2017 ADVANCED POST-CONVICTION LITIGATION SEMINAR
INEFFECTIVE ASSISTANCE OF COUNSEL PRESENTATION WITH JACK CUNHA

A PRIVILEGE BY ANY OTHER NAME: A PLAY[1] IN THREE ACTS

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ACT I: PANDORA'S BOX
Scene: Cambridge District Court, Judge Jolly Presiding

Jolly: Good morning, counsel. Thank you for your patience. I am Judge Jolly. Please identify yourselves.

Justice: Joe "Hard Power" Justice for the Commonwealth, Your Honor.

Cage: Carla Cage for the defendant, Your Honor.

Jolly: Thank you. (*Shuffles papers, grumbles*.) Let me say, first of all, I don't know why we need all of these exhibits supporting the defendant's Rule 30 motion to withdraw his plea based on ineffective assistance of counsel, Ms. Cage. And Mr. Justice, I've read your **motion for subpoena or order to review trial counsel's file**. I have 15,000 cases this month. I mean, are we really going to have hearings within hearings about privilege issues over what amounts to a minor conviction? (*Stabs Cage and Justice with his stare*.)

Cage: Since it is the defendant's burden to prove ineffective assistance of counsel, I would be ineffective myself if I didn't file all of those exhibits. But I absolutely agree with Your Honor that we don't need hearings within hearings. The Court and the Commonwealth already have plenty of exhibits to work with to determine whether trial counsel's advice amounted to ineffective assistance. Trial counsel will testify on the stand and can answer limited questions about why he gave that bad advice. We don't need to further intrude upon **the attorney-client privilege**.

[1] "All the world's a stage, And all the men and women merely players[.]" As You Like It, William Shakespeare.

Jolly: Are you saying if Mr. Justice reviewed this file, that would take us to the danger zone? Or to a minefield?

Cage: He wants to review everything including attorney-client correspondence. So this is a minefield filled with hot potatoes.

Jolly: Hmm. Let's go with it would open Pandora's Box. Mr. Justice, would it not?

Justice: I don't know what trial counsel has in his files. I don't know if the defendant ever sent him a letter confessing to the crime. If he did at one point confess to the crime, then, obviously, he should stay convicted. This is common sense. Plus, the Commonwealth gets to know everything. How else could we enforce Hard Power effectively?

Jolly: He has a point, Ms. Cage. It's at least relevant whether he ever confessed to the crime on Strickland's second prejudice prong, which is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). It seems to me that it can be argued that even with accurate advice, there is no reasonable probability that he would have gone to trial due to his consciousness of guilt. But there doesn't seem to be a lot of Massachusetts case law in this area. Am I correct, Ms. Cage?

Cage: That is correct, Your Honor, but the SJC has given us a general standard: "[T]he privilege must be deemed waived, in part, to permit counsel to disclose only those confidences necessary and relevant to the defense of the charge of ineffective assistance of counsel." **Commonwealth v. Silva**, 455 Mass. 503, 529 (2009). See also Commonwealth v. Brito, 390 Mass. 112, 119 (1983). And the Appeals Court has stated: "[T]he scope of counsel's obligation to preserve confidences when a charge of misconduct is made turns on whether the disclosure is relevant, material, or necessary to defend against the charge." **Commonwealth v. Woodberry,** 26 Mass. App. Ct. 636, 637 (1988).

Federal cases provide more specific guidance in this area. "In that circumstance, 'that party waives the privilege as to all advice received *concerning the same subject matter*." United States v. Pinson, 584 F.3d 972, 977 (10th Cir. 2009) (emphasis added) (citation omitted). See also Fed. R. Evid. 502(a). Mr.

Justice wants to go way beyond the subject matter of how and why trial counsel gave bad advice.

It's simply not relevant to the **objective, prejudice test** whether the defendant subjectively thought he was guilty. He can have that subjective thought and, at the same time, stay silent and make the Commonwealth prove its case beyond a reasonable doubt. With respect to the prejudice prong, it makes more sense to rely on the objective factors listed in Commonwealth v. Clarke, 460 Mass. 30, 47 (2011): Whether he had an available, substantial ground of defense, whether he could have negotiated a better deal, or whether any other special circumstances exist here. Also, trying to dig out a confession from the defendant's file violates his privilege against self-incrimination. In the Matter of a Grand Jury Investigation, 470 Mass. 399 (2015).

Jolly: Hold on. How does he have a privilege against self-incrimination when he plead guilty to this crime?

Cage: A defendant can plead guilty for a host of reasons having nothing to do with his guilt. North Carolina v. Alford, 400 U.S. 25 (1970); Commonwealth v. Hart, 467 Mass. 322 (2014). Here, the prejudice is that he plead guilty without proper advice about his constitutional rights. In any event, who knows what any such "confession" relates to? What if he's talking about incidents or further potential crimes beyond his conviction? Plus, if the defendant won this motion, wouldn't Mr. Justice turn around and use this "confession" against him at any new trial?

Justice: Absolutely. That's totally fair!

Jolly: Really?!

Justice: That's what Hard Power is all about.

Cage: Such abuse of Hard Power is precisely why I also filed a **motion for a protective order**, Your Honor. Since the defendant has only tendered a **limited waiver** with this claim, Mr. Justice has it all wrong. This Court must construe such waiver "no broader than needed to ensure the fairness of the proceedings before it." Pinson, 584 F.3d at 979. See also **Bittaker v. Woodford**, 331 F.3d 715, 720 (9th Cir. 2003). "Implied waivers are consistently construed narrowly." In re Lott, 424 F.3d 446, 454 (6th Cir.

2005). Since Mr. Justice clearly intends to open Pandora's Box wide, I ask that this Court at least issue a protective order. "[W]e can conceive of no federal interest in enlarging the scope of the waiver beyond what is needed to litigate the claim of ineffective assistance of counsel in federal court." Bittaker, 331 F.3d at 722. Simmons v. United States, 390 U.S. 377, 394 (1968).

Justice: The defendant's motion for a protective order is so overbroad and vague, Your Honor. I mean, the order would prevent us from sharing this information with law enforcement. It would force us to destroy any documents after this proceeding, etc. How can such an order be fair when we don't even know what the information is?

Jolly: I need some time to think about all of this. We stand in recess.

ACT II: PANDORA'S BOX TO OPEN IN A SECURE LOCATION

Jolly: Good afternoon again, counsel. As for the motion for protective order, I will defer ruling on that one. Once certain documents are provided to the Commonwealth, there may be no "there there", making the motion moot.

But Mr. Justice, you are not permitted to communicate in any way with trial counsel outside of his testimony on the stand. Trial counsel would be going beyond self-defense by speaking to you outside of court supervision and notice to the defendant. It would be opening yet another Pandora's Box of ethical, privilege and due process bats. See SJC Rule of Professional Conduct 1.6(b)(5) & (c) and ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 10-456 (July 14, 2010). So let's at least keep that box firmly shut.

Justice: Just one problem, Your Honor. Trial counsel has already sent me an e-mail detailing…certain things.

Cage: I need that e-mail forwarded to me then since Mr. Justice will obviously use it against my client. And that e-mail should be subject to the protective order. Since trial counsel is already avenging himself behind the scenes, Your Honor, I just want to preview my request that I be permitted to treat him as a hostile witness on direct examination.

Jolly: Mr. Justice, please immediately forward that e-mail to Ms.

Cage. The rules of evidence may not apply to this proceeding, but your discovery obligations still do.

Now, I have wide discretion in how to proceed with respect to the Commonwealth's motion for disclosure of trial counsel's file. "[W]aiver is limited to materials concerning the alleged failure to provide the defendant with adequate representation." United States v. Stone, 824 F. Supp. 2d 176, 186 (D. Me. 2011) (Woodcock, J.). With that guidance in mind, the Commonwealth is entitled to *certain* documents including *certain* attorney-client correspondence from trial counsel's file. However, it is not entitled to any irrelevant documents and the documents must serve to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate from counsel's perspective at the time." United States v. Constant, 814 F.3d 570, 579 (1st Cir. 2016).

I should not be the one reviewing these documents or hearing trial counsel discuss them in order to avoid prejudicing my ultimate decision on the motion to withdraw plea. So this matter will be assigned to a **different judge** who will conduct an **ex-parte, closed hearing** at which trial counsel will testify about documents that he believes are relevant to this ineffective assistance of counsel claim. He will then disclose those documents to the judge and Ms. Cage and those documents will be filed under impoundment. The judge will then decide if those documents are relevant to the claim and, if so, disclose them to Mr. Justice and myself – again, under impoundment.

Justice: I object, Your Honor. The Commonwealth should be present at this hearing and be given the opportunity to respond to whether certain documents are relevant or irrelevant.

Jolly: Your objection is noted and overruled.

Cage: Your Honor, I will also be requesting to make redactions to any documents that will be disclosed to you and the Commonwealth.

Jolly: Why would you get to do that?

Cage: Because there may be entirely irrelevant or unduly prejudicial content in a letter that the Commonwealth doesn't get to know. Again, this is a limited waiver. For example, let's say my client wrote to trial counsel that he can't stop watching Keeping Up

With The Kardashians. It's his favorite show though he'd never admit it to his friends. That's irrelevant content which only serves to embarrass my client.

Justice: Maybe he plead guilty knowing that he wouldn't be permitted to watch the Kardashians while in prison. Thereby resolving that particular, embarrassing addiction. Which perfectly illustrates my point that the defendant is getting an unfair boost here.

Jolly: Ms. Cage, I suggest you take up the redaction issue with the newly assigned judge and she will figure out whether any redactions are appropriate.

ACT III: CAMEL UNDER THE TENT

Judy: Good morning, counsel. I am Judge Judy. Before we start this *ex-parte* proceeding, I have a **motion for a filter ADA** filed by Joe Justice. Mr. Justice, I have to say, I'm troubled by this motion to begin with. How did you even find out the date and session where this proceeding was?

Justice: Trial counsel told me when and where it was.

Judy: Judge Jolly has already ruled that you can't be here. So who would this "filter ADA" be?

Justice: Yes, Your Honor, let me introduce ADA Waldo Wall. He is a highly respected prosecutor in our office. He has the highest ethical standards and has many leather-bound law books. I recognize that I can't see anything until Your Honor makes rulings and discloses the relevant documents to me. ADA Wall would participate in this proceeding solely for the purpose of responding to Ms. Cage's objections about and proposed redactions to certain documents. He will not let me or anyone else in my office know about what took place in this proceeding or what the documents show. This would be fair to both the Commonwealth and the defendant.

Cage: Your Honor, I have never heard of a "filter ADA." ADA Wall is still the Commonwealth and the Commonwealth can't be here. Judge Jolly has already ruled this has to be *ex-parte*.

Judy: Agreed. It also seems to me that this is a camel's nose under the tent[2] problem. Your motion for a "filter ADA" is denied.

[*Justice and Wall depart*.]

Judy: Court officers, please close the courtroom. Before we begin, this is the general standard I'm working with: "Courts, including ours, that have imposed waivers under the fairness principle have therefore closely tailored the scope of the waiver to the needs of the opposing party in litigating the claim in question." Bittaker, 331 F.3d at 720. See also Pinson, 584 F.3d at 979 (any order for disclosure should be "carefully tailored to protect prisoners' Sixth Amendment rights.").

With this legal standard in mind, please take the stand, trial counsel, and we will begin. You will testify generally about the advice you gave, why you gave it and what you know w/r/t the defendant's motivations for pleading guilty. Then you will testify about what documents (beyond what Ms. Cage has already filed) would be relevant to those issues. After this hearing, I will take your written objections and proposed redactions, Ms. Cage, rule on them and make the appropriate disclosures.

[Ex-parte hearing proceeds. After the hearing, Carla Cage engages in exciting redaction activity with the Rocky theme song playing in the background. She files written objections and proposed redactions, *ex-parte* and under impoundment, with Judge Judy. Judge Judy sustains most of her objections and allows most redactions. Disclosures are made to Judge Jolly and the Commonwealth. Cage's motion for protective order is allowed. Mr. Justice fumes. The evidentiary hearing with trial counsel's hostile testimony finally begins.]

FIN

[2] This is a real metaphor which Ms. Cage hopes to use in the future. https://en.wikipedia.org/wiki/Camel%27s_nose