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INEFFECTIVE ASSISTANCE OF COUNSEL – STANDARDS AND REMEDIES

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I. INTRODUCTION

Because of the complexities of the law and the pressures of being faced with prosecution the Supreme Court has long been aware of the need which defendants in criminal cases have for counsel to represent them.¹ The Court has, in fact, recognized the right of an accused to such counsel²—a right which is derived directly from the Constitution. This article will examine the level of representation required by the Constitution and will discuss the various suggestions which have been made to improve the quality of representation received by criminal defendants.

The Constitution declares that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”³ The notion that the Constitution requires something beyond the mere presence of an attorney at the defense table was not established, however, until the Supreme Court decided *Powell v. Alabama*⁴ in 1932. In that case seven young black men were charged with the rape of two young white women in a freight car moving through Alabama. A sheriff’s posse seized the men off the train and took them to Scottsboro, the county seat. Because of hostile community feelings, it was necessary for the state militia to guard the prisoners and to escort them to and from the courthouse. At the defendants’ arraignment the judge appointed all members of the county bar to defend them. When the case came to trial six days later, the only attorney present at the defense table was an out-of-state lawyer who stated that “he had not been employed, but that people who were interested had spoken to him about the case.”⁵ The defendants were found guilty and each was sentenced to death. Their appeals were dis-

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1. *Powell v. Alabama*, 287 U.S. 45 (1932).

2. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3. U.S. CONST. amend. VI.

4. 287 U.S. 45 (1932).

5. *Id.* at 53.

missed by the Alabama Supreme Court with the Chief Justice dissenting.⁶ The United States Supreme Court ruled that, on the facts as presented, the defendants had been denied their right to the effective aid of counsel as required by the due process clause of the fourteenth amendment. The Court held that the mere appointment of counsel for the accused, without more, was a violation of the defendants' due process rights and that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."⁷ The Court later added:

[I]t is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.⁸

Such were the humble beginnings of what has been termed "the emerging fair trial issue for the Seventies."⁹ It is not surprising that some courts had difficulty discerning a broad rule of law from the subtle language of *Powell*. In *Mitchell v. United States*¹⁰ the court held that *Powell* only required the effective appointment of counsel. It stated that the Supreme Court in *Powell* "has not itself undertaken, nor has it imposed upon the inferior federal courts, the duty of appraising the quality of a defense."¹¹ This decision, and others like it,¹² appears to be inconsistent with both the plain meaning of the previously quoted language and subsequent decisions of the Supreme Court. For example, in *Avery v. Alabama*¹³ the Court held that the Constitution's guarantee of assistance of counsel cannot be satisfied by a mere formal appointment. In *White v. Ragen*¹⁴ the Court held that if the petitioner could show that the state had forced him to trial "with such expedition as to deprive him of the effective aid and assistance of counsel," he would be entitled to habeas corpus relief. *Glasser v. United States*¹⁵ not only restated this proposition but further tied the right to effective assistance of counsel to the sixth amendment as well as to the fourteenth. In that case the Court held that the petitioner was denied the effective assistance of counsel because his appointed attorney also represented a co-defendant in the case whose in-

6. *Powell v. State*, 224 Ala. 540, 141 So. 201 (1932).

7. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

8. *Id.* at 71.

9. Flynn, *Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies*, 14 N.Y. Sr. B.J. 19 (1975).

10. 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

11. *Id.* at 790.

12. *Hester v. United States*, 303 F.2d 47 (10th Cir.), cert. denied, 371 U.S. 847 (1962); *Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945); see also Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964).

13. 308 U.S. 444 (1940).

14. 324 U.S. 760, 764 (1945).

15. 315 U.S. 60 (1942).

terests were adverse to those of the petitioner. Thus the Court in *Glasser* did, indeed, "appraise the quality of the defense" by examining the trial record and concluding that the attorney's representation of the petitioner was not effective.¹⁶

II. CONDUCT CONSTITUTING INEFFECTIVE ASSISTANCE

It is a poorly-kept secret within the legal profession that the adequacy of representation in our trial courts is below what it ought to be. Chief Justice Burger has recently stated 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."¹⁷ Chief Judge Bazelon of the District of Columbia Circuit of the United States Court of Appeals has stated that "a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."¹⁸ Despite this recognition that representation of defendants is often inadequate, no definitive standard against which the conduct of attorneys can be measured has been uniformly adopted. Nevertheless, by examining the case law one can begin to recognize certain factual situations where it will usually be found that counsel's representation of defendant was ineffective.

A. Pre-trial Conduct

One of the most successful grounds for overturning a conviction for ineffective assistance of counsel is the lack of adequate pre-trial preparation or investigation of the case.¹⁹ The importance to a proper defense of thorough investigation of the facts and diligent preparation of the case has been recognized since *Powell* where the Court stated:

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts.²⁰

Thus where a possible defense can be shown to have existed which the defendant's attorney did not advance because of lack of preparation or investigation of the facts, a new trial may be ordered.²¹

16. *Id.* at 76. See also Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Case*, 59 NW. U.L. REV. 289, 293 (1965).

17. Address by Chief Justice Warren Burger, *The Special Skills of Advocacy*, Fourth John F. Sonnet Memorial Lecture, Fordham University Law School, Nov. 26, 1973.

18. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

19. Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1086 (1973).

20. *Powell v. Alabama*, 287 U.S. 45, 58 (1932).

21. *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967); *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963); *Tucker v. United States*, 235 F.2d 238 (9th Cir. 1956); *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968).

A failure to investigate the applicable law which results in the neglect of a legitimate defense may also cause the court to award the defendant a new trial on the grounds of ineffective assistance of counsel.²² This failure, however, is not easily discerned because an attorney's ignorance of the law seldom appears in the record. Thus instances of inadequate investigation of the applicable law most frequently are not discovered until an evidentiary hearing on the defendant's habeas corpus petition.²³ The leading case in this area is *People v. Ibarra*.²⁴ In this case the defendant's attorney was not acquainted with the rule of law which allowed a defendant simultaneously to challenge the search's legality while denying a proprietary interest in the premises entered. The court held that this failure of the attorney to research the applicable law reduced the trial to a farce and ordered a new trial. Other cases involving inadequate investigation of the law include *In re Williams*,²⁵ where defendant's attorney did not know the elements of the offense with which the defendant was charged; *Kott v. Green*,²⁶ where the attorney was unacquainted with the rules of admissibility of the defendant's prior confessions; and *Wilson v. Reagan*,²⁷ where the attorney was unaware that the trial judge had the authority to sentence the defendant to probation and thus did not request it.

There are two other categories of cases involving pre-trial attorney conduct. The first category involves cases where the adequacy of the attorney's consultations with the defendant is questioned.²⁸ The popularity of this claim is at least partially due to the fact that the Supreme Court in *Powell v. Alabama* pointed out the importance of adequate consultation.²⁹ A finding that an attorney's assistance has been ineffective on this ground must be supported by a showing that adequate consultation would have led to the discovery of a defense. This was implicitly established by the Supreme Court in the often-criticized decision of *Chambers v. Maroney*.³⁰ In *Chambers* a legal services attorney did not speak to the defendant until the morning of the defendant's trial. The Court held that to be entitled to relief a defendant must show how the inadequate consultation prejudiced his case.

The final category of cases involving pre-trial attorney conduct consists of cases where the defendant has pleaded guilty upon the advice of his attorney. It has been said that the damaging effects of ineffective

22. *Finer*, *supra* note 19.

23. *Id.*

24. 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); *see also* *Saltys v. Adams*, 465 F.2d 1023 (2d Cir. 1972).

25. 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).

26. 303 F. Supp. 821 (N.D. Ohio 1968).

27. 354 F.2d 45 (9th Cir. 1965).

28. *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962); *Bentley v. Florida*, 285 F. Supp. 494 (S.D. Fla. 1968).

29. 287 U.S. 45, 53 (1932).

30. 399 U.S. 42 (1970).

assistance of counsel are extremely great in this area.³¹ These claims are particularly difficult because there are no records kept of a defense attorney's discussions with the prosecuting attorney about possible dispositions of the case. Another complication is that courts are reluctant even to examine the "plea bargaining" process and generally are unsympathetic to a defendant's claim that he should have received a lighter sentence. Therefore, an attorney who engages in plea bargaining on behalf of his client must possess a high degree of skill both in assessing his client's chances for acquittal and in the art of negotiating. A lawyer who does not have these skills risks doing his client great harm.

The Supreme Court has held that a defendant who has pleaded guilty can attack his conviction on the ground that his guilty plea was not voluntarily made.³² Thus the claim of ineffective assistance of counsel must be directed toward whether the attorney's advice to plead guilty was so erroneous that the plea was not voluntary.³³ "The fact that the plea must be the product of an understanding and uncoerced act inevitably brings into consideration the caliber of defense counsel's representations."³⁴ The two most frequent errors committed by attorneys in the plea bargaining process which have been held to constitute ineffective assistance are the misrepresentation of an offered agreement with the prosecutor and advice based upon ignorance of the facts or law of a case.³⁵

The courts have consistently held that a general statement by an attorney such as "the court will be more lenient with you if you plead guilty" does not constitute a misrepresentation which would render an otherwise valid guilty plea invalid because it was not voluntarily made.³⁶ On the other hand, courts have invalidated convictions because of involuntary guilty pleas where an attorney has made a promise of a specific disposition of a case without express assurances of such a disposition by the prosecutor.³⁷ In *United States ex rel. Thurmond v. Mancusi*³⁸ the court stated that a defendant may withdraw his guilty plea where it was shown that the defendant's attorney promised a suspended sentence but instead the sentence was for two and one-half to five years. This principle is not uniformly applied, however. For example, in *United States v. Weese*³⁹ the defendant was sentenced to a year and a day in prison. The court refused to allow the withdrawal of the guilty plea in spite of de-

31. Comment, *Effective Assistance of Counsel in Plea Bargaining: What is the Standard?*, 12 DUQUESNE L. REV. 321 (1973).

32. *Boykin v. Alabama*, 395 U.S. 238 (1969).

33. *Brady v. United States*, 397 U.S. 742 (1970).

34. Comment, *supra* note 31, at 324.

35. *Id.*; see also *Finer, supra* note 19.

36. See, e.g., *Thomson v. Huff*, 149 F.2d 842 (D.C. Cir. 1945).

37. *State v. Tunender*, 182 Neb. 701, 157 N.W.2d 165 (1968); see also Note, *Guilty Plea Bargaining: Compromise By Prosecutions to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 890 (1964).

38. 275 F. Supp. 508 (E.D.N.Y. 1967).

39. 145 F.2d 135 (2d Cir. 1944).

fendant's contention that his attorney had assured him that he would receive a suspended sentence.

Another error made by attorneys which often leads courts to invalidate guilty pleas is advising a client to plead guilty without an adequate understanding of the law or facts involved in the case.⁴⁰ Thus where an attorney advised his client to plead guilty to a forgery charge but the defendant could have been prosecuted only for misuse of credit cards (which carried a lesser penalty), ineffective assistance was found.⁴¹ Similarly, where a defendant's attorney overestimated the possible sentence the defendant might receive if he did not plead guilty by a factor of six, ineffective assistance was found.⁴²

Defendant may also seek to withdraw his guilty plea in other types of cases involving erroneous attorney advice. In *United States ex rel. Scott v. Mancusi*⁴³ the court refused to find ineffective assistance of counsel in spite of an attorney's erroneous advice that his client could withdraw a guilty plea unilaterally—state law requiring the trial judge's approval of such withdrawal.

B. Trial Conduct

Claims of ineffective assistance of counsel involving attorney conduct at the trial itself are perhaps the most frequently made and the least successful of all ineffective assistance claims.⁴⁴ Courts are extremely reluctant to second-guess an attorney's motives for doing or not doing something at trial and usually dismiss these claims unless there appears to be no reasonable justification for the attorney's acts. For example, in *Williams v. Beto*⁴⁵ the defendant's attorney did not make any objections during the entire trial. The court dismissed this as a "trial tactic" observing that there was little objectionable material in the record and "he who often objects, only to have his objections over-ruled, risks alienating the jury."⁴⁶ In *Barba-Reyes v. United States*⁴⁷ the defendant was found with ninety pounds of marijuana under the back seat of his car by a customs agent. His attorney did not file a motion to suppress even though the car was searched without a warrant seventy miles north of the Mexi-

40. *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968).

41. *In re Williams*, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).

42. *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972). In this case the defendant's attorney agreed to advise his client to plead guilty in return for the prosecutor dropping five counts of a six-count indictment. However, the five counts dropped were clearly invalid and unenforceable and the defendant pleaded guilty to the one valid count.

43. 429 F.2d 104 (2d Cir. 1970).

44. Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1435 (1965). See also *United States v. Sobell*, 142 F. Supp. 515, 529 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957); *Bowen v. United States*, 192 F.2d 515, 517 (5th Cir. 1951), *cert. denied*, 343 U.S. 943 (1952); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1536 (1963).

45. 354 F.2d 698 (5th Cir. 1965).

46. *Id.* at 703.

47. 387 F.2d 91 (9th Cir. 1967).

can border. The court said that this was a "trial tactic" and it "decline[d] to indulge in speculation in an effort to make plain that which is not discernible in the record."⁴⁸

Because of the small amount of information which can be gathered from a trial record, most courts will not question tactical decisions made by a defendant's attorney as long as there might be a rational reason for his decision.⁴⁹ Thus courts have overlooked the absence of an opening statement because the attorney might not have wanted to commit himself to a particular defense⁵⁰ and have overlooked the absence of cross-examination of witnesses because there was no indication that it clearly would have been advantageous.⁵¹

In cases where the performance of the attorney at trial is consistently poor and this fact is amply demonstrated by the available record, the courts have found that defendants have been deprived of effective assistance of counsel. An example of this situation is found in *People v. DeSimone*.⁵² In this case the defendants' appointed attorney told the jurors during voir dire that the defense had the burden of proving the defendants were insane at the time of the murder. The attorney elicited testimony from witnesses at trial which tended to show the sanity of the defendants, and the judge had to stop the attorney from introducing documentary proof of sanity. The attorney was unable to formulate a proper hypothetical question for a psychiatrist, so he gave up. In addition, he made no objections throughout a 2,250 page record despite the introduction of much inadmissible evidence including statements made by the defendants. Finally, the attorney informed the jury, both during voir dire and opening statement, of numerous prior arrests of the defendants.

Two other examples of attorney conduct at trial clearly constituting ineffective assistance of counsel are *Brooks v. Texas*⁵³ and *United States v. Burks*.⁵⁴ In *Brooks*, because of overwhelming evidence of guilt, the defendant's only possible defense was insanity. Defendant had been civilly committed at least three times in the two years immediately preceding the crime, and he had twice attempted suicide during that period. The prosecutor had the defendant examined by a psychiatrist and the report of this examination contained much information which would have tended to establish insanity. Despite all this, however, the defendant's attorney did not raise insanity as a defense. In addition, the attorney allowed the defendant to be tried while handcuffed and in his jail uniform. In

48. *Id.* at 93.

49. Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963); see also *United States ex rel. Weber v. Ragen*, 176 F.2d 579 (7th Cir.), cert. denied, 338 U.S. 809 (1949).

50. *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965).

51. *Frand v. United States*, 301 F.2d 102 (10th Cir. 1962); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

52. 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

53. 381 F.2d 619 (5th Cir. 1967).

54. 470 F.2d 432 (D.C. Cir. 1972).

Burks the defendant's attorney failed to seek discovery under Federal Rule of Civil Procedure 16 (a), could not tell the difference between impeaching a witness by a prior statement and refreshing his recollection, and tried to introduce defense exhibits during the prosecution's case. Also, the attorney did not know how to introduce character evidence and did not request instructions to the jury as to lesser included offenses as he thought the judge would automatically include these instructions.

Most ineffective assistance cases are not so clear-cut. An attorney may make only one or two errors or engage in questionable trial tactics or the record may be insufficient to determine just what he did or why. As a result most cases are decided on the particular facts involved. Nevertheless, over the last forty years trends in the area of ineffective assistance of counsel involving trial conduct have emerged.

Where blacks have been systematically excluded from a black defendant's jury and no challenge is made to the jury's composition,⁵⁵ claims of ineffective assistance of counsel have been upheld. No independent showing of prejudice need be made since a presumption of prejudice appears to be applied. The reasons for the more favorable treatment of these particular claims are not articulated by the courts. Possible explanations might be the historical deference which courts have given to attempts to counter racial discrimination and the reluctance of appointed counsel to antagonize a trial judge by challenging the racial composition of a jury.

Another area of trial conduct where claims of ineffective assistance have been successfully raised encompasses cases where the attorney fails to object to clearly inadmissible and prejudicial testimony.⁵⁶ If such claims are to be successful the defendant must be able to demonstrate both the inadmissibility of the evidence and substantial prejudice flowing from its admission. In *People v. Blevins*⁵⁷ two inexperienced defense attorneys were pitted against an experienced prosecutor and his three privately-retained assistants. As a result the prosecutors succeeded in getting the defendant to admit his participation in two prior crimes although no convictions resulted therefrom. The Illinois appellate court admonished the trial judge for not cutting off this questioning and ordered a new trial.

A third category of ineffective assistance claims involves cross-examination of witnesses at trial. Although the failure of an attorney to cross-examine witnesses has never been found to be ineffective assistance itself,⁵⁸ one court has said that it is one factor which may be looked at in con-

55. *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), cert. denied, 361 U.S. 850 (1959).

56. *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963); *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

57. 251 Ill. 381, 96 N.E. 214 (1911).

58. *Finer*, *supra* note 19.

junction with other factors.⁵⁹ However, where a defense attorney damages his client through his own cross-examination, a claim of ineffective assistance will be upheld. In *People v. Nitti*⁶⁰ a mother and her son were tried for the murder of the mother's husband. At trial the mother's attorney asked one of her other sons on cross-examination whether he loved his mother. When he answered in the negative and the attorney further inquired why, the boy replied, "because she killed my father."⁶¹ Despite the repeated efforts of the trial judge to caution the defendant's attorney, more damaging testimony was elicited on cross-examination. The Illinois Supreme Court found itself compelled to order a new trial for the defendants as a result of their attorney's ineffective assistance.

In another Illinois case⁶² in which ineffective assistance was found the defense attorney allowed the prosecutor to cross-examine the defendant as to alleged fraud in business dealings, abandonment of his family, and an adulterous relationship. The court noted that the cross-examination covered thirty pages of trial transcript and at least half the examination was irrelevant to the charge of manslaughter on which the defendant was being tried.

Unlike the failure to make an opening statement,⁶³ the failure to make a closing argument or making one which is clearly perfunctory has been found to constitute ineffective assistance.⁶⁴ The rationale for this difference appears to be that there is no logical reason for waiving closing argument. As in the failure to challenge the racial composition of the jury, a presumption of prejudice appears to be applied. This presumption seems justified by the difficulty the defendant would have in trying to establish prejudice to his case from the attorney's omission.

A fifth type of trial conduct where claims of ineffective assistance are often made and upheld is the failure of the defendant's attorney to request jury instructions to which the defendant is entitled.⁶⁵ In *Banks v. United States*,⁶⁶ the defendant was tried for the purchase of heroin. He contended, however, that the "buy" was made at the urging of federal narcotics agents and was made with money supplied by them. His attorney advised him to admit making the purchase, but he failed to request an instruction on entrapment. The court held this to be ineffective assistance. However, this is another area, in which the "trial tactics" doctrine is used by the courts to deny relief to petitioners. In *State v. Fulford*⁶⁷ there was no ineffective assistance of counsel found where, in a trial for

59. *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

60. 312 Ill. 73, 143 N.E. 448 (1924).

61. *Id.* at 453.

62. *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922).

63. *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965).

64. *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971); *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959).

65. *People v. Georgev*, 38 Ill. 2d 165, 230 N.E.2d 851 (1967), *cert. denied*, 390 U.S. 998 (1968).

66. 249 F.2d 672 (9th Cir. 1957), *cert. denied*, 358 U.S. 886 (1958).

67. 290 Minn. 236, 187 N.W.2d 270 (1971).

second-degree murder, the defendant's attorney requested a self-defense instruction and thereby waived a "heat of passion" instruction which might have reduced the conviction to manslaughter.⁶⁸ The court said that the attorney had made a rational tactical decision to try to get his client acquitted completely.

A final area where courts have found the acts of defense attorneys at trial to constitute ineffective assistance encompasses claims where the attorney represents interests which conflict with those of his client. This most frequently occurs where two or more persons are being tried for a certain crime and are being represented by the same attorney.⁶⁹ If one defendant has made statements implicating another defendant in the crime, the attorney is representing conflicting interests.⁷⁰ The Supreme Court has recently eliminated the presumption of prejudice in this area and now requires the defendant to show how his attorney's conflict of interest has prejudiced his case—at least in cases where the defendant has pleaded guilty.⁷¹ This seems to be an unduly harsh burden for the defendant to bear in a situation where his attorney should not have undertaken his defense in the first place.⁷²

C. Post-Trial Conduct

Claims of ineffective assistance involving post-trial attorney conduct which are frequently made and upheld concern the defense attorney's failure to exercise the defendant's right to appeal. It most often arises where the attorney fails to inform his client of his right to appeal a conviction⁷³ or where the client instructs his attorney to appeal the case but the attorney fails to follow his client's instructions.⁷⁴ A less frequent claim is that the attorney informed his client of his right to appeal and did try to file an appeal but was incapable of following the correct appellate procedure. This was the case in *State v. Thomas*,⁷⁵ where the attorney failed to assign grounds in a motion for a new trial and failed to file a timely notice of appeal, and in *McAuliffe v. Rutledge*,⁷⁶ where the appeal was dismissed because the attorney failed to obtain an extension of time for filing the trial transcript with the appellate court. It has been argued

68. Although the court is required to give general instructions on the issues without request from counsel, attorneys are often expected to request instructions favorable to their client, particularly where there has been little or no evidence presented on the issue raised by the proposed instruction. See Annot., 56 A.L.R.2d 1170 (1957) on the duty of the trial court to instruct the jury on the issue of self-defense.

69. *Glasser v. United States*, 315 U.S. 60 (1942).

70. *Id.*

71. *Dukes v. Warden*, 406 U.S. 250 (1972); but see *Ray v. Rose*, 491 F.2d 285 (6th Cir.), cert. denied, 417 U.S. 936 (1974).

72. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5, EC 5-15 states: "A lawyer should never represent in litigation multiple clients with differing interests . . ."

73. *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967).

74. *Coffman v. Bomar*, 220 F. Supp. 343 (M.D. Tenn. 1963).

75. 203 S.E.2d 445 (W. Va. 1974).

76. 231 Ga. 745, 204 S.E.2d 141 (1974).

that a new trial is unnecessary in these cases and that all that is needed is a rule which will permit the appellate courts to hear the defendant's appeal.⁷⁷ Such a view seems reasonable as long as provision is made for the appointment of a different attorney to represent the defendant on his appeal.

D. General Competence of the Attorney

In cases involving claims of ineffective assistance the courts' concern is with the quality of assistance provided in the case at issue and not with the overall competence of the attorney. This seems to be the reason why courts are not at all receptive to allegations of ineffectiveness because of the physical or mental condition of the attorney in question. Those petitioners who allege ineffective assistance based merely on the physical or mental condition of their attorney seem to confuse the "effective assistance of counsel" with the "assistance of effective counsel." Thus courts routinely deny relief to petitioners who claim that their attorneys were too young,⁷⁸ were mentally unbalanced,⁷⁹ were addicted to narcotics,⁸⁰ were physically ill,⁸¹ or were intoxicated during the trial.⁸² In *Hudspeth v. McDonald*⁸³ the court stated:

The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or lesser degree during the whole trial. But what of it? Appellee employed him; he paid him a substantial fee, and had a right to his services if he desired them, even though he might have been under the influence of intoxicants.⁸⁴

III. STANDARDS OF PERFORMANCE

The predominant reason the courts have been unable to reach consistent results in the area of ineffective assistance is the lack of a workable standard by which to measure the conduct of defense attorneys. Only in the past ten years have the courts attempted to remedy this problem by defining just what does and does not constitute ineffective assistance of counsel. For many years after *Powell v. Alabama*⁸⁵ courts either did not apply any standard in assessing an attorney's performance or applied a standard phrased in fourteenth amendment "due process" terms of a

77. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973).

78. *Spaulding v. United States*, 279 F.2d 65 (9th Cir.), cert. denied, 364 U.S. 887 (1960); see also Comment, *Quality of Counsel in Criminal Cases*, 8 ARK. L. REV. 484 (1954).

79. *Hagan v. United States*, 9 F.2d 562 (8th Cir. 1925).

80. *United States v. Butler*, 167 F. Supp. 102 (E.D. Va. 1957), aff'd 260 F.2d 574 (4th Cir. 1958).

81. *People v. Schiers*, 160 Cal. App. 2d 364, 324 P.2d 981 (2d Dist. 1958), rev'd on other grounds, 19 Cal. App. 3d 102, 96 Cal. Rptr. 330 (2d Dist. 1971).

82. *People v. Gourdin*, 108 Cal. App. 333, 291 P. 701 (2d Dist. 1930).

83. 120 F.2d 962 (10th Cir.), cert. denied, 314 U.S. 617 (1941).

84. *Id.* at 967.

85. 287 U.S. 45 (1932).

deprivation of a fair trial.⁸⁶ The Supreme Court used such a standard in *Betts v. Brady*⁸⁷ where it stated that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right."⁸⁸ This vague test is still in use in some jurisdictions today, but most have abandoned it for other tests.⁸⁹

After the "fair trial" standard was abandoned, most courts moved to the rule that counsel has provided ineffective assistance if his representation was such "as to make the trial a farce, a sham or a mockery of justice."⁹⁰ This standard imposes a heavy burden on defendants and seems somewhat inconsistent with *Betts v. Brady* because a trial may be unfair yet not be farcical. It is also a vague test which can be and which has been applied inconsistently by the courts. This results partly from the fact that courts applying the "farce and mockery" test do not apply it literally.⁹¹ For these reasons and others, this standard has been uniformly criticized by the commentators. One commentator has stated that this standard "seem[s] to be utilized as appropriate language, though largely devoid of substance, so as to rationalize the result rather than as a basis of reaching the result."⁹² Similarly, another has noted that "really these are not standards at all. They are so much circular verbiage designed to conceal the completely subjective determinations made by the reviewing courts."⁹³ Chief Judge Bazelon of the District of Columbia Circuit has simply stated that this standard "is itself a mockery of the sixth amendment."⁹⁴

Efforts by the courts to clarify the "farce and mockery" standard have not succeeded. One proposed "clarification" is "the presence or absence

86. *People v. Nowak*, 372 Ill. 391, 24 N.E.2d 50 (1939); *State v. Keller*, 57 N.D. 645, 223 N.W. 698 (1929).

87. 316 U.S. 455 (1942).

88. *Id.* at 473.

89. *See, e.g., Hall v. State*, 496 S.W.2d 300, 303 (Mo. App., D. St. L. 1973), where the court stated that "[t]he ultimate test is whether the efforts and representation of the attorney have reached a level of adequacy so that the defendant has had a 'fair trial' . . ."

90. *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967), quoting Palmer, *Incompetency and Inadequacy of Counsel as a Basis for Relief in Habeas Corpus Proceedings*, 20 Sw. L.J. 136, 138 (1966).

91. *See, e.g., McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974).

Stringent as the 'mockery of justice' standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the 'mockery of justice' standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness.

Id. at 214. *See also United States v. Hager*, 505 F.2d 737 (8th Cir. 1974).

92. Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 300 (1973).

93. Lee, *Right to Effective Counsel: A Judicial Huristic*, 2 AM. J. CRIM. L. 277, 289 (1974).

94. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973).

of judicial character in the proceedings as a whole."⁹⁵ Another is "a total failure to present the defendant's cause in any fundamental respect."⁹⁶ A third "clarification" is "that which amounts to no representation at all."⁹⁷ It can be readily seen that these are not improvements on the "farce and mockery" standard either from the standpoint of clarity or of constitutionality.

Recently many courts have reacted to this criticism by abandoning the "farce and mockery" standard.⁹⁸ They have been largely left without the guidance of the Supreme Court in this endeavor. A test which was first developed by the Fifth Circuit in 1961 is "counsel reasonably likely to render and rendering reasonably effective assistance."⁹⁹ This test has recently been adopted by the Sixth Circuit,¹⁰⁰ Ninth Circuit,¹⁰¹ and the California state courts.¹⁰² The District of Columbia Circuit also has adopted a very similar standard. Thus in *United States v. DeCoster*¹⁰³ it was stated that: "[a] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."¹⁰⁴ This test was supplemented by guidelines setting forth some of the duties owed by counsel to his client.¹⁰⁵ Although the "reasonableness" test is constitutionally an improvement over the "farce and mockery" standard, it is still too vague to provide the courts with sufficient guidance or to lead to more consistent results.

An improvement on the Fifth Circuit test was first announced by the Third Circuit in *Moore v. United States*.¹⁰⁶ That court stated that "the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency."¹⁰⁷ This test would compare an attorney's performance with that of other attorneys, thus introducing the tort concepts of due care, community standards, and customary skill and knowl-

95. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

96. *Jones v. Huff*, 152 F.2d 14, 15 (D.C. Cir. 1945).

97. *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957).

98. This standard has not been totally abandoned by the federal courts. See, e.g., *United States v. Hager*, 505 F.2d 737 (8th Cir. 1974); *United States v. Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *Moran v. Hogan*, 494 F.2d 1220 (1st Cir. 1974); *Johnson v. United States*, 485 F.2d 240 (10th Cir. 1973). With *Moran compare* *Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974), *cert. denied*, 421 U.S. 1003 (1975), and *Karger v. United States*, 388 F. Supp. 595 (D. Mass. 1975).

99. *McKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). See also *Bursten v. Caldwell*, 506 F.2d 24 (5th Cir.), *cert. denied*, 421 U.S. 990 (1975); *United States v. Beasley*, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924 (1973).

100. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

101. *United States v. Elksnis*, 528 F.2d 236 (9th Cir. 1975).

102. *People v. Strawder*, 34 Cal. App. 3d 370, 108 Cal. Rptr. 901 (1973).

103. 487 F.2d 1197 (D.C. Cir. 1973).

104. *Id.* at 1202.

105. *Id.* at 1203-4.

106. 432 F.2d 730 (3rd Cir. 1970).

107. *Id.* at 737. See also *United States v. Hines*, 470 F.2d 225 (3rd Cir. 1972),

edge.¹⁰⁸ It is a radical departure from the earlier tests as it focuses directly on the attorney's performance.¹⁰⁹ It further presumes that a defendant who was represented by an attorney who was negligent (in the tort sense of that word) cannot have had a fair trial. This test has received critical approval and has been adopted by several state courts with certain improvements.¹¹⁰ The most significant improvement is the addition of the words "of criminal lawyers." This improvement assures that an attorney must perform at the level of the reasonably competent criminal lawyer¹¹¹ and places a greater burden on newly admitted bar members and on "office practitioners" who are appointed to represent indigent defendants.

The most specific standard which has been adopted to replace the "farce and mockery" test is based upon the *American Bar Association Standards Relating to the Administration of Criminal Justice*.¹¹² It lists specific duties and guidelines for defense attorneys. These guidelines provide that:

- (1) an attorney must confer with his client as early as possible and as often as necessary,
- (2) he must advise his client of the charges against him and of his rights,
- (3) he must ascertain and develop all appropriate defenses,
- (4) he must conduct all necessary investigations, and
- (5) he must allow time for reflection and preparation.¹¹³

They have been adopted as a minimum standard for effective assistance of counsel in three jurisdictions. The Fourth Circuit was the first jurisdiction to adopt them.¹¹⁴ Its lead was followed by the District of Columbia Circuit¹¹⁵ and by the Wisconsin Supreme Court.¹¹⁶ A standard based on specifically outlined duties and guidelines is not only more fair to the defendant but is also more fair to the defense attorneys who are on notice as to what they must do to avoid successful attacks on their assistance. In addition, it incorporates much of the existing case law and puts it in a framework that will provide more consistent results than those obtained under other tests.

The use of a court-fashioned standard to determine whether counsel has provided defendant with inadequate assistance implies that not all

cert. denied, 410 U.S. 968 (1973).

108. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

109. The test adopted by the Seventh Circuit is somewhat similar. In *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975), the court stated: "We now hold that the constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation."

110. *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

111. *Jackson v. Warden, Nevada State Prison*, 537 P.2d 473 (Nev. 1975); *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Thomas*, 203 S.E.2d 445 (W. Va. 1974).

112. ABA STANDARDS, THE DEFENSE FUNCTION (1971).

113. *Id.*

114. *Colos v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

115. *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973). See notes 103-105 and accompanying text *supra*.

116. *State v. Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973).

errors made by defense counsel render his aid so ineffective as to violate defendant's constitutional rights.¹¹⁷ Because the right to effective assistance of counsel is guaranteed by the Constitution, one might argue that the state should have the burden of proving that any errors committed by defendant's counsel were harmless beyond a reasonable doubt.¹¹⁸ This would require a showing that the error did not contribute to defendant's conviction. However, no court initially places this burden on the state. Instead courts require that defendant show that any errors committed resulted in counsel's performance falling below the standard for effective assistance in that jurisdiction. In addition, many courts require that defendant show that his attorney's errors substantially prejudiced the outcome of his case.¹¹⁹ In *McQueen v. Swenson*¹²⁰ the Eighth Circuit stated that a two-step process should be employed in evaluating claims of ineffective assistance of counsel. First, the court must determine whether counsel has failed to perform some essential duty owed to his client. In making this determination the stage of the process where the error occurred must be considered. Second, the court must determine whether counsel's failure resulted in prejudice to the criminal defendant.¹²¹

In most jurisdictions the standard of performance required of attorneys in plea bargaining situations is the same as that required in trial situations.¹²² A few courts, however, have imposed different (and less stringent) standards on an attorney involved in plea bargaining for his client.¹²³ In *Lamb v. Beto*¹²⁴ the Fifth Circuit held that the only duty of an attorney in guilty plea situations is to ascertain whether the plea is entered voluntarily and knowingly. In *Winters v. Cook*¹²⁵ the district court said that "more is required of an attorney where the plea is not guilty and the case goes to trial than in the case of a guilty plea."¹²⁶ In *McMann v. Richardson*¹²⁷ the Supreme Court adopted its own standard for guilty plea cases. This standard bears a resemblance to the Third

117. Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

118. *Chapman v. California*, 386 U.S. 18 (1967); *Fahy v. Connecticut*, 375 U.S. 85 (1963).

119. *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *United States v. Re*, 336 F.2d 306 (2d Cir. 1964); *Taylor v. United States*, 332 F.2d 918 (8th Cir. 1964); *Mace v. State*, 452 S.W.2d 130 (Mo. 1970).

120. 498 F.2d 207 (8th Cir. 1974).

121. Baylard, *Ineffectiveness of Counsel—The Duty to Make a Reasonable Pretrial Investigation*, 40 MO. L. REV. 369 (1975).

122. *Burnside v. Sigler*, 329 F. Supp. 1257 (N.D. Neb. 1971), *rev'd on other grounds*, 451 F.2d 987 (8th Cir. 1971); *Morris v. United States*, 315 F. Supp. 1016 (N.D. Ga. 1970). See also Comment, *Effective Assistance of Counsel in Plea Bargaining: What is the Standard?*, 12 DUQUESNE L. REV. 321 (1973).

123. Missouri appears to apply a different test in the case of guilty pleas. *State v. Garrett*, 510 S.W.2d 203 (Mo. App., D. St. L. 1974).

124. 423 F.2d 85 (5th Cir. 1970).

125. 333 F. Supp. 1033 (N.D. Miss. 1971), *rev'd on other grounds*, 466 F.2d 1393 (5th Cir. 1973), *aff'd on rehearing*, 489 F.2d 174 (5th Cir. 1973).

126. *Id.* at 1041.

127. 397 U.S. 759 (1970).

Circuit standard which is derived from the *Restatement (Second) of Torts* § 299A. The Court described this standard in *McMann* as follows:

whether a plea of guilty is unintelligent, and, therefore, vulnerable . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.¹²⁸

The Court thus recognized that competent advice is necessary for a voluntary and intelligent guilty plea. Shortly after the Supreme Court's decision, the Second Circuit, exhibiting its traditional hostility towards claims of ineffective assistance of counsel, added as a requirement of reversal in cases involving a guilty plea that defendant show that he would not have pleaded guilty if the erroneous advice had not been given.¹²⁹ This holding not only removes the focus of attention from the attorney's conduct, but it also ignores the basic fact that a defendant in a criminal case is wholly dependent on his attorney. He is incapable of making reasonable judgments unless he is competently advised.¹³⁰ Fortunately, other courts have not followed the Second Circuit in adding this requirement.

Until recently claims of ineffective assistance in the case of a privately retained lawyer were seldom successful. Two basic theories were employed to defeat these claims. The first theory used to deny relief stated that because the attorney is the defendant's agent, the defendant is bound by the acts and omissions of his counsel.¹³¹ The second theory denied relief on the grounds that there has been no state action which has deprived the defendant of a fair trial.¹³² According to the second theory, state action is only present where a responsible official of the state such as the judge, prosecutor, or other law enforcement officer is connected with the rejection or interference with the defendant's right

128. *Id.* at 771.

129. *United States v. Welton*, 439 F.2d 824 (2d Cir. 1971).

130. *Powell v. Alabama*, 287 U.S. 45 (1932).

131. *Hendrickson v. Overlade*, 131 F. Supp. 561 (N.D. Ind. 1955); *Prince v. State*, 461 S.W.2d 413 (Tex. Crim. App. 1970); *People v. Fryson*, 36 Misc. 2d 73, 232 N.Y.S.2d 224 (Sup. Ct. 1962).

This theory has been attacked on the basis that if an attorney cannot waive his client's right to a fair trial, he cannot waive his right to the effective assistance of counsel. *Glasser v. United States*, 315 U.S. 60 (1952). Therefore, the defendant should not be bound by any acts or omissions of the attorney which rise to the level of ineffective assistance. Another criticism of this theory is that it is grossly unfair. As one commentator has pointed out:

[T]he agency theory . . . hardly seems consistent with contemporary constitutional doctrine which holds that no unrepresented defendant can be presumed to have received a fair trial because of the complexity of criminal law and because of the psychological anxiety of being in jeopardy.

Flynn, *Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies*, 14 N.Y. St. B.J. 19 (1975).

132. *Darcy v. Handy*, 203 F.2d 407 (3rd Cir. 1953); *United States ex rel. Wilkins v. Banmiller*, 205 F. Supp. 123 (E.D. Pa. 1962); *People v. Hernandez*, 8 N.Y.2d 345, 170 N.E.2d 673, 207 N.Y.S.2d 668 (1960).

to assistance of counsel.¹³³ This theory has been used to defeat claims of ineffective assistance in the case of both a retained and appointed attorney.¹³⁴ However, it poses greater difficulty in the case of a retained attorney because a presumption that a privately-retained attorney has protected his client's rights is applied.¹³⁵ The state action theory fails to recognize that state action is present simply because the state is the agency responsible for the trial and incarceration of the defendant. Since only the government can conduct criminal prosecutions, state action exists if during the prosecution the defendant is denied his rights to due process and effective assistance of counsel guaranteed by the fourteenth and sixth amendments. These theories are of decreasing importance, however, because a growing majority of courts now treat ineffective assistance claims involving retained counsel and appointed counsel alike.¹³⁶

IV. REMEDYING INEFFECTIVE ASSISTANCE

A. *Retrospective Remedies*

There are two general categories of remedies for ineffective assistance claims. The first category consists of those actions which an aggrieved defendant, himself, might take. Within this category are three "retrospective" remedies. Defendant may attempt to have his conviction overturned on the grounds of ineffective assistance, he may sue his lawyer for malpractice, or he may ask that the ABA institute disciplinary proceedings against his attorney. All of these actions have serious limitations. The latter two remedies, especially, are of limited use because they do not accomplish defendant's fundamental objective—they fail to provide him with a new trial.

The weaknesses of the first remedy are obvious. Before defendant's conviction will be reversed on the grounds of ineffective assistance he must first show that his attorney's conduct fell below the required standard of performance and that this fact substantially prejudiced his case. Defendant also must show that his attorney's errors were made from ignorance and not as some form of "trial tactics." This places a burden on defendants which many will be unable to meet. In addition, because the burden is on the defendant to initiate this proceeding, many defendants who are entitled to a new trial but who are ignorant of this fact will never receive the benefit of effective counsel.

Two problems with a malpractice suit as a remedy, other than its failure to provide the defendant with a new trial, are lack of knowledge

133. *Malone v. Alabama*, 514 F.2d 77 (5th Cir. 1975); *People v. Tomaselli*, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960).

134. See cases cited note 133 *supra*.

135. *Malone v. Alabama*, 514 F.2d 77 (5th Cir. 1975).

136. See cases cited in Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 312-13 (1973). See also *Blanchard v. Brewer*, 429 F.2d 89 (8th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971); *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2d Cir. 1967); *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966); *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954); *People v. Lathrom*, 192 Cal. App. 2d 216, 13 Cal. Rptr. 325 (1961); *Abraham v. State*, 91 N.E.2d 358 (Ind. 1950).

of the existence of the remedy and the traditionally hostile attitudes of courts to malpractice claims. The fact that there are no clear standards in most jurisdictions by which to measure the attorney's conduct also is a problem.¹³⁷ As one commentator has noted, "when standards that clearly articulate counsel's duty to his client are developed, such suits may become more practical, but whatever it may become, this form of action is not at all significant now."¹³⁸

The third remedy, disciplinary action by the ABA, also has significant weaknesses. First, as with the other remedies, clients may not be aware of it; they may not know about the existence of the ABA or its functions. Second, the *ABA Standards Relating to the Administration of Criminal Justice*¹³⁹ are purely advisory. In any disciplinary proceeding only the vague guidelines of Canons 6 and 7 of the *Code of Professional Responsibility* will be applied. Even where the Canons clearly have been violated, the courts are often extremely lenient with the offending attorneys. For example, in the case of *In re Eldredge*¹⁴⁰ a member of the Missouri bar admitted violating an ABA disciplinary rule. The attorney had been appointed by the Eighth Circuit to represent a defendant on a habeas corpus appeal. However, he had failed to file a timely brief, failed to give the defendant a copy of it when the defendant asked for one, failed to file a petition for certiorari with the supreme court, and failed to meet with the defendant or answer the defendant's letters. The Eighth Circuit struck the attorney's name from the roll of attorneys authorized to practice before it. The Missouri Supreme Court refused to do more than issue a reprimand. This case demonstrates that even though this remedy is theoretically available, it may not lead to the desired result.¹⁴¹ In addition, even if strong action is taken, the defendant has received no benefit.

B. PROSPECTIVE REMEDIES

Included in the second category of remedies for ineffective assistance claims are prospective actions which the courts and society might take to reduce the incidence of inadequate representation and to increase the consistency and equity of results reached. The first such remedy is to change the rules of law applied in proceedings attacking convictions based upon ineffective assistance of counsel. Such changes not only would increase the likelihood that defendant has had a fair trial but also would act as a deterrent by increasing the frequency of successful claims.

137. Unless a jurisdiction has adopted the "reasonably competent attorney" test or a test based on specific guidelines, in most malpractice actions an attorney need only show compliance with the vague standards provided in Canons 6 and 7 of the Code of Professional Responsibility.

138. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

139. ABA STANDARDS, THE DEFENSE FUNCTION (1971).

140. 530 S.W.2d 221 (Mo. En Banc 1975).

141. This remedy is made even more impractical by the fact that in many jurisdictions grievances against attorneys are initially investigated by local grievance committees whose members may know the attorney involved.

One proposed change in the applicable rules of law is to require the state to show beyond a reasonable doubt that no prejudice has resulted when the defendant has made a *prima facie* showing of ineffective assistance.¹⁴² This would seem to be the proper course in light of the language of several Supreme Court opinions.¹⁴³

A second proposed change is to alter the standard used in weighing the effectiveness of an attorney's assistance. One test which has been suggested is "whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are *fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar.*"¹⁴⁴ While this standard is a vast improvement over the "farce and mockery" test, it is too vague to be of any use to the courts or to defense attorneys. The most serious problem with this test is that it fails to account for the fact that even the best lawyers sometimes make serious mistakes. Its use, therefore, would deny relief to the defendant whose brilliant criminal lawyer forgot to file a motion to suppress evidence or to interview a witness but who otherwise performed adequately.

Another suggested standard is that an attorney's assistance has been ineffective if "it [is] unlikely that a fair trial could be had in accordance with the applicable constitutional principles."¹⁴⁵ This formulation is also too vague to give the courts any guidance or to give defense attorneys adequate notice of what will be expected of them. It really only repeats the holding in *Powell v. Alabama* that the Constitution guarantees a fair trial to all defendants, and a fair trial cannot be had unless the defendant is competently represented.

A standard similar to that adopted first in the Fourth Circuit and which is based on the ABA guidelines provides the most viable alternative. First, by stating specific duties and providing broader guidelines it furnishes a set of criteria to the attorney which if followed protects both the defendant and his attorney. It protects the defendant by assuring him of more adequate representation. The attorney is protected because he can limit his liability and protect his reputation by carefully adhering to the designated guidelines. A set of guidelines also aids the courts in evaluating an attorney's performance. This should lead to increased consistency in the results reached by the courts. Finally, this standard is preferable because it incorporates much of the existing law in a framework which can be easily amended to accommodate any new factual situations that arise.

A third proposed change in the applicable rules of law involves the standards applied in plea bargaining cases. At least two commentators have stressed the need for a separate standard of performance in these

142. Bazelon, *supra* note 138.

143. *Chapman v. California*, 386 U.S. 18 (1967); *Fahy v. Connecticut*, 375 U.S. 85 (1963).

144. Finer, *supra* note 110, at 1080.

145. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445, 460 (1965).

cases because of the different nature of problems involved in them.¹⁴⁶ If the *ABA Standards Relating to the Administration of Criminal Justice* are adopted as the applicable standard, no separate standard for guilty plea cases is needed as the ABA guidelines adequately provide for investigation of the facts and of appropriate defenses. If such a standard is not adopted, however, a separate standard for plea bargaining cases is probably necessary. Such a standard should stress the importance of adequately investigating the law and the facts and of accurately informing the client of the prosecution's position.

To supplement the meager record available to appellate courts it has also been proposed that the defense attorney write down both his advice to his client and the reasoning behind it and file it with the court in a sealed envelope. The contents of the envelope would be read only if the client later claimed that his attorney's assistance was ineffective. Obviously defense attorneys will object to the extra work and judicial interference with their duties. Any disadvantages, however, are outweighed by the benefits of providing a more fair determination of defendants' claims and by the ability to actually determine whether those claims are justified. Defense attorneys should be satisfied that the courts will be able to say with certainty that the attorney provided effective assistance. Objection to these proposals might also be made on the ground that such supplementation would violate the attorney-client privilege. However, a defendant probably waives this privilege when he attacks his lawyer's assistance.

A second prospective remedy which has been suggested is improving the overall quality of criminal lawyers. The most creative method which has been proposed to accomplish this is to make the practice of criminal law a state-recognized and certified specialty. Programs of this type have been adopted on a voluntary basis in California and New Mexico.¹⁴⁷ In California in order to be certified as a specialist in criminal law an attorney must have practiced for at least five years prior to application. He must also show participation as principal counsel in a number of criminal cases, take post-law school coursework in criminal law and procedure, and be examined on this coursework.¹⁴⁸ There are three problems with this system as it exists at the present time. First, there is a "grandfather clause" which exempts attorneys who have been practicing ten years or more from the examination and education requirements.¹⁴⁹ This reduces the effectiveness of the system upon older attorneys who may be in need of "refresher courses" covering recent developments. Second, the five-year requirement may serve to discourage competent young lawyers from entering into the practice of criminal law. Finally, because the system is voluntary, it probably does not reach those lawyers whose as-

146. Bazelon, *supra* note 138; Comment, *supra* note 122.

147. *Final Report—Committee on Specialization*, 44 CAL. ST. B.J. 493 (1969).

148. *Standards for Specialization Announced*, 48 CAL. ST. B.J. 80, 82-3 (1973).

149. *Id.* at 81-2.

sistance to their clients is inadequate. If such a system of specialization is made mandatory and if it does not contain a "grandfather clause," it will probably raise the overall quality of defense counsel and significantly reduce the incidence of ineffective assistance of counsel. Lawyers will still make mistakes, but they will probably occur with less frequency.

There have been several other proposals made which would improve the overall quality of practicing criminal lawyers. It has been suggested that only lawyers with a certain amount of experience in criminal law be appointed in felony cases.¹⁵⁰ There are two problems with this suggestion besides the obvious one that it cannot apply to privately-retained counsel. First, it does nothing to eliminate incompetent lawyers or to provide them with additional training and education. In fact such a system probably tends to protect less competent lawyers who have practiced five years or more. Second, such a system restricts the number of attorneys practicing criminal law at a time when it is desirable to channel young lawyers into this area.

Another suggestion which has been made is to provide defense attorneys with a checklist of steps to take when defending a client in a criminal case.¹⁵¹ The United States District Court in Maryland does this, and it appears to be a successful experiment.¹⁵² Obviously, if a standard consisting of specific guidelines is adopted, a special checklist, while still helpful, may provide little additional guidance.

Finally, it has been suggested that the caseloads of attorneys in public defender offices be limited and that the compensation paid to appointed counsel be increased—with no limits on the amount paid for any case.¹⁵³ These proposals should be considered seriously because they will encourage lawyers to spend more time on their appointed cases and will make the field of criminal law more attractive.

V. CONCLUSION

In the past the appellate courts have been reluctant to develop clear standards of performance for defense attorneys and have tended to gloss over contradictions and inconsistencies in the law of effective assistance of counsel.¹⁵⁴ There are many reasons for this reluctance. One reason expressed by Justice Frankfurter in *Foster v. Illinois*¹⁵⁵ is that if claims of ineffective assistance are too readily upheld, a "flood" of "criminals" will be turned loose upon the public. Other courts have expressed the fear that recognition of these claims will cause deliberate ineffective

150. Finer, *supra* note 110. See also LA. STAT. ANN. Title 15 § 141 (1967) (Assigned counsel in capital cases must have had five years experience at the bar.).

151. Finer, *supra* note 110.

152. JUDICIAL CONFERENCE OF THE UNITED STATES: REPORT ON CRIMINAL JUSTICE ACT, 36 F.R.D. 277, 338 (1965).

153. Finer, *supra* note 110.

154. Bazelon, *supra* note 138, at 21.

155. 332 U.S. 134 (1947).

assistance to be rendered by attorneys who have an otherwise weak case.¹⁵⁶ A third reason is the recognition that ineffective assistance claims may injure many attorneys' reputations and, as a corollary, will make it harder to find attorneys willing to accept criminal appointments.¹⁵⁷ Another cause for this reluctance is the possibility that recognition of these claims will result in an upsurge in caseloads of already overburdened appellate courts.¹⁵⁸ Chief Judge Bazelon has suggested a fifth reason which, if it is true, creates grave doubts about the "justice" of our criminal justice system. He states:

It is the belief—rarely articulated; but, I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account.¹⁵⁹

In reply to these concerns it may be said that the courts are capable of weeding out claims which have no merit. Unsuccessful claims need not damage an attorney's reputation. If an attorney's reputation is damaged because he actually did provide ineffective assistance, that is a small price to pay for the ability of the defendant to receive a fair trial. In addition, the competence of the attorney is not questioned by these claims. What is at issue is the ineffective assistance of counsel in a particular case—not the assistance of ineffective counsel. Regarding judicial economy, an upsurge of claims in the appellate courts, if successful, might prompt the courts to consider guidelines to insure effective assistance. Thus fewer cases would have to be retried. Finally, regardless of the likelihood that a defendant will be convicted even with effective representation, our judicial system requires that he receive a fair trial. No policy consideration such as judicial economy should be used to justify depriving the defendant of his constitutional right to effective assistance of counsel.

The outlook for future development of the law in this area in the Supreme Court is not heartening. This is partially due to the Court's reluctance to hear cases involving ineffective assistance claims. In one recent case a claim of ineffective assistance was the primary issue presented in the briefs and at oral argument. Nevertheless, the Court's opinion dealt almost exclusively with a subsidiary search and seizure issue.¹⁶⁰ In another case, *Ray v. Rose*,¹⁶¹ defendant claimed that he had

156. *Cross v. United States*, 392 F.2d 360 (8th Cir. 1968); *Norman v. United States*, 100 F.2d 905 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939).

157. *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Gray v. United States*, 299 F.2d 467 (D.C. Cir. 1962). Many courts take steps to protect the attorney's reputation. Thus in *United States v. Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964), the court referred to the attorney as "Mr. Z" in oral argument and in its opinion.

158. *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

159. Bazelon, *supra* note 138, at 26.

160. *Chambers v. Maroney*, 399 U.S. 42 (1970); *see also* Bazelon, *supra* note 138, at 21.

161. 491 F.2d 285 (5th Cir.), *cert. denied*, 417 U.S. 936 (1974).

been coerced into pleading guilty by his attorney. The Sixth Circuit remanded the case for an evidentiary hearing but did not require Ray to show prejudice to his case stemming from his lawyer's alleged conflict of interest. Despite the fact that the Sixth Circuit's decision directly contradicted a previous decision of the Court,¹⁶² the Supreme Court refused to grant certiorari. In cases where ineffective assistance claims have been addressed there is no indication that the Supreme Court will reverse the requirement of many courts of making the defendant show prejudice after he has established serious errors on the part of his attorney. In fact the Court has upheld this practice in two cases.¹⁶³ There also appears to be little hope that the Court will fashion a definitive standard of performance for defense attorneys. In *United States v. Badalamente*¹⁶⁴ the Second Circuit denied the defendant's habeas corpus petition which claimed that defendant had not been adequately represented. In doing so the court applied the "farce and mockery" test. The Supreme Court denied the defendant's petition for writ of certiorari despite his contention that the "farce and mockery" test was inconsistent with the tests used in the Third, Fourth, Fifth and Sixth Circuits, and the test adopted in *McMann*¹⁶⁵ by the Supreme Court itself.

In the state courts and lower federal courts the trends are encouraging. The majority of jurisdictions appear to be abandoning the distinction between privately-retained and appointed attorneys. They also appear to be moving away from the "farce and mockery" standard of ineffective assistance and toward the Third and Fourth Circuit tests.

Claims of ineffective assistance of counsel have never been a favorite of the legal profession. For this reason the law in the field has been developed on a largely ad hoc basis with few guidelines for either the courts or defense attorneys to follow. Many suggested changes in the present system have been proposed, and most of these have some merit. They cannot be adopted, however, without decisive action by the courts, the bar, and the state legislatures. If these changes are adopted, both the legal system and the legal profession will benefit by the higher level of representation which will be available in our criminal courts and by the enhanced public image of lawyers which will result.

162. *Dukes v. Warden*, 406 U.S. 250 (1972).

163. *Id.*; *Chambers v. Maroney*, 399 U.S. 42 (1970).

164. 507 F.2d 12 (2d Cir.), *cert. denied*, 95 S. Ct. 1565 (1975).

165. *McMann v. Richardson*, 397 U.S. 759 (1970). See note 128 and accompanying text *supra*.