that in some states the standard of proof at a disciplinary counsel may be higher and mitigating factors

176. *Id*.

177. Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998), *aff'd*, 187 F.3d 622 (1st Cir. 1999) ("It is the government, not the defense attorney, who suffers adverse consequences when a defendant's conviction is vacated due to 'ineffective assistance.'").

178. Utah State Bar, *supra* note 17; *see also* Henak, *supra* note 168, at 371 (stating that the "former lawyer is only a witness, and witnesses do not really 'belong' to any one particular party or side of a case").

179. Utah State Bar, *supra* note 17.

180. *In re* Wolfram, 847 P.2d 94, 105 (Ariz. 1993).

181. *See* MODEL RULES OF PROF'L CONDUCT r. 8.3.

may exist and be taken into account.[182] For example, in Arizona the defendant must establish by a preponderance of the evidence that a constitutional defect has occurred and then the state has the burden of proving that the defect was harmless beyond a reasonable doubt.[183] But Arizona's grounds for discipline require bar counsel to establish allegations by clear and convincing evidence.[184] Other states are similar.[185] But again, neither of these differences impacts whether or not the judge has knowledge sufficient to report an attorney. As Justice Martone from the Arizona Supreme Court has stated, "[T]he conduct which results in a denial of effective assistance of counsel necessarily implicates a denial of competent representation."[186] In other words, even though there may be mitigating factors, and even though the standard of proof may be different, those factors do not impact whether a judge has knowledge that a violation has occurred, only the extent of the sanction imposed.[187]

In sum, because of the relationship between the Model Rules and *Strickland*, when an attorney violates his client's Sixth Amendment right, he also has sufficiently violated the Professional Rules for a court to have the duty to report the attorney.

182. *See infra* notes 183–85

183. ARIZ. R. CRIM. P. 32.8(c).

184. *Wolfram*, 847 P.2d at 98 n.4.

185. *See, e.g.*, *In re* Collins, 288 P.3d 847, 854 (Kan. 2012) ("Attorney misconduct must be established by clear and convincing evidence."); State *ex rel.* Okla. Bar Ass'n v. Zimmerman, 276 P.3d 1022, 1027 (Okla. 2012) ("Before discipline is imposed, misconduct must be demonstrated by clear and convincing evidence."); Fla. Bar v. Forrester, 916 So. 2d 647, 651 (Fla. 2005) ("Given this fact, we agree with the Bar that the appropriate standard of proof is that which is applicable to attorney disciplinary proceedings in general, clear and convincing evidence."); *In re* Discipline of Lerner, 197 P.3d 1067, 1075 (Nev. 2008) ("[T]o support a rule violation, clear and convincing evidence must support a finding . . . ."). *But see* Ky. Bar Ass'n v. Craft, 208 S.W.3d 245, 262 (Ky. 2006) ("[T]he burden of proof shall rest upon the Association in a disciplinary proceeding, and the facts must be proven by a preponderance of the evidence.") (citation omitted); Office of Disciplinary Counsel v. Cappuccio, 48 A.3d 1231, 1236 (Pa. 2012) ("In attorney disciplinary proceedings, the [Office of Disciplinary Counsel] bears the burden of establishing attorney misconduct by a preponderance of the evidence.").

186. *Wolfram*, 847 P.2d at 106.

187. For example, see UTAH COURTS. Judicial Council Rules Judicial Administration Rule 14-607, https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch14/06%20Standards%20for%20Lawyer%20Sanctions/USB14-607.html, which states that "[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose." But again, those mitigating factors are considered after the court has determined that a violation has occurred.

C. Ineffective Assistance and Asylum

Moreover, this type of connection between a constitutional right violation as a result of counsel's ineffectiveness and the Professional Rules has already been applied in other similar cases. Take, for example, the case of asylum. Granted, it is important to note at the outset of this discussion that an ineffective assistance claim for asylum arises not out of the Sixth Amendment right to counsel, but out of the "due process guarantees of the Fifth Amendment."[188] But the requirements to establish ineffective assistance under the Fifth Amendment are remarkably similar to those of the Sixth Amendment.[189] Thus it is very instructive of how Sixth Amendment violations should be applied.

Similar to a Sixth Amendment ineffective assistance claim, where the defendant is claiming that his attorney was so terrible that he deprived his client of a fair trial,[190] when an alien files an ineffective assistance of counsel claim under the Fifth Amendment, he is claiming that "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[191] And similar to a *Strickland* claim, the petitioner must show (1) "that counsel failed to perform with sufficient competence," and (2) "that she was prejudiced by counsel's performance."[192] But unlike a *Strickland* claim, before an alien is allowed to file an ineffective assistance claim, he or she is expected to comply with several procedural guidelines.

188. Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005) (stating that "[a]lthough there is no Sixth Amendment right to counsel in a deportation proceeding, the due process guarantees of the Fifth Amendment 'still must be afforded to an alien petitioner.'" (quoting Singh v. Ashcroft, 367 F.3d 1182, 1186 (9th Cir. 2004))).

189. *Compare* Maravilla v. Ashcroft, 381 F.3d 855, 858 (9th Cir. 2004) (holding that to establish ineffective assistance under the Fifth Amendment petitioners must (1) "demonstrate that counsel [failed to] perform with sufficient competence" and (2) "show that they were prejudiced by their counsel's performance") (internal citation omitted), *with* Strickland v. Washington, 466 U.S. 668, 687 (1984). The prejudice prong of the Fifth Amendment right is slightly different than *Strickland*'s in that under the Fifth Amendment all that has been required is that the "performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings." Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999) (emphasis added).

190. *See* Padilla v. Kentucky, 559 U.S. 356, 385 (2010) (citing *Strickland*, 466 U.S. at 686).

191. *Mohammed*, 400 F.3d at 793 (citation omitted).

192. *Id.*

First, the alien must submit an affidavit that includes and explains "the agreement that was entered into with former counsel."[193] Second, "former counsel must be informed of the allegations and allowed the opportunity to respond."[194] And finally, "the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."[195] If an individual fails these procedural requirements, the proceedings may be dismissed.[196]

In sum, the implication of these requirements is that there cannot be ineffective assistance in the constitutional sense unless there is also incompetence in the ABA sense. Thus, by adopting[197] and approving[198] the requirement to file a complaint with the appropriate disciplinary authorities every time a claim of ineffective assistance of counsel is raised, both courts and administrative agencies are recognizing the important and inherent link between the ABA standards and constitutionally effective assistance.

What is interesting about these requirements is not just that the requirements exist, but also their reasoning. Citing *Lozada*, the Sixth Circuit stated:

> The requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in

193. Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *overruled by* Compean, 25 I. & N. Dec. 1, 1 (B.I.A. 2009); *see also* 8 C.F.R. § 208.4 (2015); Debeatham v. Holder, 602 F.3d 481, 484 (2d Cir. 2010). It is important to note that not all circuits have required exact compliance with these rules. *See* Castillo-Perez v. I.N.S., 212 F.3d 518, 525 (9th Cir. 2000) ("[F]ailure to comply with *Lozada* requirements is not necessarily fatal to a motion to reopen."); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 824–25 (9th Cir. 2003) (holding that an ineffective assistance of counsel claim may "go forward when there is substantial compliance with *Lozada* such that the purpose of *Lozada* is 'fully served by other means.'") (citation omitted). *But see* Henton v. U.S. Att'y. Gen., 520 F. App'x 801, 805 (11th Cir. 2013) ("We have held that all three of *Lozada*'s procedural requirements must be satisfied.").

194. *Lozada*, 19 I. & N. Dec. at 639.

195. *Id.*

196. *See Henton*, 520 F. App'x at 804; Pepaj v. Mukasey, 509 F.3d 725, 727 (6th Cir. 2007) ("An alien who fails to comply with *Lozada*'s requirements forfeits her ineffective-assistance-of-counsel claim.").

197. *See* 8 C.F.R. § 208.4(a)(5)(iii).

198. *Compean*, 25 I. & N. Dec. at 2 (stating that courts have "acknowledged that the *Lozada* framework had largely stood the test of time, having been expressly reaffirmed by the Board 15 years after its initial adoption") (internal citation omitted).

> immigration proceedings, the outcome of which may, and often does, have enormous significance for the person.[199]

And if there is "enormous significance" for asylum, which demands a duty to report the attorney, is there not also "enormous significance" in a capital case? Or when an individual faces life in prison? When an individual's freedom is at stake, as is the case in a criminal prosecution, surely that creates the possibility of consequences that are enormously significant to the defendant. In addition, if the purpose of the *Lozada* requirements are to "deter meritless claims," how much more important would a similar requirement be in criminal cases. Ineffective assistance is the most raised claim,[200] yet only a fraction of those claims are deemed meritorious by the courts.[201] That would indicate many, many meritless claims.

V. THE RELATIONSHIP BETWEEN INEFFECTIVE ASSISTANCE AND THE MODEL RULES CREATES THE SOLUTION—MANDATORY REPORTING

This recognized link between the Professional Rules and constitutionally ineffective assistance creates the needed remedy—make it mandatory for judges to report an attorney to the bar when a counsel has been found ineffective. This would correct the many problems created by the current lack of any remedy against the ineffective counsel.[202]

Because of the self-regulating nature of the legal profession, the Model Rules of Professional Conduct already require an attorney to report another attorney for a violation of those Rules.[203] And judges have a similar duty to report violations. Specifically, when a judge has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct, the judge is required to report that attorney.[204] Even if a judge receives information that *indicates* a substantial likelihood that a lawyer has committed a violation of the

199. *Pepaj*, 509 F.3d at 727 (quoting *Lozada*, 19 I. & N. Dec. at 639–40).
200. *Supra* notes 75–79.
201. *Supra* notes 75–79.
202. *Supra* Part II.
203. MODEL RULES OF PROF'L CONDUCT r. 8.3.
204. MODEL CODE OF JUDICIAL CONDUCT r. 2.15.

Rules, he is required to take "appropriate action" against that attorney.[205]

Yet no one seems to be taking upon himself or herself to report attorneys who have violated a client's constitutional Rights. As one scholar noted, "It seems that trial judges and opposing counsel may be ignoring the fact that incompetence is unethical and judge and lawyer alike are equally culpable for not taking steps to report the particular practitioner."[206] Thus, the solution is simply to require judges and attorneys to report the deficient attorney after he is found ineffective. To be sure, the Rules state that the reporting requirement is only applied when an attorney has committed a violation that raises a "substantial question as to that lawyer's . . . fitness as a lawyer."[207] But the official comments clarify that the term "substantial" refers to "the seriousness of the possible offense."[208] And the more serious the offense, the more reason to report the violation.[209]

Now, when an attorney violates a client's Sixth Amendment right under *Strickland*, it is because the court has determined that he has fallen far below any objective level of reasonableness.[210] In fact, in order for there to be ineffective assistance, the attorney must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[211] It follows logically that if counsel has been so deficient to not be functioning as counsel, of course a substantial question arises as to the lawyer's fitness.

I am not suggesting a scheme similar to asylum,[212] where once a claim of ineffective assistance is raised the petitioner is required to

205. *Id*.

206. Kelly, *supra* note 42, at 1094–95 ("Under the Model Code of Judicial Conduct and the Model Rules of Professional Conduct, the judge and the lawyer have a duty to inform the appropriate professional disciplinary authority when either knows that a practitioner is not fit to practice. All of us must be cognizant of our professional duty to assist in and improve the legal system.") (footnote omitted).

207. MODEL RULES OF PROF'L CONDUCT r 8.3.

208. *Id*. cmt. 3.

209. Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 539 (1986) ("The more serious the violation, the more likely it is that people will universally agree that there is a moral duty to report it.").

210. Strickland v. Washington, 466 U.S. 668, 689 (1984).

211. State v. Vance, 790 N.W.2d 775, 785 (Iowa 2010) (quoting *Strickland*, 466 U.S. at 687).

212. *Supra* Section III.C.

report the deficient attorney to the bar, but I am suggesting that after the attorney is actually found ineffective, he should be reported. This could be accomplished by simply requiring the court to instruct the clerk to send a copy of the order to the state bar every time the judge finds an attorney ineffective. Because of the relatively low number of ineffective assistance claims that actually win, this would not be a huge burden on any state bar association. But it would show to both the bar as well as to those claiming ineffective assistance the seriousness of their claim—that the attorney was so incompetent that he was not functioning as counsel.

And if attorneys and judges really understood the seriousness of the claim that they were raising as well as the possible negative consequences against the alleged ineffective attorney, that in turn would have many positive impacts on the judicial system. It would reduce frivolous claims. It would deter attorneys from "falling on their sword." And it would deter ineffective attorneys from continuing to give terrible assistance.[213] In sum, reporting ineffective attorneys would increase society's faith in the judicial system.

VI. CONCLUSION—RAISING THE BAR

It has been stated that "[a]ttorney competence directly affects the fairness of our criminal proceedings."[214] But a system that fails to impose any real repercussions on the attorney who is so ineffective that he is no longer acting as counsel permits society to lose faith in the judicial system itself. However, because of the inherent link between competence, as defined by the ABA Rules, and *Strickland*, simply requiring judges to report constitutionally ineffective attorneys after finding them ineffective presents a workable remedy.

213. *See* People v. Henderson, 776 N.W.2d 906, 907 (Mich. 2010) (Corrigan, J., concurring) ("Further, referral to the AGC in these cases avoids encouraging attorneys to use this Court to correct for their own ineffective representation at the Court of Appeals.").

214. *In re* Hawver, 339 P.3d 573, 591 (Kan. 2014).

Doing so will provide an immediate, positive impact on the system. Ineffective attorneys would either improve or be removed, defendants would be more likely to receive a fair trial, and the general level of skill and competence of practicing attorneys would increase. As a result, the low *Strickland* bar may very well rise.

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