

Ineffective Assistance Claims Can And Do Improve The Law And Our Legal System

For

**The Lawyer As Witness in
Criminal Law Cases**

**Friday, December 13, 2024
9:30 a.m. – 12:00 Noon**

By

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The last sentence of “A Lawyer’s Creed” tells us that we, as lawyers, “will strive to improve the law and our legal system.” Each and every case that we handle gives us an opportunity to do that. As criminal defense lawyers, we routinely advocate for favorable rulings relating to our clients’ constitutional and statutory rights. We do this to benefit the clients we represent in those cases, but also for future criminal defendants – to improve the law and our legal system.

Claims of ineffective assistance of counsel are challenging in many ways for those involved. For the lawyers against whom the claims are raised, it can be uncomfortable, inconvenient and feel like a personal attack. For the appellate lawyer asserting them, they are difficult to prove and at times, due to the procedural posture of the case, difficult to even raise. Sometimes, particularly in the habeas corpus context, ineffective assistance claims are the only claims left for a client to litigate. Yet, even these cases offer the opportunity to those involved to improve the law and the legal system.

The primary goal of asserting a claim of ineffective assistance of counsel is, as it should be, helping a client challenge a conviction or sentence. While some lawyers view these claims as an attack on their abilities or preparedness, they should more properly be viewed as an effort to improve the law, as underlying these claims is almost always something problematic caused by someone other than the trial lawyer -- an improper argument made by the prosecutor, a trial court’s erroneous or incomplete jury instruction, a juror who committed some form of misconduct etc. These are the very things we as criminal defense lawyers combat on a daily basis in order to make favorable law that can positively affect future criminal defendants and the lawyers representing them.

Lawyers called to testify in response to ineffective assistance claims should take this view/follow this approach. Lawyers are told all the time, in the context of ineffective assistance claims, to not “take it personally.” There are situations where the former lawyer and the client had a strained relationship, leaving the lawyer feeling less than appreciated despite their best efforts to help the client. Many lawyers are able to remove their personal feelings from the process, with the recognition that they have a continued duty to their former client, not to perjure themselves, but to respond to the claims with civility and candor. For the beginning lawyer facing their first time testifying at a motion for new trial or habeas corpus evidentiary hearing, focusing on how they can play a role in improving the law can alleviate those feelings of discomfort and/or frustration.

For the lawyers raising the ineffective assistance claims, it is helpful to speak to your lawyer-witness before calling them to the stand. Of course, you want to know in advance what the lawyer will say and how they will come across, just as any witness. But it also provides the opportunity to explain how the claim or claims are designed to improve whatever aspect of criminal law or procedure is involved, and to further explain

that, at whatever stage the case is presently in, the only way to strive for that improvement in the law is through your ineffective assistance claim. A conversation of this nature will reassure the lawyer-witness that you are not seeking to make them look bad, but instead striving for a change or clarification in the law that would benefit all involved.

For the lawyer raising the ineffective assistance of counsel claim, and for the lawyer against whom the claim is brought, focusing on our ongoing efforts to improve the law and the legal system can make the process easier, less combative and more likely to lead to lead to favorable results for our clients.

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