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Mitigation Reports in Capital Cases: Legal and Ethical Issues

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ARTICLE

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Abstract. The mitigation investigation that is essential in every capital case requires a multidisciplinary team. The duty to conduct this investigation is clearly established federal law, as well as an ethical obligation of counsel. The mitigation evidence that is uncovered is of vital importance to the rights of the individual accused of a capital offense, but also to reliable outcomes since all decisionmakers—including prosecutors, jurors, and judges—need the most complete and accurate picture of the person facing the punishment of last resort. This Article discusses some of the unique legal and ethical issues affecting the documentation of this investigation. The Authors address two specific problems: the changing landscape of discovery rules over the extraordinarily long life of a capital case from pretrial litigation to federal habeas corpus review, and the nature of mitigating evidence itself. The ubiquity of trauma in the capital client population affects the dynamics of disclosure of mitigating evidence and can explain apparent inconsistencies arising from these dynamics. There are no simple solutions to these problems, but capital defense teams have an obligation to adopt thoughtful strategies based on an awareness of these complexities.

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I. INTRODUCTION

Death penalty defense cases differ in a myriad of ways from noncapital criminal defense representation. They require a multidisciplinary team.[1] Specifically, one member of the team is a mitigation specialist, which is a practitioner whose expertise arose entirely from the need to prepare for potential sentencing proceedings, which are unique to the bifurcated trials of capital cases in the modern era. The duty to conduct this investigation is clearly established federal law,[2] as well as an ethical obligation of counsel.[3]

1. *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952–60, 999–1004 (2003) [hereinafter *ABA Guidelines*] (Guidelines 4.1.A.1 and 10.4.A–C) (requiring at a minimum two lawyers, a fact investigator, and a mitigation specialist, and including someone qualified by training and experience to screen for mental and psychological disorders and impairments); Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1121 (2003) ("The skills and expertise required to effectively represent a capital client are broad and multi-disciplinary in nature, thus requiring a team approach."); Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1151 (2003) ("The weight and breadth of the defense preparation for a capital trial have given rise to the need for an expert to identify, develop and coordinate mitigating evidence."); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 677 (2008) [hereinafter *Supp. Guidelines*] ("[L]ead counsel must assemble a capital defense team consisting of no fewer than two qualified attorneys, an investigator, and a mitigation specialist . . . ."); Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 699 (2008) (describing the range of backgrounds of mitigation specialists, including "anthropologists, attorneys, educators, journalists, social workers, sociologists and others with education and training in human development and behavior"); *see also Team Defense in Capital Cases*, FORUM, May–June 1978, at 24 ("The [death penalty defense] team itself is made up of both attorneys and social scientists. . . . To win at trial, an in-depth knowledge of both disciplines is required."); Michael G. Millman, *Interview: Millard Farmer*, FORUM, Nov.–Dec. 1948, at 31 ("The staff of the project is comprised of social scientists, attorneys, and student interns who employ an interdisciplinary holistic approach in the disposition of death penalty cases . . . .").

2. Williams v. Taylor, 529 U.S. 362, 391 (2000); Wiggins v. Smith, 539 U.S. 510, 522 (2003) (citing Strickland v. Washington, 466 U.S. 688, 688–91 (1984)); Rompilla v. Beard, 545 U.S. 374, 380–81 (2005); Porter v. McCollum, 558 U.S. 30, 38 (2009) (per curiam); Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam).

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1, 5.3(b) (AM. BAR ASS'N 2023) (embodying the guidelines attorneys must follow regarding competency and responsibilities to their client); *see also Supp. Guidelines*, *supra* note 1, at 688 ("Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client."). *See generally* AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed.

The uncovered mitigation evidence is vitally important to the rights of the individual accused of a capital offense,[4] but also important to reliable outcomes because the decision makers, including prosecutors,[5] jurors,[6] and

1993) [hereinafter CRIMINAL JUSTICE STANDARDS] (discussing how defense lawyers and prosecutors should perform as professional and ethical attorneys); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1184–85 (2003) ("It is my hope that this article will demonstrate that these Guidelines reflect not just best practice, but actual ethical mandates . . . ."); Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 798 (2008) ("The ethical duty of communication exists in any lawyer-client relationship.").

4. *See Taylor*, 529 U.S. 362 (2000); *Smith*, 539 U.S. 510 (2003); *Beard*, 545 U.S. 374 (2005); *McCollum*, 558 U.S. 30 (2009); *Upton*, 561 U.S. 945 (2010) (establishing the duty to conduct a mitigation investigation); *see also* Lockett v. Ohio, 438 U.S. 586, 597 (1978) ("We find it necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) ("Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982))); McKoy v. North Carolina, 494 U.S. 433, 441 (1990) (upholding the requirement for a sentencer to consider mitigating evidence). Each of the preceding cases is an Eighth Amendment case defining the breadth of mitigation available to the defense. *See generally* John Blume & Russell Stetler, *Mitigation Matters*, *in* TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES 19, 19 (Edward Monahan & James Clark eds., 2017) (emphasizing the importance of a comprehensive investigation and integration of the narrative in bringing forth the best results for mitigation).

5. *See* Jason Williams & Ben Cohen, *To Be a Prosecutor in the Deep South: Race, the Justice System, and the Death Penalty*, 41 AMICUS J., no. 41, 2021, at 35, 38 (noting prosecutors must grapple with "historic and systemic failures: by our schools, our juvenile justice system, drug treatment and mental health systems, the lead in our homes, the failures of our foster care systems, and our justice system" before deciding to seek the death penalty); *see also* Oliver Laughland, *Inside the Division: How a Small Team of US Prosecutors Fight Decades of Shocking Injustice*, GUARDIAN (May 6, 2022) (describing the work of two former defense attorneys, Emily Maw and Bidish Sarma, who are now reviewing potential wrongful convictions and sentences for New Orleans's district attorney); A.M. "Marty" Stroud III, Opinion, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES (Nov. 21, 2017, 1:08 PM), https://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/ [https://perma.cc/BS8N-DEGX] (detailing how a blinded, arrogant, young prosecutor focused on winning rather than seeking justice and needed to be more inquisitive about evidence that would avert a miscarriage of justice).

6. *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (citing Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring)) (sentencing imposed by a jury should reflect a "reasoned *moral* response to the defendant's background, character, and crime") (emphasis in original).

judges,[7] need the most complete and accurate picture of the person facing the punishment of last resort.

In addition, death penalty cases do not end when the trial court imposes a sentence. Appeals of convictions and death sentences are automatic. The judgment of the highest state court affirming a death penalty can be challenged in post-conviction proceedings with evidence unknown to the trial court. The case can receive further review of federal constitutional claims in habeas corpus proceedings. Multiple new lawyers represent the capital client at these different stages, and they also engage the services of new multidisciplinary teams to find hitherto undiscovered evidence at the stages where it can be introduced. Almost all the clients are indigent.[8] Even those who can afford to retain counsel at the outset generally become indigent as the case proceeds through the multiple stages. The interval between trial and ultimate resolution—either execution or imposition of a sentence other than death—is extraordinarily long.

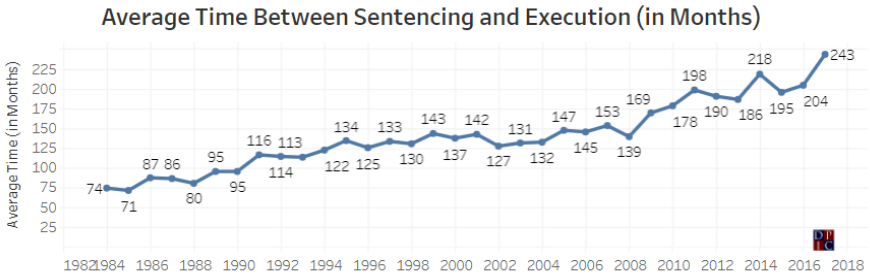
This Article examines legal and ethical issues related to the reports documenting the mitigation investigation, including the discoverability of these reports over the long life of the case.[9] The Authors address some of

7. *See* Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 830–33 (2008) (attributing the presence of a mitigation specialist to the reduction of risk of reversible error); William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 805 (2008) ("[J]udges and juries should have as much information as possible before determining whether a defendant should live or die . . . ."); Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391, 415 (2013) ("[G]reater fidelity to the ABA Guidelines is a win-win for everyone involved in capital litigation: victims' families, defendants and their families, the prosecution team and law enforcement, the defense team, the trial and appellate judges, and the taxpayers.").

8. *See generally Death Penalty and Poverty*, WORLD COAL. AGAINST DEATH PENALTY (2017), https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf [https://perma.cc/5FQK-XETU] (describing the relationship between economic status and those likely to be sentenced to death).

9. The duration of the interval between sentencing and execution has risen consistently. According to the Death Penalty Information Center, the amount of time on death row between sentencing and execution has increased to approximately 243 months in the last twenty years:

the problems concerning notetaking, report writing, changing discovery rules, and what should, or should not, be memorialized. The ethical problems unique to a capital case persist throughout the proceeding, from pretrial litigation to federal habeas corpus review.[10] Over the extraordinary



Time on Death Row, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [https://perma.cc/58EX-G9RW]; *accord* TRACY L. SNELL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2020 – STATISTICAL TABLES 17 (David Fialkoff & Edrienne Su eds., 2021) (highlighting Table 12, which displays the average time between sentencing and execution from 1977 to 2020).

10. *See ABA Guidelines*, *supra* note 1, at 919 (including Guideline 1.1.B, which states the Guidelines "apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation"). Definitional Note 5 further explains:

> The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari, (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (e.g., stay of execution, appointment of counsel) in connection with any of the foregoing, and (d) all requests, in any form, for pardons, reprieves, commutations, or similar relief made to executive officials, and all applications to administrative or judicial bodies in connection with such requests.

Id. at 920; *accord Supp. Guidelines*, *supra* note 1, at 679 (mirroring the language of the ABA Guidelines: "These Guidelines apply from the moment that counsel is appointed and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, competency-to-be-executed proceedings, clemency proceedings and any connected litigation."); *see also ABA Guidelines*, *supra* note 1, at 1074–90 (covering the interaction among all the attorneys who may be involved at different stages and the duties specific to the latter stages within Guidelines 10.13, 10.14, 10.15.1, and 10.15.2);

duration of this litigation, however, the evidence may change in subtle but important ways.[11] The Authors analyze the important differences between mitigation or "slice of life" witnesses, and fact witnesses, who observed a specific event for a short duration. With mitigation witnesses (just as with capital clients themselves), reliable information emerges slowly after the capital defense team builds trust and rapport with those who knew them at various stages of life. In addition, the ubiquity of trauma in the capital client population affects the dynamics of disclosure of mitigating evidence and can explain apparent inconsistencies arising from these dynamics.[12] The Authors note particularly how trauma pervades the lives of capital clients and how it often affects their loved ones and closest friends. Additionally, they look at the dynamics which govern disclosure of traumatic memories. The Authors then consider these processes of disclosure from the perspective of how the discoverability of notes and reports may change over the long life of the case.

The Authors offer no simple answer to the question on how best to memorialize the information obtained from mitigation witnesses. Nonetheless, they urge capital defenses to be thoughtful from the beginning of every case in developing prudent strategies consistent with the relevant legal and ethical guidelines. One important takeaway: understanding the ethical duties of defense teams over the life cycle of a capital case is essential to resolving many of the issues that arise in connection with confidentiality,

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Supp. Guidelines, *supra* note 1, at 680–81 (highlighting the importance of "discovery rules at the various stages of capital litigation").

11. *See* Blume & Stetler, *supra* note 4, at 22 (explaining the defense of "changing the narrative").

12. *See* Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.–Feb. 1999, at 35, 37 ("The overwhelming majority of capital clients have suffered trauma outside the realm of ordinary human experience, whether it occurs within the home, as in incest and sexual abuse, or in the wider social setting, where growing up as an inner-city person of color means witnessing violent death of peers and loved ones."); Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 923 (2008) ("Psychological trauma lies at the heart of death penalty cases."). Dr. Van Der Kolk discusses the unspeakable knowledge blocked by alcohol, drugs, and self-mutilation. BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 12 (Penguin Books 2015) (describing the harm veterans cause themselves in dealing with past trauma). He further notes, "Traumatized people simultaneously remember too little and too much." *Id.* at 179. "Nobody wants to remember trauma." *Id.* at 194. Dr. Wayland's article also discusses psychological, familial, cultural, and institutional barriers to the disclosure of traumatic experiences, as well as uninformed interview practices that exacerbate the problem. Wayland, *supra*, at 956–59.

privilege, and discoverability of materials prepared by investigators and mitigation specialists.

II. FUNDAMENTAL LEGAL DOCTRINES

The fundamental legal doctrines discussed in Part II may need explicit elaboration in the context of the death penalty for two reasons the Authors explain in more detail below. First, capital defense invariably involves core team members who are not lawyers. Second, most of the lawyers operate in a limited sphere of practice—in one state or even one county, at trial or in post-conviction, in state court or federal court. It is rare for many of the practitioners involved in these cases to be familiar with the changing rules and practices the Authors review.

A. Attorney–Client Privilege

The attorney–client privilege is a venerable common law doctrine intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[13] There are several influential tests that list the elements of the privilege, including one set out in the Wigmore treatise on evidence,[14] U.S. District Judge Wyzanski's opinion in *United States v. United Shoe Machinery Corp.*,[15] and the never adopted but nevertheless still frequently cited Federal Rule of Evidence 503(b).[16]

13. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also* United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995) (first citing *Upjohn*, 449 U.S. at 389; and then citing United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)) (stating the purpose of the privilege is "to encourage clients to be forthcoming and candid with their attorneys so that the attorney is sufficiently well-informed to provide sound legal advice").

14. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. ed. 1961) ("(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.").

15. United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

16. *United Shoe*, 89 F. Supp. at 358–59 ("The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the

The American Law Institute's Restatement of the Law Governing Lawyers provides a simplified version of the test for the privilege. According to the Restatement, "the attorney–client privilege may be invoked . . . with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."[17] A communication satisfying the elements of the privilege is absolutely protected from compelled disclosure through civil discovery, a grand jury subpoena, or questioning at trial or in a deposition. The privilege extends beyond the termination of the attorney-client relationship and, as the U.S. Supreme Court has held, survives the death of the client.[18]

A frequent source of confusion is the relationship between the attorney–client privilege and the duty of confidentiality stated in the rules of professional conduct for attorneys in the United States. The confidentiality rule, predominantly based on Model Rule 1.6,[19] with some jurisdictional variation,[20] states lawyers "shall not reveal information relating to the

purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."); Rules of Evidence for U.S. Courts and Magistrates, 56 F.R.D. 183, 236 (1972) ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client."). Many courts have said that proposed Federal Rule of Evidence 503(b) is an accurate statement of federal common law regarding the attorney–client privilege. *See* United States v. Moscony, 927 F.2d 742, 751 (3d Cir. 1991) (discussing why, although never adopted, 503(b) is a restatement of the federal common law of attorney–client privilege); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J., dissenting) (addressing proposed Federal Rule of Evidence 503 and how it encapsulates the federal common law concerning attorney–client privilege).

17. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

18. Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

19. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (AM. BAR ASS'N 2023).

20. A few states retain the definition of confidential information from the 1969 ABA Model Code of Professional Responsibility. The Model Code defined the scope of protected information as including both "confidences" and "secrets." These were defined as follows: "'Confidence' refers to information protected by the attorney–client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE OF PROF'L RESP. DR 4-101(A) (AM. BAR ASS'N 1969). Jurisdictions retaining something close to the Model Code definition of protected information, though adopting the numbering of the Model Rules, include California, the District of Columbia, New York, and Virginia. *See* CAL. RULES OF PROF'L CONDUCT R. 1.6(a) (2023) (incorporating by reference CAL. BUS. & PROF'L

representation of a client" without the client's informed consent, unless the disclosure is impliedly authorized or one of several enumerated exceptions applies.[21] The rule further provides that lawyers must use reasonable efforts to prevent the unauthorized or inadvertent disclosure of protected confidential information.[22] The scope of information protected by the rule is much broader than the attorney–client privilege.[23] The privilege applies to only confidential communications between attorney and client, whereas the rule of confidentiality applies to all information relating to the representation of the client. While the rule of confidentiality states the duties the lawyer owes to the client, it does not have any significance in the discovery process or on the admissibility of evidence at trial. It is neither a component of evidence law nor the rules of procedure.[24] Furthermore, the rule may not be invoked as a basis for blocking discovery or objecting to the admission of evidence.[25]

Using the Restatement elements as guidance, the Authors can briefly identify the privilege issues that tend to arise in the long process of litigating a capital case. Some of these issues will be discussed in greater depth in Section V,[26] after introducing the dynamics of mitigation and the procedural complexity of capital cases. However, the early introduction of these

CODE § 6068(e)(1)); D.C. RULES OF PROF'L CONDUCT R. 1.6(a) (2023) ("[A] lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."); N.Y. RULES OF PROF'L CONDUCT R. 1.6(a) (2023) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ."); VA. RULES OF PROF'L CONDUCT R. 1.6(a) (2023) ("A lawyer shall not reveal information protected by the attorney–client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation.").

21. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (AM. BAR ASS'N 2023).

22. *Id.* R. 1.6(c).

23. 1 EDNA SELAN EPSTEIN, THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE 16 (5th ed. 2007).

24. *See supra* notes 16–20 and accompanying text (discussing proposed Federal Rule of Evidence 503(b) and the confidentiality element associated with attorney–client privilege).

25. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (discussing the rule of confidentiality as compared to related bodies of law, such as "the attorney–client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics").

26. *See infra* Part V (discussing mitigation and the notion of traumatic disclosure).

doctrines helps frame the following discussion, which pertains to managing a complex multidisciplinary team over the course of protracted litigation.

1. Communications vs. Facts

In line with the policy of encouraging full and frank communications between clients and their lawyers, courts interpret the attorney–client privilege to cover only information conveyed in a lawyer–client communication. The attorney–client privilege blocks the production of communications memorialized in a document.[27] The communication element excludes two common sources of information—observations made by a lawyer or investigator and communications with non-client witnesses. As the Supreme Court stated in *Upjohn v. United States*[28]: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[29] Clients may be compelled to testify about an observation or recollection—for example, "Was the light red?" However, if the client communicates to the lawyer that she recalls that the light was red, the lawyer cannot be compelled to reveal the content of this privileged communication—as long as it was communicated in confidence and for the purpose of obtaining legal assistance.[30] More interesting questions arise in connection with the identity of a client, the fact that the client retained counsel, and the nature of the fee arrangement between lawyer and client. Absent unusual circumstances, these are regarded as facts, not communications, and therefore are not protected by the attorney–client privilege.[31]

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27. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 69 cmt. h (AM. L. INST. 2000) ("The privilege applies both to communications when made and to confidential records of such communications, such as a lawyer's note of the conversation."). Note, however, preexisting documents and records do not acquire privilege merely by being conveyed to the lawyer. The communication is privileged but not the records themselves unless there is an independent evidentiary privilege applicable to the records. *See generally* Fisher v. United States, 425 U.S. 391 (1976) (discussing the evidentiary privileges one has in the legal system and the various ways a document cannot be compelled to be turned over).

28. Upjohn Co. v. United States, 449 U.S. 383 (1981).

29. *Id.* at 395.

30. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 69 cmt. d ("The attorney–client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves.").

31. *See* EPSTEIN, *supra* note 23, at 88–89 ("Ordinarily, the client's identity is not a matter that the attorney may refuse to divulge."). There are some exceptions to the general rule as stated in the

2. Communications Through Agents

The elements of the attorney–client privilege often mention lawyers, clients, and their representatives.[32] The Restatement defines "privileged persons" to include the client, the client's lawyer, "agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation."[33] As seen in a classic scene from season two of the television series *Breaking Bad*, the sleazy attorney, Saul Goodman, demands a dollar from each of the methamphetamine manufacturers, Walter and Jesse, in exchange for the protection of the attorney–client privilege on their communications.[34] However, a lawyer need not be paid or formally retained for the privilege to apply. Communications during an initial consultation between a lawyer and a prospective client are covered by the privilege.[35] Moreover, as long as the representation is supervised by a licensed lawyer, the initial consultation may be conducted by agents of the lawyer or the client. A comment to the Restatement definition clarifies that the privilege extends to communications with nonlawyer staff, including paralegals and investigators.[36]

One recurring and tricky issue arises in connection with agents of the lawyer and the client. An easy case involves agents who are necessary for lawyer–client communications, such as foreign-language interpreters.[37] Extending the principle of necessary agents, the Second Circuit in *United*

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text, but this is a complicated area. It is also beyond the scope of the brief introduction provided in this Article. In most capital defense situations, the identity of the client and fact of retention of counsel are known, and defense counsel are either court-appointed or public employees; thus, there is no need for the prosecution to inquire into fee arrangements.

32. *See, e.g.*, Rules of Evidence for U.S. Courts and Magistrates, 56 F.R.D. 183, 236 (1972) (noting the individuals associated with the privilege include "[the client] or his representative and his lawyer or his lawyer's representative").

33. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70.

34. *See* Armen Adzhemyan & Susan M. Marcella, *"Better Call Saul" If You Want Discoverable Communications: The Misrepresentation of the Attorney–Client Privilege on* Breaking Bad, 45 N.M. L. REV. 477, 490–94 (2015) (debunking the "myth of the dollar bill").

35. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 cmt. c; EPSTEIN, *supra* note 23, at 198.

36. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 cmt. g.

37. *See id.* § 70 cmt. f ("A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person . . . .").

States v. Kovel[38] held that an accountant, working for a lawyer, fell within the category of privileged persons to the extent the accountant interpreted the client's financial statements for the lawyer's benefit.[39] With unfamiliar terms and equations, lawyers inexperienced in the financial sector may perceive financial statements as a foreign language, and a translator may be necessary to enable the lawyer to understand the facts pertaining to the client's situation.[40] Taking the analogy to a translator seriously, it is uncertain whether an accountant would be a privileged person if the accountant provided strategic advice to the lawyer about how to defend, for example, a tax proceeding before the IRS. Courts have taken broad and narrow views of *Kovel*, depending on how strictly they interpret the analogy to a translator.[41] These positions correspond to whether privileged persons include those who are assisting the lawyer in providing legal services (the broad view of *Kovel*), or whether the category is limited to those analogized closely with foreign-language interpreters, who assist the lawyer in clarifying, facilitating, or improving an attorney's comprehension of facts (the narrow view).[42] The Restatement, in a comment to the section defining "privileged persons," takes a broad view of *Kovel*. It states, "The privilege also extends to communications to and from the client that are disclosed to independent contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client and not for the purpose of testifying."[43]

Effective representation of clients in capital litigation often requires the involvement of nonlawyer experts such as psychologists and social workers. In some cases, such as where the client communicates with a medical professional, there could be an independent privilege protecting the

38. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

39. *See id.* at 922 ("Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege . . . .").

40. *Id.*

41. *See, e.g.*, United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1070–73 (N.D. Cal. 2002) (concluding, after careful review of the *Kovel* doctrine, Price Waterhouse was not serving as a translator but more of an advisor on tax matters, and therefore communications among the client, counsel, and the accounting firm were not privileged).

42. *See* EPSTEIN, *supra* note 23, at 264 (framing the issue as "whether the third party's presence materially facilitates and improves the attorney-client communication process, or whether it is a mere convenience").

43. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 cmt. g (AM. L. INST. 2000).

communication. In other instances, however, the only possible privilege would be derivative of the attorney–client privilege. In that case, the privilege would depend on a court taking the broad view of *Kovel*, which is to say privileged persons include not only those agents who are necessary for the communication but those who provide assistance with the representation as well. Courts vary tremendously in their approach to *Kovel*, and the results of cases tend to be fact specific.[44] Some courts go so far as to protect communications with retained public-relations experts, as well as the usual accountants, economists, engineers, and physicians.[45] While it is probably fair to see a trend in the direction of the broader reading of *Kovel*, lawyers on a defense team should be extremely careful to review the applicable caselaw and, if necessary, structure the engagement of an expert in a way that maximizes the likelihood that a court will deem the expert within the category of "privileged persons." Otherwise, the expert has the status of a stranger to the representation, which destroys the confidentiality of the communication.

3. Presence of Third-Party "Strangers" to the Attorney–Client Relationship

The attorney–client privilege protects confidential communications.[46] This means the presence of someone not falling within the category of privileged persons will destroy the privilege from the outset. The circumstance of a communication must indicate that the parties expected it would be confidential.[47] Classic fact patterns accompanying a loss of the attorney–client privilege include talking in restaurants, airports, or other public places. In fact, lawyers can destroy the privilege by sharing

44. *See* EPSTEIN, *supra* note 23, at 216–29 (discussing various approaches to extended attorney–client privilege and finding "[t]he *Kovel* cloak of attorney–client privilege will not be automatically extended to all professionals, even where such professionals are hired to assist an attorney in preparing a defense").

45. *See In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (applying attorney–client privilege to communications between lawyers and public relations firms); Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (first citing *In re* Pfizer Inc. Secs. Litig., 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993); and then citing Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 589 (N.D.N.Y. 1989)) (rejecting the notion that lawyers waive work–product protection by sending their work product to public relations firms).

46. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 cmt. a.

47. *Id.* § 71 cmt. c.

confidential communications with others in a public setting, who would otherwise count as privileged persons. Two lawyers in the same firm talking about their case at a bar after work run a serious risk of compromising privileged communications. Criminal defense lawyers are familiar with this element in connection with client meetings held in correctional facilities. Here, defense lawyers must exercise an elevated level of care to ensure that guards and others are not able to eavesdrop on the conversation.[48]

In the context of death penalty litigation and mitigation investigation, one common pitfall is the presence of friends or family members during a lawyer–client communication. Clients may understandably be nervous about talking to lawyers and may prefer to have trusted confidants present during the conversation. If the client is a minor child (in a noncapital case) or if the client has psychological needs that require the presence of another person in order to be able to communicate, the third party may qualify as an agent for the communication.[49] Similarly, a family member acting as a translator would qualify as an agent for the communication under *Kovel*.[50] However, even the broadest reading of *Kovel* extends only to retained experts who assist the lawyer in providing legal services, including, for example, handling the public-relations dimension of legal representation. Although a lawyer's humane instincts may favor the presence of close friends and family members during conversations with the client, it is clear the attorney–client privilege will not protect these conversations because of the stranger's presence to the professional relationship.[51] Best practices involve the use of explicit confidentiality agreements when experts of any kind are retained. These agreements should provide for the confidentiality of their mere retention until and unless they are disclosed as testifying witnesses. These protective agreements may be particularly important for unusual consultants, such as laypersons who are retained to help the defense team

48. *See* Adzhemyan & Marcella, *supra* note 34, at 491–92 (noting one of the few instances where *Breaking Bad* accurately portrays attorney–client privilege law in Saul's initial jailhouse interview with Badger, where Saul ensures that guards are out of the interview room and the camera is turned off).

49. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 cmt. f, illus. 4.

50. *See supra* notes 38–41 and accompanying text (assessing whether accountants translating financial information for lawyers qualify as agents). However, in a mitigation investigation, using a family member to interpret creates the risk of omissions or unreliable translations of family secrets.

51. EPSTEIN, *supra* note 23, at 266–67. If the family member is the spouse, then the marital privilege would independently apply and, together with the attorney–client privilege, protect the communication.

understand or relate to individuals from foreign countries who are not native speakers of English.

It is essential not only that the lawyer-client communication take place in a confidential setting but that the parties intend to keep it confidential.[52] If the lawyer or the client intends to subsequently reveal the communication, the "in confidence" element remains unsatisfied and there is no privilege in the communication.[53] If one of the parties subsequently discloses the communication to anyone not within the protected circle of privileged persons, the privilege is waived.[54] The subject of waiver is further examined below, but waiver by subsequent disclosure is closely related to the failure of the "in confidence" element due to the intention of one of the parties to subsequently disclose the communication. Accordingly, lawyers should take precaution and warn clients not to talk with others about what they have discussed with their lawyer.

4. Witness Interviews

Picking up again on the policy rationale of encouraging candid lawyer-client communications, the attorney–client privilege applies only to information obtained in a confidential communication from the client.[55] This excludes information learned from non-client witnesses. A great deal of information acquired during a mitigation investigation is likely to come from family members, friends, and others who knew the client. It is important to remember that none of this information is protected by the attorney–client privilege. The work product doctrine may presumptively shield records of these interviews from discovery, provided they were prepared in anticipation of litigation. However, as discussed below, the protection for "ordinary" work product, consisting of records apart from the mental impressions, theories, and conclusions of a lawyer, may be lost if

52. EPSTEIN, *supra* note 23, at 236.

53. United States v. Ruehle, 583 F.3d 600, 612 (9th Cir. 2009).

54. *See, e.g.*, United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003) (holding Martha Stewart's sharing of her attorney's advice with her daughter waived the attorney–client privilege but not work product protection).

55. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 cmt. b (AM. L. INST. 2000) ("The privilege does not extend to communication from nonprivileged persons, even if the client transmits such a person's communication to the lawyer . . . .").

the adversary can demonstrate substantial need for the materials, along with an inability to obtain their equivalent without undue hardship.[56]

5. Warning Labels are Irrelevant

Some lawyers (and other members of capital defense teams) have the bad habit of slapping labels reading "PRIVILEGED AND CONFIDENTIAL—ATTORNEY WORK PRODUCT" on all documents they seek to protect from discovery, or possibly all documents they generate. These labels are utterly meaningless. A court will analyze the elements of the privilege—or the work product doctrine, to be discussed next—and conclude based on its analysis whether the documents are privileged. But warning labels may be worse than useless if they cause lawyers, or their agents, to be lazy in running their own analysis of the privilege. A competent lawyer must think through all of the potential issues that might arise, element-by-element, before creating a record of a communication.

B. Waiver of the Privilege

Waiver can occur where the subsequent conduct of either the lawyer or client is inconsistent with the confidentiality and commonality of interest, which are the foundations of the attorney–client privilege. The two most common waiver scenarios in the capital defense context are: (1) subsequent intentional or inadvertent revelation of privileged communications, and (2) an assertion by the client that the lawyer's services were ineffective (often referred to as "putting in issue" the communications related to those services).[57]

1. Subsequent Disclosure

Disclosure of protected communications to nonprivileged persons waives the attorney–client privilege.[58] Waiver by subsequent disclosure includes both intentional and unintentional disclosure. A common example of the latter is the failure by a lawyer, or a member of the lawyer's support

56. FED. R. CIV. P. 26(b)(3)(A)(ii).

57. Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney–Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 792 n. 45 (1977).

58. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 79.

staff, to use reasonable care in safeguarding confidential client information, including records of privileged communications. As discussed below, in connection with the obligations of nonlawyer members of the defense team,[59] lawyers having supervisory authority over nonlawyer assistants must ensure that all team members comply with duties such as safeguarding confidential information.

2. Putting in Issue

"The attorney–client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that . . . a lawyer's assistance was ineffective, negligent, or otherwise wrongful."[60] It is extremely important to point out, however, that the privilege is waived only with respect to communications relevant to the issue of ineffective assistance.[61] If an allegation of ineffective assistance of counsel pertains to the lawyer's advice, then communications showing that advice would be relevant to the resolution of the claim. For this reason, the privilege in those communications is waived. But if the claim pertains to some other aspect of the lawyer's performance, such as the failure to assert a defense or cross-examine a prosecution witness at trial, it is unlikely that the privilege would be waived for most of the communications between the lawyer and client. This is true unless the client was involved in the decision-making process that led to the claim of ineffective performance, which would be unusual.

Remember, the attorney–client privilege and the professional rule of confidentiality are different. Lawyers have an ongoing duty to the client under both doctrines,[62] however, this duty does not evaporate if the client asserts that the lawyer was negligent or constitutionally ineffective. The lawyer's fiduciary duties of loyalty and confidentiality persist despite the

59. *See infra* notes 103–08 and accompanying text (discussing how defense attorneys in capital cases rely on various nonlawyer professionals to provide adequate representation).

60. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 80(1)(b); *In re* Lott, 424 F.3d 446, 452–54 (6th Cir. 2005).

61. *See* Waldrip v. Head, 532 S.E.2d 380, 383 (Ga. 2000) (limiting the implied waiver of the attorney–client privilege to the documents relevant to a claim of ineffective assistance); People v. Madera, 112 P.3d 688, 691 (Colo. 2005).

62. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 20 (AM. BAR ASS'N 2023) ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); Swidler & Berlin v. United States, 524 U.S. 399, 410–11 (1998) (establishing attorney–client privilege as outlasting the death of the client).

adversity of interests created by the client's allegation. One aspect of the ongoing duty of confidentiality is the lawyer's obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[63] Because the lawyer's failure to object to the disclosure of privileged communications can waive the privilege,[64] the duty stated in Rule 1.6(c) requires an ongoing effort by the lawyer to object, where appropriate, to the disclosure of communications protected by the attorney–client privilege. Where the client's claim of ineffective assistance arguably waives the privilege as to some attorney-client communications, the ongoing duties of confidentiality, loyalty, and effective representation require that the lawyer fight to narrow the scope of waiver as much as possible.[65] Ideally, the lawyer should seek a court order specifying the extent of waiver resulting from the client's allegation.[66] It would be a serious breach of responsibility for the lawyer to simply turn over the entire contents of the client file to the prosecution upon an allegation of ineffective assistance.[67] The interest in defending one's reputation does not justify a wholesale betrayal of the client by surrendering the client's file including confidential information and attorney–client privileged communications.[68] Lawyers facing an

63. MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

64. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 78(3).

65. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456, at 1 (2010) ("[A] lawyer must maintain the confidentiality . . . for former clients . . . and may not disclose protected information unless the client or former client gives informed consent.").

66. Not all courts require judicial supervision of disclosure of privileged communications in response to an ineffectiveness claim. *See* Wharton v. Calderon, 127 F.3d 1201, 1205–06 (9th Cir. 1997) ("The attorney–client privilege is a rule of evidence. It does not provide a legal basis to support issuance of the district court's 'protective order,' which purports to bar out-of-court interviews to which the rules of evidence do not apply."). *But see* Coluccio v. United States, 289 F. Supp. 2d 303, 305 (E.D.N.Y. 2003) (upholding the court's authority to review and release affidavits to the government); Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir. 2003).

67. *See, e.g.*, Binney v. State, 683 S.E.2d 478, 479–80 (S.C. 2009) (cautioning against a broad disclosure of information to opposing counsel, as the petitioner's attorney had done in the case).

68. A bit technical, but worth noting: There is an express textual exception to the duty of confidentiality, allowing lawyers to disclose confidential information to the extent reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5). Disclosure is permitted but not required, and it is only permitted to the extent it is necessary. ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456, at 3 (2010). An ineffective assistance of counsel claim does not threaten the lawyer with financial harm, and the reputational harm is limited by the recognition of lawyers that these claims are

ineffectiveness claim should consult the literature on the continuing duties of loyalty and confidentiality owed in that situation.[69]

C. Work–Product Protection

The work–product doctrine (not a privilege, because its protections can be overcome) has its origin in a 1947 U.S. Supreme Court case called *Hickman v. Taylor*.[70] The case arose out of the sinking of a tugboat.[71] The lawyer representing the vessel owners interviewed the survivors of the shipwreck and made notes summarizing the interviews.[72] Because none of the sailors were clients of the lawyer, the attorney–client privilege did not shield the witness statements from interrogatories and requests for production seeking statements from any of the survivors of the accident.[73] Nevertheless, the Court thought it important to afford to lawyers "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[74] Its reasoning is particularly solicitous of a lawyer's "mental impressions, conclusions, opinions or legal theories,"[75] which would come to be known as "opinion work product." However, there is still some protection for witness statements and other "ordinary work product," but if the opposing party shows a substantial need for that information and the

often not meritorious. Some state ethics opinions do recognize the reputational impact of an ineffectiveness claim as a reason to disclose in self-defense. Nevada Op. 55, at 5 (2018); D.C. Op. 364, at 16 (2013); N.C. Bar Formal Op. 16, at 1 (2011); Tenn. Bar Formal Op. 2013-F-156, at 2 (2013); Virginia LEO 1859, at 2–3 (2012). If the lawyer does reasonably believe it to be necessary to disclose in self-defense, it is important to keep the scope of the disclosure as narrow as possible. Disclosure by a lawyer, not authorized by the client and not in pursuit of the client's interests, including disclosure in self-defense, does not waive the privilege. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 79 cmt. c ("Unauthorized disclosure by a lawyer not in pursuit of the client's interests does not constitute waiver . . . .").

69. *See generally* David M. Siegel, *The Continuing Duty Then and Now*, 42 HOFSTRA L. REV. 447 (2013); David M. Siegel, *What (Can) (Should) (Must) Defense Counsel Withhold from the Prosecution in Ineffective Assistance of Counsel Proceedings?*, CHAMPION, Dec. 2011, at 18; David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14; Jenna C. Newmark, *The Lawyer's Prisoner's Dilemma: Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699 (2010).

70. Hickman v. Taylor, 329 U.S. 495 (1947); *see* United States v. Nobles, 422 U.S. 225, 254 (1975) (extending the rule in *Hickman* to criminal cases).

71. *Hickman*, 329 U.S. at 498.

72. *Id.*

73. *Id.* at 504, 508.

74. *Id.* at 510.

75. *Id.* at 508.

inability to obtain its equivalent without substantial hardship, ordinary—i.e. non-opinion—work product may be ordered produced.[76] The rule in *Hickman* was subsequently codified in the Federal Rules of Civil Procedure.[77]

Under the Federal Rules and the rules of most states today, work–product protection applies to documents and other tangible things, including electronically stored information, prepared by a party or the party's representative (such as a lawyer) in anticipation of litigation.[78] A court may order the production of ordinary work products, such as witness statements, upon a showing by a party of substantial need for the materials and inability to obtain their substantial equivalent by other means without undue hardship.[79]

Like the attorney–client privilege, the protection of the work–product doctrine may be waived. There is an interesting difference, however, regarding inadvertent disclosure. Considering the policy supporting the attorney–client privilege—i.e., protecting a relationship of trust and confidence between attorney and client[80]—the privilege is waived by any disclosure to someone outside the circle of "privileged persons," which includes the attorney, client, and agents that are necessary for the communication.[81] However, the work–product doctrine is founded on a different rationale. It is meant to protect the theories and mental impressions of a lawyer from the prying eyes of the adversary. In line with this policy, disclosure of work product will waive protection only where the disclosure occurs in circumstances in which there is a significant likelihood

76. FED. R. CIV. P. 26(b)(3)(A)(ii).

77. *See id.* R. 26(b)(3)(A) (recognizing the qualified protection for ordinary work product); *id.* R. 26(b)(3)(B) (stating the absolute protection for opinion work product, i.e., "the mental impressions, conclusions, opinions, or legal theory of a party's attorney or other representative . . . .").

78. There is quite a bit of litigation over how broadly the "anticipation of litigation" element should be construed. A leading case, *United States v. Adlman*, states the test in terms of whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998). In other words, it need not have been prepared with the exclusive purpose of assisting in litigation. Since the great majority of documentary materials prepared by mitigation teams will have no purpose other than to assist in the ongoing litigation, this issue is less likely to arise in this context.

79. FED. R. CIV. P. 26(b)(3)(A)(ii).

80. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

81. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 (AM. L. INST. 2000).

that the materials will come into the possession of the adversary.[82] For example, Martha Stewart's email to her daughter summarizing advice she received from her attorney waived the attorney–client privilege, because her daughter was a stranger to the lawyer–client relationship; however, it did not waive work–product protection because sending the email did not increase the likelihood that the government would access it.[83]

D. Prosecution's Obligations to Disclose; Reciprocal Obligations

While work–product protections cover both parties in criminal cases to some extent, caselaw and statutes have imposed important limitations on the protections. Clinton Jencks was a union organizer in New Mexico who was prosecuted federally for falsely swearing that he was not a member of the Communist Party on April 28, 1950.[84] The Government's case was entirely circumstantial and relied on the testimony of two FBI informants, Harvey Matusow and J. W. Ford.[85] Both Matusow and Ford were paid to make oral and written reports of Communist Party activities in which they were involved, including meetings they alleged that Jencks attended.[86] The trial court denied a defense motion to direct the Government to produce these reports for inspection and use in cross-examining Matusow and Ford.[87] The Court of Appeals affirmed, but the Supreme Court reversed, holding:

> [T]he petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially

82. *Id.* § 91(4).

83. *Id.*; United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003).

84. Jencks v. United States, 353 U.S. 657, 658–60 (1957). Jencks went on to earn a Ph.D. in economics at the University of California, Berkeley, and taught at San Diego State University from 1964 until his retirement in 1988. Myrna Oliver, *Clinton Jencks, 87; Organizer Who Led Mineworkers' Strike Later Taught at San Diego State*, L.A. TIMES (Dec. 23, 2005), https://www.latimes.com/archives/la-xpm-2005-dec-23-me-jencks23-story.html [https://perma.cc/28T2-FWPE].

85. *Jencks*, 353 U.S. at 659. Matusow was later convicted of five counts of perjury in an unrelated case. United States v. Matusow, 244 F.2d 532, 532 (2d Cir. 1957).

86. *Jencks*, 353 U.S. at 659.

87. *Id.*

> be entitled to see them to determine what use may be made of them. Justice requires no less.[88]

Congress then enacted 18 U.S.C. § 3500, commonly known as the Jencks Act, to codify the prosecution's obligation to produce documents relevant to its inculpatory witnesses. Section 3500 states: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness[.]"[89] Over the years, courts and the federal government have recognized that earlier disclosure of this material promotes efficiency and minimizes delays, but disclosure also promotes negotiated dispositions which resolve the overwhelming majority of criminal cases without trial.[90] Section 3500 was later largely incorporated into Federal Rule of Criminal Procedure 26.2.[91] Similar pretrial discovery rules can be found in state courts as well.

While Jencks originally concerned the production of inculpatory material, the Supreme Court decision in *Brady v. Maryland*[92] held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[93] This due-process duty of disclosure was clarified in *Giglio v. United States*[94]

88. *Id.* at 668–69 (citation omitted).

89. 18 U.S.C. § 3500(b).

90. *See* U.S. ATTORNEYS' MANUAL § 9-5.002 (U.S. DEP'T OF JUST. 2008) ("Providing broad and early discovery often promotes the truth-seeking mission of the Department," and "Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations."); N.D. CAL. DEPT. OF JUST., DISCOVERY POLICY 5 (2015), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/can_discovery_policy.pdf [https://perma.cc/377J-TKFF] ("Jencks Act . . . material . . . ordinarily should be produced at a reasonable time prior to trial."); *see also* Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (noting 95% of all criminal cases are resolved by negotiated pleas); Missouri v. Frye, 566 U.S. 134, 143 (2012) (citing the Bureau of Justice Statistics Sourcebook, which reflects 97% of federal cases and 94% of state cases are resolved by pleas); Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[Ours] is for the most part a system of pleas, not a system of trials.").

91. FED. R. CRIM. P. 26.2.

92. Brady v. Maryland, 373 U.S. 83 (1963).

93. *Id.* at 87.

94. Giglio v. United States, 405 U.S. 150 (1972).

when the failure to disclose impeachment evidence resulted from negligence, rather than intent.[95]

In *Kyles v. Whitley*,[96] the Supreme Court overturned a conviction and death sentence in Louisiana, noting that the effects of failure to disclose exculpatory information had to be assessed cumulatively, rather than piece by piece—even if the police had not brought it to the prosecution's attention.[97] The prosecution's obligation under Brady "turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention."[98] Moreover, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[99]

One state high court decision that endorsed the logic of *Jencks*, but extended its analytical reach, is *People v. Rosario*.[100] The Authors quote from it at length because this opinion noted the importance of letting defense counsel, rather than the trial judge, assess the significance of cross-examination of prior statements by a prosecution witness:

> When it appears that a witness for the prosecution has made a statement to police, district attorney or grand jury, the attorney for the defendant, naturally enough, desires to see it in the hope that it may assist him to impeach and discredit that witness. The question then arises whether the statement should forthwith be delivered to the defense or whether it should be handed over only if it is found, on inspection by the court, to contain material at variance with the witness' testimony in court. The United States Supreme Court has held that a defendant "is entitled to inspect" any statement made by the Government's witness which bears on the subject matter of the witness' testimony, whereas in New York we have allowed the defendant to

95. *See generally id.* (establishing the prosecution's duty to disclose a deal with a co-conspirator, who had been told he would not be prosecuted in return for testifying).

96. Kyles v. Whitley, 514 U.S. 419 (1995).

97. *Id.* at 436–37.

98. *Id.* at 421.

99. *Id.* at 437.

100. People v. Rosario, 9 N.Y.2d 286 (N.Y. 1961). The essential holding was later codified as N.Y. CRIM. PROC. L. § 240.45 and interpreted to include notes as well as reports. This eventually provided the basis of reciprocal discovery ("reverse *Rosario*").

see and use the statement only if it contains matter which is inconsistent with the testimony given by the witness from the stand.

The procedure to be followed turns largely on policy considerations, and upon further study and reflection this court is persuaded that a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination. (Cf. U. S. Code, tit. 18, § 3500.)

A pretrial statement of a witness for the prosecution is valuable not just as a source of contradictions with which to confront him and discredit his trial testimony. Even statements seemingly in harmony with such testimony may contain matter which will prove helpful on cross-examination. They may reflect a witness' bias, for instance, or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor. Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light. As the United States Supreme Court has so well observed, "Flat contradiction between the witness' testimony and the version of the events given [previously] * * * is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?[101]

E. All Members of the Defense Team Are Governed by the Lawyer's Legal and

101. *Rosario*, 9 N.Y.2d at 289–90 (citations omitted).

Ethical Obligations[102]

Mitigation investigations, like all aspects of capital defense litigation, require interdisciplinary teams.[103] By the early 2000s, it had become established as the professional standard of care that an adequate defense team must consist of two attorneys, a mitigation specialist, and an investigator.[104] The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases begin with the recognition that providing competent representation to the client is inherently multi-faceted and multidisciplinary, and "counsel must rely on the assistance of experts, investigators and mitigation specialists in developing mitigating evidence."[105] As the Supplementary Guidelines recognize, this is an aspect of the ethical obligation of competence that applies to all lawyers. Guideline 4.1.B states: "Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members."[106]

The Guidelines thus acknowledge that counsel cannot provide competent representation without the assistance of nonlawyer mitigation specialists and investigators. Importantly, however, lead counsel retains the final responsibility for ensuring compliance with the ethical obligations that apply to all lawyers, including competence, diligence, and acting reasonably to protect confidential client information. Counsel sometimes assumes investigators and other nonlawyers retained to assist the team are familiar with the requirements for ensuring the protection of confidential information, such as the attorney–client privilege and the work–product doctrine. The client could be seriously harmed if this assumption is not actualized. For example, an investigator's communication with their client

102. *Supp. Guidelines*, *supra* note 1, at 680 (Guideline 4.1.C states: "All members of the defense team are agents of defense counsel. They are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel. The confidentiality of communication with persons providing services pursuant to court appointment should be protected to the same extent as if such persons were privately retained.").

103. *See supra* note 1 and accompanying text (describing the various roles that make up a capital defense team).

104. Miller, *supra* note 1, at 1120.

105. *Supp. Guidelines*, *supra* note 1, at 677.

106. *Id.* at 680.

in the presence of a nonessential third party proscribes the conversation from being privileged.

The approach of the Guidelines is consistent with the allocation of responsibility recognized by the Model Rules. With respect to nonlawyer assistants, such as investigators and mitigation specialists, Model Rule 5.3(b) states that any lawyer having direct supervisory authority over a nonlawyer "shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[107] Comment 3 to this Rule, like all reasonableness standards, states that the extent of the lawyer's obligation depends on the circumstances. These include the "education, experience and reputation of the nonlawyer; [and] the nature of the services involved."[108] Thus, complying with the obligations of this rule may only require reminding experienced investigators of their responsibilities. Someone relatively new to the field, however, may require more extensive training. Reflecting the importance of client confidentiality throughout the law governing lawyers, Comment 3 specifically mentions the supervision of nonlawyers to ensure that they comply with "the terms of any arrangements concerning the protection of client information."[109] For example, lead counsel may need to specifically remind team members of the special care required to ensure that attorney-client communications are confidential and that no "strangers" to the attorney-client relationship are present during a conversation.

Rule 5.3(b) speaks to a general obligation of training, supervision, and ensuring competence. Rule 5.3(c) is different. It creates professional liability for any attorney that orders or ratifies the improper conduct of a nonlawyer, or (1) possesses managerial or direct supervisory authority over a nonlawyer, (2) knows of the nonlawyer's improper conduct, and (3) "fails to take reasonable remedial action."[110] The two provisions are independent in that it is theoretically possible to violate subsection (b) by failing to adequately train a nonlawyer assistant even if the assistant does not commit

107. MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (AM. BAR ASS'N 2023); *see also* Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 442 (2012) ("Model Rule of Professional Conduct 5.3 . . . prohibit[s] lawyers from disavowing responsibility for assistants' conduct in the context of professional discipline.").

108. MODEL RULES OF PROF'L CONDUCT R. 5.3(b) cmt. 3.

109. *Id.*

110. *Id.* R. 5.3(c).

another specific violation. Of course, it would be unlikely that the deficient training would come to the attention of a disciplinary authority absent another violation. Similarly, a lawyer could be responsible under subsection (c) for the misconduct of a nonlawyer assistant even if the lawyer had provided what the lawyer reasonably believed was sufficient training.

Numerous cases have arisen in which a lawyer is personally liable—either to professional discipline or some court-imposed sanction—for the conduct of a nonlawyer assistant that violates the lawyer's obligation under the Rules of Professional Conduct. For example, Rule 4.2 prohibits communicating "about the subject of the representation with a person the lawyer knows to be represented" by counsel in the matter.[111] In a lawsuit involving a manufacturer and two of its dealers, counsel for the manufacturer hired a private investigator to talk to employees of the dealers and secretly record their conversations.[112] The communication by the manufacturer's lawyers with the employees was prohibited by Rule 4.2. The Eight Circuit held the lawyers themselves were properly subject to sanctions even though it was their investigator who had prohibited contact with employees of the opposing parties:

> Arctic Cat's attorneys attempt to shield themselves from responsibility by "passing the buck" to Mohr. . . . [L]awyers cannot escape responsibility for the wrongdoing they supervise by asserting that it was their agents, not themselves, who committed the wrong. Although Arctic Cat's attorneys did not converse with Becker themselves, the Rules also prohibit contact performed by an investigator acting as counsel's agent.[113]

111. *Id.* R. 4.2.

112. Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 695 (8th Cir. 2003).

113. *Id.* at 698. Although Rule 5.3(c) is written as a rule requiring the lawyer's knowledge of the nonlawyer's conduct to establish a violation, one district court stated that the Rules are "more in the nature of strict liability rules." *In re* Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 909 F. Supp. 1116, 1125 (N.D. Ill. 1995). The court in that case was considering a sanction precluding the plaintiffs from using evidence gathered in violation of Rule 4.2. Because the court's authority derives from its inherent power to supervise the practice of lawyers appearing before it, strictly speaking it is not required to follow the literal terms of the Rules of Professional Conduct, which are primarily enforced through the state court disciplinary process. This is a subtlety that often catches lawyers unaware. The court could also have relied on Rule 8.4(a), which does not contain an express *mens rea* term, and thus, might support strict liability for violation of the rules by nonlawyer assistants. MODEL RULES OF PROF'L CONDUCT R. 8.4. In practical terms, the possibility that a court might interpret

The court noted that this result follows directly from Rule 5.3, which makes a lawyer responsible for the misconduct of a nonlawyer if the lawyer orders or ratifies the conduct.[114] The result could also be supported by Rule 8.4(a), which states that it is "professional misconduct for a lawyer to . . . violate the Rules of Professional Conduct . . . through the acts of another."[115]

Reading subsections (b) and (c) of Rule 5.3 together, along with Rule 8.4(a), it is apparent that lead counsel has an ongoing obligation to supervise and monitor nonlawyer assistants. Rule 5.3(c) does speak in terms of knowledge of the nonlawyer's misconduct, but Rule 8.4(a) arguably establishes strict liability for a rule violation committed "through the acts of another."[116] To be safe, lawyers on the defense team should remain engaged with the activities of mitigation specialists and investigators, discuss how they have obtained information, and certainly not turn a blind eye if there are indications that the nonlawyer has violated a provision of the rules applicable to lawyers.[117] This is not to say that a lawyer cannot reasonably trust an experienced investigator or mitigation specialist with whom the lawyer has a long-term working relationship. However, since the buck

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Rule 5.3(c) as imposing strict liability means that lead counsel had better be extremely diligent in ensuring that nonlawyer assistants comply with rules applicable to lawyers on the defense team.

114. *Midwest Motor Sports*, 347 F.3d at 698. The court also cited an ABA ethics opinion reminding lawyers of their responsibilities under Rule 5.3. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396, at 2 (1995) ("[I]f the investigator acts as the lawyer's 'alter ego,' the lawyer is ethically responsible for the investigator's conduct.").

115. MODEL RULES OF PROF'L CONDUCT R. 8.4. Relying on the predecessor of this rule, the Oregon Supreme Court sanctioned a lawyer who hired a private investigator to pose as a journalist and talk to the opposing party. *In re* Ositis, 40 P.3d 500, 503–04 (Or. 2002) (relying on DR 1-102(A)(1) from the Oregon Code of Professional Responsibility, which is identical to the current Rule 8.4(a) from the Oregon Rules of Professional Conduct). The other issue raised in *Ositis*, namely the permissibility of deception in the course of an investigation, where the deception helps a lawyer develop evidence of the opposing party's wrongdoing, is fascinating. *See* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995) (explaining the role deception plays in specific investigative measures). It is beyond the scope of this Article, however, as we assume that there are likely no situations in which mitigation investigators may legitimately use deception to gather evidence.

116. MODEL RULES OF PROF'L CONDUCT R. 8.4.

117. *See, e.g.*, Att'y Grievance Comm'n of Md. v. Smith, 116 A.3d 977, 995 (Md. 2015) (contending an individual "cannot avoid responsibility for the misconduct of his employee under MLRPC 5.3(c)(2) by remaining willfully ignorant of the employee's conduct").

always stops with the lawyer, lawyers should remain sufficiently informed about the activities of nonlawyer assistants to be alert to any potential issues.

These obligations apply in particular to relations with prospective witnesses. For example, counsel and their agents may not communicate with a person known to be represented in the matter, such as a codefendant or alternative suspect.[118] Lawyers may also "not give legal advice to an unrepresented person"—other than the advice to retain a lawyer—if "the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[119] Witnesses, other than codefendants or alternative suspects, generally do not have interests that are adverse to those of the client. In addition, Rule 3.4(f) states that a lawyer shall not "request a person other than the client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee . . . of the client . . . ."[120] This rule would apply when talking to witnesses who may have been contacted by prosecutors or law enforcement officers seeking information.[121]

In general, the defense team's obligations are to the client; they have no obligation to advise a prospective witness during an interview, prior to sworn testimony, of the possibility of self-incrimination, or in matters concerning the witness's need for an attorney.[122] ABA Standard 4-4.3(c) states: "It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."[123] The Commentary to Standard 4-4.3 explains: "Occasionally a prospective witness gives a statement to the defense that is helpful to the client on whose behalf the statement is obtained but at the cost of possibly incriminating the

118. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 ("[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another . . . .").

119. *Id.* R. 4.3. Most cases involving a violation of this provision of Rule 4.3 arise in the context of settlement negotiations with unrepresented adverse parties. *See, e.g.*, Hopkins v. Troutner, 4 P.3d 557, 558–59 (Idaho 2000) (demonstrating Rule 4.3's applicability to an alleged settlement offer between parties).

120. MODEL RULES OF PROF'L CONDUCT R. 3.4(f).

121. *See, e.g.*, *In re* Stanford, 48 So. 3d 224, 227–28 (La. 2010) (demonstrating how an attorney's communication with a victim resulted in a disciplinary proceeding alleging a violation of Rule 3.4(f)).

122. CRIMINAL JUSTICE STANDARDS, *supra* note 3, at 10.

123. *Id.*

prospective witness."[124] Nevertheless, the lawyer's "paramount loyalty to his or her own client must govern in this situation."[125]

An earlier version of this standard stated that "it is proper but not mandatory" for a lawyer or defense investigator to caution a prospective witness concerning possible self-incrimination and the need for an attorney.[126] However, the ABA changed the wording "due to the belief that the giving of such warnings is probably inconsistent with counsel's responsibilities under the adversary system."[127]

F. Lead Counsel Is Responsible for Educating the Team About the Law and Deciding How Mitigation Is Presented

The Supplementary Guidelines for the Mitigation Function cover some final points relevant to the Authors discussion. Supplementary Guideline 4.1.D states:

> It is counsel's duty to provide each member of the defense team with the necessary legal knowledge for each individual case, including features unique to the jurisdiction or procedural posture. Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of the capital charges and available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars and "door-opening" doctrines; and rules affecting confidentiality, disclosure, privileges[,] and protections.[128]

Supplementary Guideline 10.4.B states, "Counsel decides how mitigation evidence will be presented."[129] There are no overriding guidelines or rules

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124. AM. BAR ASS'N, STANDARDS FOR THE DEFENSE FUNCTION 58 (2d ed. 1979) [hereinafter DEFENSE STANDARDS].

125. *Id.*

126. *See* AM. BAR ASS'N, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 228–29 (1971) ("In interviewing a prospective witness it is proper but not mandatory for the lawyer or his investigator to caution the witness concerning possible self-incrimination and his need for counsel."); DEFENSE STANDARDS, *supra* note 124, at 58 (claiming a lawyer is not required "to caution the witness concerning possible self-incrimination and the need for counsel").

127. DEFENSE STANDARDS, *supra* note 124, at 57.

128. *Supp. Guidelines*, *supra* note 1, at 680–81.

129. *Id.* at 688.

about reports or notetaking. There are also no overriding guidelines about whether the ultimate totality of the mitigation evidence requires a summary or social history report. As discussed below,[130] these are all matters for each capital defense team to address as soon as the team is assembled, which is to say, as soon as possible after counsel has been designated by the responsible authority.[131]

III. DEATH IS DIFFERENT

A. Defense Interviews with Prosecution "Fact" Witnesses

On issues of guilt, innocence, and aggravating evidence in capital cases, defense investigation largely maps the minefield and focuses on prosecution witnesses associated with specific events and particular facts. It is mainly used to verify the accuracy of police reports and prosecution witness interviews, as well as plan effective cross-examination. In addition to preparing for effective cross-examination, defense counsel needs a thorough investigation to advise clients about the likely outcome of a trial and help them make a fully informed decision about whether a negotiated disposition is in their best interests.[132] Clients may have unrealistic beliefs—even magical thinking—about whether witnesses will testify to what they have told the police or whether jurors will find the witnesses credible. Defense investigation goes a long way toward educating clients about what to expect if they go to trial.

If a witness's testimony is inconsistent with prior statements to a defense investigator, the investigator's reports may be used to impeach the witness, or the investigator may be called to testify to the inconsistency. The defense attorney may participate in pretrial interviews, but it is imperative to have an

130. *See infra* Section IV.A (discussing the nine stages of capital defense litigation).

131. *See ABA Guidelines*, *supra* note 1, at 999 ("[A]fter designation, lead counsel should assemble the rest of the defense team . . . ."). ABA Guideline 10.4.C states: "As soon as possible after designation, lead counsel should assemble a defense team . . . ." *Id.*

132. *See* Jencks v. United States, 353 U.S. 657, 668–69 (1957) ("Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness . . . the defense must initially be entitled to see [reports] to determine what use may be made of them.").

investigator present in case testimony is used to impeach the witness.[133] Otherwise, the attorney risks running afoul of Model Rule 3.7, which prohibits attorneys from serving as both advocates and witnesses at trial.[134] Regardless of who memorializes a defense interview with a prosecution witness, the report will likely enjoy work–product protection if used only for cross-examination. However, the report will be discoverable if shown to the testifying witness (for example, as a prior inconsistent statement or past recollection recorded) or if the defense investigator testifies to impeach the witness. As discussed earlier, mental impressions will remain protected but factual statements—especially verbatim ones—will not. The factual portions of a witness statement will be considered ordinary work product, discoverable by an adversary who cannot, without undue hardship, obtain the substantial equivalent of the materials by other means.[135]

It should be noted that these witnesses are commonly referred to as "fact witnesses."[136] They provide evidence that is material to a factual controversy because they have direct knowledge of the event. Fact

133. *See also ABA Guidelines*, *supra* note 1, at 958 ("Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case.").

134. MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (AM. BAR ASS'N 2023). The lawyer conducting the interview would be disqualified from serving as an advocate at trial only if the lawyer is likely to be a *necessary* witness. Courts have discretion in deciding motions to disqualify counsel under this rule and may not order it in every case, particularly since Rule 3.7(a)(3) invites the court to consider whether "disqualification of the lawyer would work substantial hardship on the client." *Id.* Rule 3.7(a) also refers to serving as an advocate and witness at trial, suggesting that other adversarial proceedings, such as evidentiary hearings, would not require disqualification under these circumstances. This result follows from the major rationale underlying Rule 3.7, which is to prevent jury confusion caused by a lawyer simultaneously playing the roles of advocate and witness. *See id.* R. 3.7 cmt. 2 (explaining the potential confusion caused by a lawyer "serving as both advocate and witness"). A judge presiding at an evidentiary hearing is less likely to be confused in the same way as a jury by a lawyer who briefly steps out of the role of advocate to testify about her recollection of a witness's statement. In any event, Rule 3.7(b) permits other lawyers in the same firm to serve as an advocate at trial, even if the first lawyer is disqualified under Rule 3.7(a). *See id.* R. 3.7(b) ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness . . . ."). It is still prudent to have an investigator present, however, to avoid the necessity of arguing about disqualification under the advocate-witness rule.

135. FED. R. CIV. P. 26(b)(3)(A)(ii).

136. *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a fact witness as a person with "firsthand knowledge of something based on . . . perceptions through . . . the five senses"). Similarly, the term "fact investigator," as applied to defense investigators, appears in ABA Guideline 10.4.C.2.a. *ABA Guidelines*, *supra* note 1, at 1000.

witnesses usually act as percipient witnesses—they have observed an event utilizing one or more of their senses. Percipient witnesses testify to what they saw, heard, smelled, felt, tasted, etc. For instance, they might make a factual observation that "the light was red" or "the light was green." These witnesses may or may not be eager to take the witness stand, but they generally have no difficulty understanding why they are being called.

Defense interviews of percipient witnesses traditionally assess the quality of the potential evidence using the same general criteria as a prosecution interview would employ: how accurate is the witness's perception,[137] how reliable is her memory, is she biased (explicitly or implicitly),[138] and is she able to articulate what she observed? Defense interviews will additionally inquire about the police investigation to learn how it may have influenced the witness's report and testimony: what was she told before and after viewing a lineup or photo array, for example. Was she told to come to the police station because a suspect had been arrested? Was her uncertain identification strengthened when a police officer told her, "Good. You identified the actual suspect."[139] Reports of the defense interviews are meant to document these interviews thoroughly.

B. Defense Interviews of "Fact" Witnesses Called by the Defense

Interviews of fact witnesses called by the defense are treated differently in most jurisdictions from defense interviews of witnesses called by the prosecution. Federal Rule of Criminal Procedure 26.2(a) echoes the *Jencks* obligation and states: "After a witness other than the defendant has testified on direct examination, the court . . . must order . . . [the defense] to produce . . . any statement of the witness . . . ."[140] An advisory note in 1993

137. *See* Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCH. 100, 103 (1989) (describing how memory distortion can produce misleading post-event information). Cognitive psychologists have explored how perception and memory affect eyewitness evidence over many decades, from the groundbreaking work of Professor Elizabeth Loftus to the influential work by Professor Gary Wells who examined the role of eyewitness error in wrongful convictions.

138. *See* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 32 (2019) (describing Walter Lippmann's "stereotypes" as "impressions that reflect subjective perceptions but stand in for objective reality").

139. *See* Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCH. 360, 375 (1998) (distinguishing the effect police statements have on eyewitness identifications).

140. FED. R. CRIM. P. 26.2(a).

clarifies that the amendments to Rule 26.2 are "not intended to require production of a witness's statement before the witness actually testifies."[141]

These witnesses may raise reasonable doubt about the allegations—for example, by impeaching a prosecution witness, disclosing an admission by an alternative suspect, or demonstrating that the defendant's role in the offense was minor compared to another perpetrator. Anyone who helps establish a statutory affirmative defense, such as alibi or insanity, where the defense has the burden of proof and notice is required, also falls squarely in this category.

Once again, these are fact witnesses. They have direct knowledge of some specific fact relevant to the defense against the charges. Whether eager or reluctant to be interviewed or to testify, they generally understand why the defense views them as witnesses.

C. Defense Mitigation Witnesses

By contrast, the bifurcated capital case has an extremely broad second phase (variously referred to as the penalty phase or sentencing proceeding) where the defense has the burden of proving its mitigating evidence.[142] The breadth of mitigating evidence under the Eighth Amendment has been established in a series of Supreme Court decisions since the Supreme Court required individualized sentencing as a constitutional requirement in the modern era.[143] Not surprisingly, mitigation remains a mystery decades after

141. FED. R. CRIM. P. 26.2 advisory committee's note to 1993 amendment.

142. The extent of this burden has been clarified in numerous Supreme Court decisions. The standard of proof is by a preponderance of the evidence, and the jury need not be unanimous in finding mitigation. Mills v. Maryland, 486 U.S. 367, 384 (1988); *accord* Wiggins v. Smith, 539 U.S. 510, 537 (2003) (first citing Borchardt v. State, 786 A.2d 631, 660 (Md. 2001); and then citing Wiggins v. Smith, 539 U.S. 510, app. 369 (2003)) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").

143. *See* Blume & Stetler, *supra* note 4, at 6 ("The breadth of mitigating evidence has been clear since the Supreme Court rejected the mandatory sentencing statutes enacted in Louisiana and North Carolina."); Russell Stetler, *The History of Mitigation in Death Penalty Cases, in* SOCIAL WORK, CRIMINAL JUSTICE AND THE DEATH PENALTY: A SOCIAL JUSTICE PERSPECTIVE (Lauren A. Ricciardelli, ed., Oxford Univ. Press, 2020); *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (asserting the sentencer must consider compassionate or mitigating factors based on the "diverse frailties of humankind"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (concluding sentencer must be able to consider defendant's background, record, and circumstances of the offense as mitigation); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (determining youth must be considered because it is a time of susceptibility to influence, immaturity, and psychological damage); Skipper v. South Carolina, 476 U.S.

the Supreme Court mandated individualized sentencing in death penalty cases.[144] Understandably, potential mitigation witnesses have no idea why the capital defense team wants to talk with them. They do not think of themselves as witnesses. They repeatedly assure the lawyer, investigator, or mitigation specialist that they know nothing about the horrific crime.

Mitigation investigation is also intrusive. It asks the client and his loved ones unwanted questions. It probes the sensitive subjects that make us all uncomfortable and that no one is eager to discuss with strangers. Decades of experience have shown that families almost universally respond to capital defense teams with conclusory affirmations that the client was a "good guy," the home was "normal," and the capital charges must all be a terrible mistake.

In most jurisdictions, if these witnesses testify, the reports of these interviews will be subject to reciprocal discovery. While the defense team's mental impressions may retain work–product protection, the witnesses' written summary statements may fall squarely in the category of discoverable statements.

1, 4 (1986) (finding good behavior during jail as relevant mitigation evidence even though it would not reduce culpability for the offense); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (specifying sentencer needs mitigation evidence to make a reasoned moral response); McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (quoting State v. McKoy, 373 S.E.2d 12, 45 (N.C. 1988) (Exum, C.J., dissenting), *vacated*, 494 U.S. 433 (1990)) ("Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."); Tennard v. Dretke, 542 U.S. 274, 287 (2004) (concluding no nexus requirement because some things are inherently mitigating); Ayers v. Belmontes, 549 U.S. 7, 21 (2006) (in dicta, Court refers to "potentially infinite mitigators"). For examples of specific, non-statutory mitigating factors in cases that went to a penalty trial, *see* Michael Radelet, *Florida Death Cases Where Non-Statutory Mitigators Were Found*, https://www.colorado.edu/sociology/sites/default/files/attached-files/florida_death_cases_where_non-statutory_mitigators_were_found.pdf [https://perma.cc/UUP5-5NY3] (providing a list of judicially recognized non-statutory mitigators); *Penalty Phase Verdict Forms*, FED. DEATH PENALTY RES. COUNS., https://fdprc.capdefnet.org/verdict-forms [https://perma.cc/6SLY-ZTYU] (presenting penalty phase verdict forms from federal capital cases).

144. *See* Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 237 (2008) (noting even judges and defense counsel have little understanding of mitigation until they have actually handled a capital case).

IV. THE LABYRINTHINE PROCEDURAL PATHWAY OF CAPITAL CASES

A. The Nine Stages of Capital Litigation

What the Authors have discussed thus far covers the doctrines which apply to pretrial preparation in death penalty cases. However, as noted at the beginning of this Article, the litigation life of a capital case typically extends two decades from arrest to final resolution.[145] Figure 1, *infra*, depicts the nine stages of a capital case prosecuted in state court.[146] Additionally, the Authors have broadly discussed the doctrines that apply to the state trial court as depicted in the lower lefthand corner of Figure 1. If the capital client is convicted and sentenced to death, there is an automatic appeal to the highest state court of criminal jurisdiction (usually denominated the state supreme court, but in some cases named the court of criminal appeals).[147] Since this stage simply reviews legal claims arising from the trial record, extra-record facts and reports are not implicated. If the state high court affirms the conviction and death sentence, the capital client may petition the United States Supreme Court for review of legal error arising from the federal constitutional dimension; however, these so-called "cert. petitions" (petitions for certiorari) are rarely granted, and once again do not implicate extra-record facts and reports.[148]

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145. *See supra* note 9 and accompanying text.

146. About 98% of capital cases are prosecuted in state court. *See* DEBORAH FINS, DEATH ROW USA (NAACP Legal Def. Fund 2022), https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf [https://perma.cc/AW6U-RCEX] (providing United States death row statistics). As of January 1, 2022, only forty-four of the 2,436 people under sentence of death in the United States were prosecuted in federal court rather than state court. *Id.* at 59. The procedural pathway for federal prosecutions is streamlined into six stages: (1) trial court, (2) direct appeal, (3) discretionary petition to the Supreme Court, (4) federal habeas corpus under 18 U.S.C. § 2255, (5) discretionary appeal of the district court decision to the circuit court, and (6) discretionary petition to the Supreme Court. PUB. INFO. OFF., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 8–10 (2022).

147. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976) (approving Georgia's newly enacted death penalty statute in part because of its provision of automatic, direct appeal to the state supreme court as a safeguard against arbitrariness and caprice).

148. "Of the 7,000 to 8,000 cert. petitions filed each Term, the court grants cert. and hears oral argument in only about 80. Granting a cert. petition requires the votes of four justices." *Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/supreme-court-procedure/ [https://perma.cc/U47E-GQYS]. Of the roughly eighty cases that are reviewed, only a small number are criminal cases, and capital cases represent an even smaller fraction.

The fourth stage is known by various names—such as, "state post-conviction review," "state habeas," "motion for appropriate review," "Rule 32," etc.—depending on local statutes and custom, but the generic name "state post-conviction review" accurately captures the concept. State post-conviction review is the stage where capital clients have an opportunity to introduce extra-record facts—for example, new evidence of innocence, new evidence that the client is not eligible for execution because of intellectual disability, or evidence that trial counsel was ineffective for failing to conduct a thorough investigation of potential mitigation evidence.

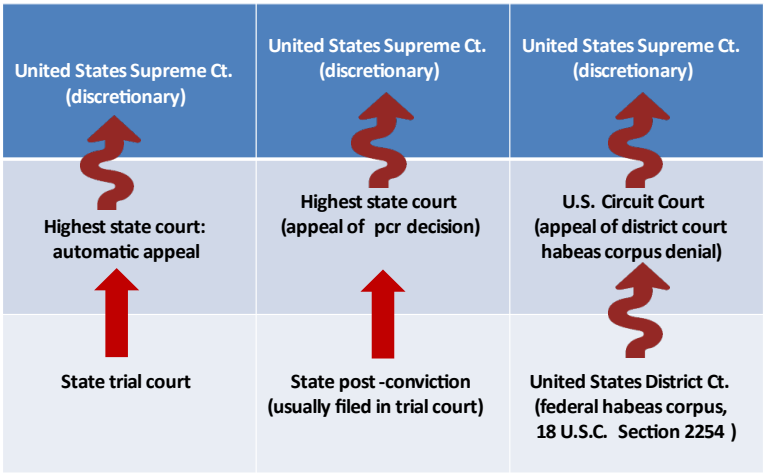
Although jurisdictional variation concerning where the petition is filed subsists, it is typically filed in the state trial court and often before the same judge who presided over the trial. If this court denies the petition and affirms the conviction and death sentence, the decision is appealed to the state's highest court and counsel may again seek discretionary review by the Supreme Court of the United States at stage six. The Authors turn to the changed rules affecting privileged and protected material in state post-conviction litigation in subsequent pages, but note that these rules affect extra-record facts and reports only at stage four (not stages five and six). Importantly, the state post-conviction phase of the proceeding is generally governed by state rules of civil procedure—the intricacies of which may be less familiar to lawyers accustomed to working with state rules of criminal procedure.[149]

The last three stages govern federal habeas corpus claims. These constitutional claims are raised in the federal district court and may include claims rejected on direct review in state court and claims based on extra-

149. For example, the attorney–client privilege and work–product protection are waived if a timely objection to a demand for production does not occur. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 78(3) (AM. L. INST. 2000) (describing a waiver for the attorney–client privilege if there is a failure to "object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication"). One way to waive the privilege by failing to assert it is to fail to identify it with sufficient specificity on a privilege log. *See* FED. R. CIV. P. 26(b)(5)(A)(ii) ("[T]he party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed . . . ."); *see also* 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016.1 (3d ed. 1994) (discussing requirements for sufficient identification of documents in a privilege log). Civil litigators are familiar with privilege logs but some criminal defense lawyers, with limited experience on the civil side, may not be aware of the risk of waiver if the requirements of the civil procedure rules are not followed carefully.

record evidence. Once again, doctrines of privilege and work–product protection may be implicated in stage seven (not eight or nine).

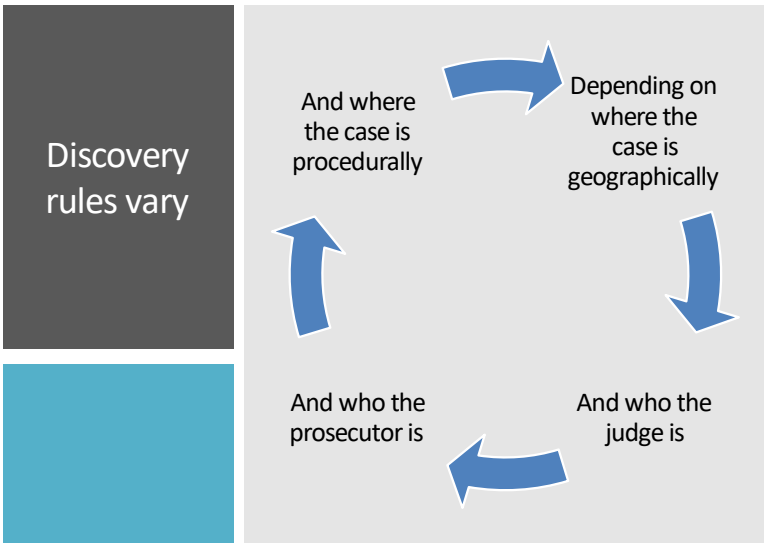
Figure 1. The Nine Stages of a Capital Case



B. Other Variations in Discovery Rules, by Statute and As Applied

Figure 2, *infra*, illustrates a few broad points that need to be noted before the Authors turn to the details of how the rules change as the case moves along the procedural pathway. The discoverability of defense mitigation reports varies geographically, not only according to the statutes of different jurisdictions but how those statutes are applied by judges around the state. While state high courts endeavor to enforce uniformity, there is considerable variation in how trial court judges—often elected—interpret the statutes and disparity regarding the aggressiveness of local prosecutors' pursuit of defense work product. The Authors will provide examples later in this section, but suffice it to say for now that there is some elasticity in the way judges and prosecutors in the same state may interpret the rules that the Authors have outlined.

Figure 2. Discovery Rules Vary



C. The Interplay of Criminal and Civil Rules[150]

Figure 3, *infra*, is a simplified representation of exceptions to the rules that the Authors have discussed and the dramatic ways in which the rules change when leaving the criminal domain of trial litigation for the civil arena of post-conviction and habeas litigation—particularly apparent when there is a claim of ineffective assistance of trial counsel ("IAC"). The Authors have already discussed in detail the difference between the attorney–client privilege and the doctrine of work–product protection. They now reiterate

150. For a detailed general discussion of criminal rules, *see* ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 7 FOR THE DEFENSE OF CRIMINAL CASES 1 (7th ed. 2022) (providing "a compact guide through the stages of an ordinary criminal case, from arrest and investigation to appeal"). The book is free and available for download by public defenders and other lawyers who do substantial, nonprofit criminal defense work. A form for requesting a free download is available at https://www.ali.org/publications/show/trial-manual-7-defense-criminal-cases/ [https://perma.cc/T9XT-8JZ9]. State post-conviction rules vary widely according to jurisdiction. For a discussion of federal habeas corpus rules, *see generally* RANDY A. HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (7th ed. 2015).

that even reports of attorney-client communications and interviews may be discoverable pretrial if they are disclosed to a third party, such as a testifying mental health expert. As discussed above,[151] the assertion of an IAC claim has a significant impact on the scope of attorney–client privilege protection because it operates as a waiver of the privilege covering relevant communications to the ineffective assistance claim. "The attorney–client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that . . . a lawyer's assistance was ineffective, negligent, or otherwise wrongful."[152] Importantly, the privilege is waived only with respect to communications relevant to the assertion of ineffective assistance.[153] Lawyers representing clients asserting IAC claims must be aware of the relevant jurisdiction's caselaw regarding the scope of a waiver stemming from the client's assertion of an IAC claim.

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151. *See supra* note 60 and accompanying text (addressing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 80(1)(b), as well as cases concerning ineffective assistance of counsel).

152. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 80(1)(b); *see also In re* Lott, 424 F.3d 446, 452 (6th Cir. 2005) (noting "[t]he privilege may be implicitly waived by claiming ineffective assistance of counsel"); Bittaker v. Woodford, 331 F.3d 715, 722 (9th Cir. 2003) (citing Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967)) (refusing to enlarge the scope of waiver concerning privileged communications and "adjudicating [an] ineffective assistance of counsel claim").

153. *See, e.g.*, Waldrip v. Head, 532 S.E.2d 380, 387 (Ga. 2000) (holding " a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney–client privilege and work product doctrine"); People v. Madera, 112 P.3d 688, 691 (Colo. 2005) ("Implied waiver may occur when the defendant raises a claim of ineffective assistance of counsel as to any communications relevant to the defendant's claim of ineffective assistance of counsel."). The ABA ethics committee has cautioned lawyers that the self-defense exception to the rule of confidentiality does not justify an overbroad disclosure of confidential information, even where there has been a waiver as a result of the client's IAC claim:

> Although an ineffective assistance of counsel claim ordinarily waives the attorney–client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-456 (2010).

Figure 3. Discovery Issues Concerning Defense Work Product

	Pretrial	Trial	Post-conviction
Client interviews	Attorney / client privilege	*Unless* disclosed to expert	Privilege may be waived by IAC claims
Witness interviews	Work-product protection	*Unless* witness or expert relying on report testifies	Protection waived by IAC claim; discoverable even if witness didn't testify at trial
Expert reports	Protected	*Unless* expert testifies or report is offered by defense	Protection waived by IAC claim; discoverable even if expert didn't testify at trial

In light of the dramatic decrease in the number of annual death sentences and the scholarship documenting hundreds of life sentences from juries even in highly aggravated cases, it is hardly surprising that the effectiveness of representation is questioned when a death sentence is returned. Indeed, "the empirical evidence . . . is so powerful that the cases resulting in death sentences can plausibly be seen as outliers."[154]

In the pretrial context, written records of witness interviews are protected under the work–product doctrine unless the witness testifies, the defense team member who conducted the interview testifies, or the report is disclosed to a testifying expert pretrial. Expert reports (including DNA analyses, brain scans, and myriad varieties of forensic tests) are also protected as attorney work product unless the expert testifies or the defense

154. Russell Stetler, Maria McLaughlin & Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 HOFSTRA L. REV. 87 (2022) (listing over 600 cases in three highly aggravated categories where juries declined to impose death sentences).

otherwise offers the findings into evidence.[155] However, in post-conviction proceedings, if an ineffectiveness claim is based on alleged deficiencies in the investigation of mitigating evidence, information derived from witnesses who were interviewed but did not testify may not be protected as work product. Work product protection is waived in the same way as the attorney–client privilege by an assertion that the lawyer's assistance was "ineffective, negligent, or otherwise wrongful."[156] The distinction between work–product and attorney–client privilege is that the former only offers qualified protection for "ordinary" work product, which may be lost if the adversary shows a substantial need for the material and the inability to obtain its substantial equivalent without undue hardship.[157] Billing records, reports, and other work product relating to the mitigation investigation are likely to be discoverable. To the extent that the alleged deficiencies relate to mental health evidence, the reports, psychological tests, and brain scans performed by experts not disclosed at trial may also lose attorney–client and work–product protection in post-conviction proceedings.[158]

V. THE "MYSTERY OF MITIGATION" AND THE DYNAMICS OF TRAUMATIC DISCLOSURE

A. The "Mystery of Mitigation"

Capital cases involve the two harshest punishments our laws impose. Once convicted of capital murder, a defendant will die in prison—by execution, from a natural death through age or infirmity, or through prison violence under a life sentence that allows no possibility of parole or release. Mitigation evidence is whatever may persuade a juror to spare the defendant from execution. The search for this evidence begins on day one of capital defense representation. Clients and their loved ones are inevitably confused

155. *See* FED. R. CIV. P. 26(b)(4)(D) ("[A] party may not . . . discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial . . . .").

156. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 92(1)(b).

157. FED. R. CIV. P. 26(b)(3)(A)(ii).

158. *See generally* Elizabeth F. Maringer, *Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts*, 62 FORDHAM L. REV. 653 (1993) (discussing the discovery of privileged information in cases of insanity and capital sentencing proceedings).

when the legal team contesting the capital allegations announces it is simultaneously investigating the evidence to be presented only after his conviction. They cannot fathom why the defense team insists on preparing for a sentencing proceeding. There is no other area of criminal law where jurors play a role in sentencing, and the focus on that life-or-death decision is often misunderstood by clients and their families as an indication that the defense team assumes the client's guilt, believes nothing that he says about the allegations, and has already given up any hope of avoiding a conviction.

The client's family members are often in shock about the allegations and cannot believe their loved ones could be guilty. Clients and family members go through something resembling the stages of grief,[159] with early emotions of denial and anger before accepting the reality of what the client faces. The legal concept of mitigation is alien to anything they have ever known or experienced, considering it arises in no other context in the criminal legal system. Not surprisingly, family members and others whom the client may identify as potentially helpful witnesses mistakenly assume that they are wanted as traditional character witnesses, rather than as factual witnesses with intimate knowledge of all the painful experiences that may have shaped the client's development. Their initial statements are likely to be emotional responses and conclusory opinions, rather than the solid facts on which mitigation evidence must ultimately rest.

Mitigation investigation is intrusive. It asks the client and his loved ones unwanted questions. It probes the sensitive subjects that make us all uncomfortable and that no one is eager to discuss with strangers. Most death-eligible cases avoid death sentences and executions, and many do so by avoiding trial.[160] These propositions were true even when capital

159. *See generally* ELISABETH KÜBLER-ROSS, ON DEATH AND DYING (1969) (identifying five stages of grief: denial and isolation, anger, bargaining, depression, and acceptance).

160. *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161, 1189 (2018) (claiming the significant decrease in death sentences and executions is because of the increase in specialized capital defense offices); *id.* app. at 1226–27 (finding few death sentences in absolute numbers in all forty jurisdictions that have had death-eligible statutes in the modern era and highlighting the large number of cases that avoided death sentences through negotiated dispositions); *see also* Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA L. REV. 1157, 1157 (2003) (noting the availability of pleas in the overwhelming majority of capital cases in the modern era, including those of hundreds of individuals who have been executed).

punishment was in its ascendancy in the final decades of the twentieth century, and they are truer still in the twenty-first century, as both death sentences and executions have been in steep decline.[161] As a result, mitigation remains a mystery even to the players in the criminal legal system[162]—and especially to those outside the legal system who are surprised to be told they are potential mitigation witnesses.

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161. *See The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report [https://perma.cc/DNJ8-889B] ("2021 saw historic lows in executions and near historic lows in new death sentences.").

162.

A capital offense is most often a murder that has received sensational local publicity, and potential mitigation witnesses, especially the client's family and friends, often react with horror at the thought the perpetrator could be someone they cherish. Despite their relationship with the client, they want to avoid association with the horrendous crime. To protect their standing and reputation in the community, as well as their feelings for the client, mitigation witnesses will often react with denial and insist that the client is not guilty. Their first responses to mitigation interviews may be protective—not only of their belief about who the client is but also concerning their own dignity. They are reacting to the trauma of the crime itself and its impact on their community.

Some potential mitigation witnesses are estranged from the capital client or may never have really liked the client. Nonetheless, the defense seeks them out because they knew the client and his family or household in his developmental years, when he was doing well, or when he spiraled downward. Their knowledge may span the client's entire life trajectory. They knew him in school or in his neighborhood. They worshiped with him, worked with him, or served their country with him. They knew him in the juvenile facilities, jails, or prisons which may be a critical period for those deciding whether he should live or die. Their insights may provide a window into the world that shaped him, but they do not simply sit down and tell the capital defense team all that they know.

> Few have seen its power, its transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an often monstrous crime. It would be rare for an individual juror to sit on more than one case in which mitigating evidence was presented in the penalty phase of a capital trial. Indeed, in twenty years of federal death penalty prosecutions, very few judges have presided over more than one penalty proceeding. Some of the most experienced public defenders specializing in capital cases have presented mitigating evidence only a handful of times over their long careers. Even mitigation specialists—the capital defense team members who give undivided attention to the client's life-history investigation—have few opportunities to observe penalty proceedings, to watch the entire courtroom drama unfold.

Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 237 (2008); *see generally* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 676–81 (2013) (seeing an absence of cases in the appellate courts in which the government does not seek the death penalty).

Family members may also share the client's disabilities. Many disorders and impairments involve genetic predispositions: they run in families.[163] The disorders and impairments may be stigmatized in ways that exacerbate the difficulty of discovering the client's handicaps and disadvantages. One may be dealing with family members who view their own experiences with rehabilitation and mental health therapy through a harsh and negative lens and are therefore reticent about exposing the client to the labeling and stereotyping that has harmed their own life options.

A. Dynamics of Traumatic Disclosure[164]

In addition to the many reasons that the Authors have already enumerated for the reticence of mitigation witnesses, those closest to the clients are often hard-wired not to share their memories.[165] Many of the people most intimately connected to the client—especially parents, caretakers, and siblings—have experienced or witnessed the same traumas as the clients themselves, and they are haunted by the "shame for what they did or didn't do" in response to the trauma they experienced or witnessed.[166] The client's mother, for example, may have brought someone into the home who violently assaulted her children, including the client. A sibling may feel the same shame as the client for being too young to intervene and stop domestic brutality directed against their mother. Parents may be ashamed

163. *See generally* AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 1 (5th ed. 2013) (identifying genetic influences in multiple disorders, including alcohol use disorder, autism spectrum disorder, bipolar disorder, intellectual disability, and schizophrenia).

164. This Article's discussion of the psychological mechanisms at work and the dynamics of disclosure is informed by what the Authors have learned over many years from numerous psychologists who have consulted on capital cases and lectured at training programs on these issues, including Drs. Leslie Lebowitz, David A. Lisak, Lee Norton, Katherine Porterfield, and Kathleen Wayland, to name only a few of the clinicians specializing in trauma who have helped lawyers and mitigation specialists acquire a rudimentary understanding of these issues. *See also* AM. ACAD. OF EXPERTS IN TRAUMATIC STRESS, www.aaets.org [https://perma.cc/DP76-D5L7] (providing resources on managing traumatic stress). Others who have deepened the Authors' appreciation of racial trauma include Drs. Hope Hill and Sara Vinson. *See also* Kenneth V. Hardy, *Healing the Hidden Wounds of Racial Trauma,* 22 RECLAIMING CHILDREN & YOUTH 24, 25 (2013) ("Racial oppression is a traumatic form of interpersonal violence which can lacerate the spirit, scar the soul, and puncture the psyche.").

165. Lars Schwabe, *Memory Under Stress: From Single Systems to Network Changes,* 45 EUR. J. NEUROSCI. 478, 480–83 (2017); *see also* Gimel Rogers & Marina Bassili, *Impact of Trauma on Memory,* CHAMPION, *forthcoming* 2023, at 1 ("Trauma disrupts the very fabric of our being, including our memory.").

166. VAN DER KOLK, *supra* note 12, at 13.

that they could not afford to move out of a toxic neighborhood that exposed the client to drugs, gangs, and community violence.[167] They may blame themselves or expect that others will try to blame them for the horrific crime. Males may be especially reticent about sexual trauma.[168] They have been conditioned to equate vulnerability with weakness, and this vulnerability is acute and dangerous for the clients themselves in the carceral setting with the ever-present risk of sexual victimization.[169] However, fathers, brothers, and sons have also been conditioned not to talk about a taboo subject. As boys, they learned not to disclose when they had been sexually victimized, lest they be stigmatized as gay. Other males may have sworn to keep their secret. Everyone in a household may have managed the pain in their lives by keeping it from outsiders, and penetrating their walls of protection poses immense challenges for the mitigation interviewer.

Family and friends of the capital client often begin with denial and minimization, to normalize what may have been excruciating childhood experiences. In their first responses, they use conclusory labels and descriptions to deflect probing questions. The client had a "normal" childhood, came from a "loving home," "worked hard," or was "good to his mother." They recall "nothing unusual" when he was growing up. He was "like any other boy" in the neighborhood. Their instinct is to end the interview before it has begun.[170]

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167. *See* David Freedman & George W. Woods, *Neighborhood Effects, Mental Illness and Criminal Behavior: A Review*, 6 J. POL. L. 1, 1 (2013) (reviewing social science research on "neighborhood effects" in shaping poor outcomes in mental illness and criminal behavior); *see also* JAMES GARBARINO ET AL., NO PLACE TO BE A CHILD: GROWING UP IN A WAR ZONE xix (1991) (comparing the impact of inner-city violence to the traumatic effects of growing up in a war zone).

168. *Psychology of Men and Masculinities,* AM. PSYCH. ASS'N, https://www.apa.org/pubs/journals/men [https://perma.cc/W8UL-57FC]; 1IN6, www.1in6.org [https://perma.cc/M25N-AM7E].

169. Wilbert Rideau, *The Sexual Jungle, in* LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 73, 74–75 (Wilbert Rideau & Ron Wikberg, eds., 1992); *see also* Maurice Chammah, *Rape in the American Prison,* ATL. (Feb. 25, 2015), https://www.theatlantic.com/politics/archive/2015/02/rape-in-the-american-prison/385550/ [https://perma.cc/S3EE-BFZD] (detailing the fears of a 17-year-old prison inmate in Iona, Michigan).

170. *See* Rompilla v. Beard, 545 U.S. 374, 377–79 (2005) (noting further investigation is required "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and his background was "unexceptional"). The post-conviction investigation discovered:

> [Rompilla's] father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and

Trauma has neurobiological and cognitive consequences; traumatized people have fragmented, impaired memory. They compartmentalize stressful memories and have mechanisms to avoid recalling them. Psychologists tell us that eliciting painful and shameful memories is a slow and circular process, requiring trust and rapport, adequate time and patience, and multiple interviews as the process of disclosure unfolds. The trauma in the lives of capital clients is particularly difficult to investigate because it is usually not based on a single event; rather, it is rooted in the entire social environment they experienced in childhood—their exposure over months and years to traumatic events within the very system of care that is supposed to provide the safety and support of a loving home. This is now known as complex trauma.[171]

In addition to the universal human psychological mechanisms that erect protective barriers to disclosure of traumatic and painful information, all the badges of social identity that define us create additional obstacles to disclosure between capital defense teams and clients and clients' family members. These barriers to disclosure may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender (male, female, and nonbinary), and sexual orientation (including LGBTQ+ status).

VI. PRACTICAL IMPLICATIONS

A. Prudent Defense Practice

Knowing that initial responses from a client's family and loved ones are likely to be disbelief, denial, minimization, or attempts to portray the client and those who cared for him in the most positive light, capital defense teams

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on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror.

Id. at 392.

171. *See* Alexandra Cook et al., *Complex Trauma in Children and Adolescents,* 35 PSYCHIATRIC ANNALS 390, 390 (2005) ("Complex trauma exposure results in a loss of core capacities for self-regulation and interpersonal relatedness. Children exposed to complex trauma often experience lifelong problems that place them at risk for additional trauma exposure and cumulative impairment (e.g., psychiatric and addictive disorders; chronic medical illness; legal, vocational, and family problems.)").

have no need to memorialize comments that are likely to be unreliable. Initial interviews should focus on basic facts: identifying family members and starting to construct a family tree, learning where the client lived and where he went to school, and beginning an inventory of the institutions that will have a documentary record of his childhood, his family, and his community. The prudent course is to use the records to establish a skeletal architecture of the client's life, and to slowly reveal the narrative with life-history vignettes only after the defense team establishes trust and rapport and the witnesses overcome their own defensiveness and begin to open up about embarrassing, painful, and shameful family taboo subjects.

Assessing the reliability of witnesses' dynamic disclosures is a challenge. It will require convergent validity—not only consistency in the reports of multiple witnesses but also corroboration wherever possible from the available records. The time for extensive notetaking and report writing comes when the team has begun to establish reliability through the test of convergent corroboration.

Most of the lawyers who handle death penalty cases work in one stage of the procedural pathway that the Authors have outlined, in one geographical region, and in either state or federal court. To be sure, there are some death penalty specialists who move comfortably between trial and post-conviction representation, in both state and federal court. However, most cases are handled at trial by public defenders and court-appointed attorneys not just in the state of jurisdiction, but in county offices or on a panel deemed qualified for appointment by local judges. Appellate specialists generally focus on the death-penalty jurisprudence of a single state. Increasingly, federal habeas corpus litigation falls to more than twenty specialized capital habeas units within federal defender organizations.[172] Even federal capital specialists focus on the law of the death penalty jurisprudence of their circuits. The result is a tendency toward tunnel vision: lawyers know the law

172. *See* Brief for Federal Defender Capital Habeas Units as *Amici Curiae* Supporting Respondents app. at 1a, Shinn v. Ramirez, 590 U.S. 2620 (No. 20-1009) (Sept. 20, 2021) (listing in Appendix at 1a as interested parties Capital Habeas Units from the Middle District of Alabama, Eastern District of Arkansas, Central District of California, Eastern District of California, Middle District of Florida, Northern District of Florida, Northern District of Georgia, District of Idaho, Western District of Missouri, District of Nevada, Northern District of Ohio, Southern District of Ohio, Western District of Oklahoma, Eastern District of Pennsylvania, Middle District of Pennsylvania, Western District of Pennsylvania, Eastern District of Tennessee, Middle District of Tennessee, Northern District of Texas, Western District of Texas, and the Fourth Circuit).

and practices where they work and often give little thought to what happens to the case when it moves along the procedural pathway. As a broad generalization, it can also be said that the investigators and mitigation specialists working on capital cases become familiar with the practices where they principally work (both geographically and procedurally), and may lack an understanding of how their work product may lose its protections and even privileged status over the long life of the case.

The Authors offer no magical answer as to how best to protect information at any stage of an investigation, but they urge prudent practices that are mindful of the changing rules they have outlined—rules that may change in the years ahead. No matter how experienced the capital defense team members may be, it makes sense for the team to discuss these issues at the outset of a case and reach a consensus about notes and reports, rather than assuming everyone understands the complexity of how the rules may potentially change over the long life of the case. To paraphrase the seventeenth-century maxim writer, the best practice is to memorialize all that is necessary but only what is necessary.[173]

B. Some Examples of Problems, Threats, and Uncharted Waters

1. Prosecution Anti-Mitigation Investigation

As the Authors explained in detail in Section IV, *supra*, eliciting truthful, candid, and open responses from those closest to the capital client involves a slow process of building trust and rapport. Not only is the whole concept of mitigation evidence utterly unfamiliar outside the context of capital cases, but the client's family members and most intimate acquaintances have often never shared the traumatic experiences that the mitigation investigation seeks to probe. Capital clients are almost universally indigent; they do not have the luxury of hiring lawyers and expansive legal teams. Clients—and their families—may have had negative experiences in the past with courts, public defenders, and court-appointed lawyers. At best, the capital defense

173. *See* FRANÇOIS DUC DE LA ROCHEFOUCAULD, REFLECTIONS OR, SENTENCES AND MORAL MAXIMS, at 35 (Vintage Penguin Paperback 1959) (reciting Maxim 250) ("True eloquence consists in saying all that should be, not all that could be said."). The maxim in the original Fench: "La véritable éloquence consiste à dire tout ce qu'il faut et à ne dire que ce qu'il faut." *François Duc de la Rochefoucauld*, CITATIONS OUEST-FRANCE, https://citations.ouest-france.fr/citation-francois-de-la-rochefoucauld/veritable-eloquence-consiste-dire-faut-12566.html [https://perma.cc/Y6D4-NRS9].

team is a group of strangers, often of another race and always of another socioeconomic class. At worst, they are viewed as part of an unfair criminal legal system—"government lawyers" paid for by the same taxpayers who pay the salaries of police, prosecutors, and judges. The sensational crime has brought shame to the family. Capital defense teams have learned to overcome this distrust with patience, hours of rapport building over multiple, in-person, one-on-one visits, and reflective listening that mirrors the words the family members use to describe events without substituting judgmental labeling. Capital defenders have also learned how trauma imposes its own rules on the dynamics of disclosure, first with fragments, partial disclosures, then more complete revelations, often recantations or attempts to minimize the pain that has been opened up, and sometimes the unexpected, overwhelming flood of memories that are excruciating, tormenting, and long avoided.

This is the everyday experience of capital defense teams, but it is alien to the experience of prosecutors, judges, and jurors, who have rarely set foot in the neighborhoods where capital clients were raised. They assume bias on the part of family members and loved ones and often imagine that these loved ones instantaneously cooperate with the defense team or, worse, exaggerate the adversities of a capital defendant's childhood.

More than two decades ago, an experienced federal capital prosecutor elaborated on these beliefs and published his strategy for "Defending Against the Mitigation Case."[174] Based on his experience in federal death penalty cases, the author reported, "Generally, the defense will build the case with a mitigation specialist followed by a mental health expert."[175] He recognized the right of the defense to offer mitigation evidence, but mistakenly described the focus on "negative aspects" of the client's life as an effort to "excuse the defendant's criminal conduct."[176] He disparaged mitigating evidence as often including "tales of the defendant's abuse and impoverishment as a child."[177] He explicitly stated his belief that family witnesses are "motivated to help the defendant escape the death penalty"

174. David J. Novak, *Anatomy of a Federal Death Penalty Case: A Primer for Prosecutors*, 50 S.C. L. REV. 645, 671–73 (1999).

175. *Id.* at 671.

176. *Id.*

177. *Id.*

and articulated a strategy to "negate the deterministic effect of the defendant's environment in h[is] actions."[178]

This federal prosecutor's proposed strategy had three specific points: (1) interview the family as early as possible; (2) contact witnesses "not aligned with the defendant, such as school teachers, neighbors, and probation officers"; and (3) examine the lives of siblings, "who, presumably, grew up in the same circumstances and did not turn out to be killers."[179] The author also urged prosecutors to pursue early discovery of mental health evidence and to "seek this discovery before any mental health testing occurs" to avoid "practice effects."[180]

The experience of capital defenders confirms that this general strategy is not the eccentric proposal of one idiosyncratic assistant United States attorney. Prosecutors in many jurisdictions have sent their investigators or police officers to interview a defendant's family members soon after he has been arrested. Their reports often memorialize family members' initial denials and minimizations. They report the conclusory assertions that the defendant came from a normal, loving home, and experienced no abuse or maltreatment—thereby creating prior statements that may be used to impeach the disclosures later made to the defense after multiple visits have built trust and rapport. One potential option, if the defense is confronted with such statements, is to use expert testimony on the dynamics of traumatic disclosure, discussed *supra* Section IV.B, and to bring out through the testimony of the witnesses themselves and the mitigation specialist who interviewed them how painstaking the process of disclosure was. In effect, a reliability hearing may be needed to educate the court and the jurors about this process and what distinguishes "fact witnesses" (light was red or green) from "slice of life witnesses" (those who observed the client over a period of months or even years and may have shared traumatizing experiences).

Similarly, capital defenders have always faced the question of why siblings have different outcomes—a question that can only be answered through a thorough mitigation investigation, which identifies the offsetting risk and protective (or opportunity) factors in the lives of children growing up in the

178. *Id.* at 671–72.
179. *Id.* at 671.
180. *Id.* at 672.

same household.[181] Outside the capital context, this is a subject of ongoing study in the field of child development and the developmental origin of health and disease. Dr. W. Thomas Boyce, for example, has written about how the variation between siblings "in personality, psychopathology, and cognitive ability" arises from "actual differences in their *experiences* of the same family environment (what behavior geneticists have called the 'non-shared family environment')."[182] According to Dr. Boyce, "The nuance was key; it wasn't just different events, but different ways of internalizing events, both shared and nonshared, in the brains and bodies of siblings."[183] Again, this is an appropriate area of expert testimony in the context of a capital sentencing proceeding, to provide decision-makers with a scientific framework for understanding different sibling outcomes. Of course, it is also important to conduct a broad investigation of everyone in the household. The reality is that many siblings have other negative outcomes because of the overwhelming number of risks to which all were exposed.

2. Expert Reports When Mental Health is in Issue

A potential capital case in the State of Washington illustrates how privilege and protections can be breached when the defense puts the defendant's mental state at issue.[184] William Pawlyk attempted suicide at the

181. *See generally* CRAIG HANEY, CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM (2020) (discussing the interrelation of "two broad categories of casual influences—past history and present contexts" in chapter two and considering the consequences of "multiple risk factors and stressors" in chapter three). Professor Haney has been an expert in over a hundred capital cases. In his book, Professor Haney directly confronts the "not everybody fallacy," which is the inevitable refrain of prosecutors who dispute the significance of social history mitigation by arguing that "not everybody" exposed to these risks commits a capital murder. *Id.* at 308 (internal quotation marks omitted). Just as there are smokers who do not develop lung cancer, the contextualization of criminal behavior requires more than just pointing to generic factors such as poverty, racism, and child maltreatment without considering the historical period in which an individual grew up. *Id.* at 306, 308. He also confronts how the "same family" is not the same "psychological environment" for siblings, with their differing strengths and vulnerabilities, and emphasizes the need for parsing out the risk factors themselves (how many, how enduring, and how severe?). *Id.* at 307 (internal quotation marks omitted).

182. W. THOMAS BOYCE, THE ORCHID AND THE DANDELION: WHY SOME CHILDREN STRUGGLE AND HOW ALL CAN THRIVE 112 (2019).

183. *Id.*

184. *See* Pawlyk v. Wood, 248 F.3d 815, 820 (9th Cir. 2001) (holding the defendant's due process rights were not violated when his psychiatrist was compelled to testify after he raised the insanity defense).

scene of a double murder for which he was arrested.[185] Eleven days later, the defense had Psychiatrist Number One examine Pawlyk, who found no evidence on which to base an insanity defense.[186] However, the defense later hired Psychiatrist Number Two, who testified and opined that Pawlyk had been in the midst of a psychotic episode, during which he did not know right from wrong.[187] Psychiatrist Number Two had no access to any report from Number One, so the defense believed that it could protect Number One's findings from disclosure.[188] The prosecution elected not to seek the death penalty, and the defense provided notice that it would pursue an insanity defense.[189] The prosecution subpoenaed Psychiatrist Number One to testify in rebuttal and served a subpoena duces tecum for any materials on which he relied.[190] The defense moved to quash the subpoenas; however, the trial court denied the motion, except to protect communications between defense counsel and the first expert and to limit the use of the expert's report and testimony to rebuttal in the event that the defense put mental status at issue.[191] The defense sought interlocutory review, but the Washington Supreme Court affirmed the trial court's order.[192]

The insanity defense was rejected at trial and the conviction was affirmed on appeal.[193] On federal habeas corpus, the defense alleged a due process violation, but the district court summarily denied the claim.[194] The decision was affirmed by the federal court of appeals.[195] The appellate court affirmed the right of the defense to a psychiatric expert, though not a favorable evaluation.[196] In the court's view, the defense was seeking to withhold from the jury relevant evidence on the mental state defense that it had put in issue.[197] The court found "that when a defendant places his mental status

185. *Id.*
186. *Id.* at 820–21.
187. *Id.*
188. *Id.* at 820.
189. *Id.*
190. *Id.*
191. *Id.* at 820–21.
192. *Id.* at 821.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 823.
197. *Id.* at 825.

at issue and presents favorable evidence from a psychiatric evaluation, he waives confidentiality as to evaluations unfavorable to his defense."[198]

Notably, however, the bulk of the Ninth Circuit's decision consisted of analysis on Due Process and Sixth Amendment considerations. It held there was no violation of Pawlyk's right of access to a psychiatrist due to compelled disclosure of the report from Psychiatrist Number One.[199] It would have been helpful if the court had said more about the garden-variety discovery, privilege, and work product issues raised by the compelled disclosure of Number One's report. The closest the court comes to providing this roadmap is when it says that a defendant who places his mental status at issue and therefore relies upon reports of mental health experts "should expect that the results of such reports may be used by the prosecutor in rebuttal."[200] This conclusion relies on the rule that the privilege is waived when the communication is put into issue by a party, not via an allegation of ineffective assistance of counsel (as discussed above),[201] but through affirmative reliance on what would otherwise be privileged material.[202] The court's conclusion is also supported by the rule governing the scope of waiver to include communications on related subject matters, to avoid the unfairness that might result from cherry-picking favorable portions of privileged materials.[203] There may have been some room for Pawlyk's counsel to argue—apart from the constitutional principles involved—that reliance on the report of Psychiatrist Number Two did not

198. *Id.* at 828. The opinion is silent as to how the prosecution knew that Psychiatrist Number One had evaluated Pawlyk, but absent a specific order from the trial court protecting the confidentiality of the first evaluation, the prosecution could have simply reviewed visiting logs at the jail to learn that the first expert had seen Pawlyk.

199. *Id.*

200. *Id.* at 827 (internal quotation marks omitted) (quoting Buchanan v. Kentucky, 483 U.S. 402, 425 (1987)).

201. *See supra* note 60 and accompanying text (discussing the rule governing waiver of attorney–client privilege in ineffective assistance of counsel claims).

202. *See* EPSTEIN, *supra* note 23, at 243–45 (presenting case law showing how a privilege attaches when client interviewees expect the contents of the discussion to be confidential). *See generally* Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975) (remaining one of the leading cases in this area)

203. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 79 cmt. f ("All authorities agree that [when only part of a privileged communication is disclosed] waiver extends to all otherwise-privileged communications on the same subject matter that are reasonably necessary to make a complete and balanced presentation." (citation omitted)).

waive the protection of the work-product doctrine with respect to Psychiatrist Number One.

3. Reports vs. Notes

Arizona has been one of the most aggressive states in the country in its pursuit of the death penalty, with forty executions in the modern era.[204] At one point, a single Arizona county overwhelmed its court system with 149 pending capital prosecutions.[205] Arizona prosecutors have also been aggressive in seeking discovery of defense mitigation.[206] In *State v. Johnson*,[207] the defense provided notice of mitigation witnesses and summaries of their statements in July 2015.[208] The prosecution argued that the summaries were insufficient and demanded "all written witness statements, not just summaries."[209] The defense objected, arguing "investigatory notes" were protected and not subject to disclosure because they reflected counsel's "opinions, conclusions, and impressions."[210] The trial court ordered the defense to redact the notes to protect "opinions, theories, and conclusions" but to otherwise turn over the redacted notes, with the option that the defense could seek in camera review if it believed a specific witness statement would violate an ethical obligation of counsel.[211]

The defense unsuccessfully sought special action review in the intermediate court of appeals.[212] Following the conviction and death sentence, the defense team raised the issue in the Arizona Supreme Court,

204. *Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database?state=Arizona&federal=No [https://perma.cc/G7KM-ELBU].

205. *See The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases*, DEATH PENALTY INFO. CTR. (June 13, 2019), https://deathpenaltyinfo.org/resources/videosthe-2-death-penalty-how-a-minority-of-counties-produce-most-death-cases [https://perma.cc/N5Z2-7LXH] (noting Maricopa County ranks fourth in the country in the number of people it has sent to death row). At one point, former County Attorney Andrew Thomas sought the death penalty "so aggressively" that it "overwhelmed the courts with 149 pending capital cases"; however, Thomas was later disbarred "for corruption and abuse of power." *Id.*

206. *See, e.g.*, State v. Johnson, 447 P.3d 783, 810 (Ariz. 2019) (describing the government's request for discovery of all of Johnson's mitigating evidence).

207. State v. Johnson, 447 P.3d 783 (Ariz. 2019).

208. *Id.* at 810.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

which found no abuse of discretion on the part of the trial court.[213] The state's highest court explained that the trial court had not allowed "unfettered scrutiny" of the notes and had properly ordered production by in camera review to protect opinions, theories, or conclusions.[214]

The Authors are not aware of subsequent orders by Arizona trial courts of the notes from mitigation investigations, but the *Johnson* rulings highlight the risk that even handwritten notes of mitigation witness statements may be sought by the prosecution.

4. Demand for Earlier Production of Defense Witness Statements

In *United States v. Beal*,[215] a noncapital case in 2022, federal prosecutors initially demanded that the defense provide all *Jencks* material (discussed *supra* Section II.B) before, rather than after the witnesses testified.[216] The demand included "[a]ll prior statements of witnesses defendant intends to call in his case-in-chief to include reports, emails, and any other documents or records."[217] The Authors have been advised by defense counsel that the demand was later abandoned by the prosecution, which conceded the trial court had no authority to order early production.[218] Nonetheless, they use this example to illustrate the point that settled law may continue to be challenged in this area, and, especially in the capital context, there is an ever-present risk that the law may itself change over the long life of the litigation.

VII. CONCLUSION

There is no simple answer to the question of how best to document what capital defense teams learn from mitigation witnesses. The Authors' most important point in writing this Article is simply to remind practitioners of the many ways in which "death is different," and the many concerns that a

213. *Id.* at 811.

214. *Id.* (internal quotation marks omitted) (citing State ex rel. Corbin v. Ybarra, 777 P.2d 686, 690 (Ariz. 1989)).

215. United States v. Beal, No. 8:19-CR-19-047-JLS (C.D. Cal. filed Feb. 25, 2022), ECF No.461.

216. Gov't's Mot. to Compel Reciprocal Disc. at 6, United States v. Beal, No. 8:19-CR-19-047-JLS (C.D. Cal. Feb. 25, 2022), ECF No. 461.

217. Gov't's Proposed Order Granting Disc. at 2, United States v. Beal, No. 8:19-CR-19-047-JLS (C.D. Cal. Feb. 25, 2022), ECF No. 461-1.

218. E-mail from Joseph Trigilio, Assistant Fed. Pub. Def., to Russell Stetler, Author (Aug. 10, 2022) (on file with the authors and the *St. Mary's Law Journal*).

team should consider whenever it begins its work and establishes its ground rules for notetaking and report writing, including the law and practices of the jurisdiction, how the rules change as the case advances through the many procedural stages of capital litigation, and how they are different from a noncapital criminal prosecution. Mitigation is the heart of capital defense, and trauma is a ubiquitous reality in the capital client population. Trauma-informed, culturally competent[219] interviewing is critical, but protecting truthful information that is ultimately elicited, despite great reluctance, is equally important to reliable outcomes.

219. *See generally* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008) (placing emphasis on diversity in the process of gaining cultural competency).