

CONTINUING LEGAL EDUCATION

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ETHICAL ISSUES PRESENTED BY CONFLICTS OF INTEREST

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APPELLATE DIVISION, FIRST DEPARTMENT
AND
THE ASSIGNED COUNSEL PLAN FOR THE FIRST DEPARTMENT

CONTINUING LEGAL EDUCATION

Topic:

**ETHICAL ISSUES PRESENTED BY CONFLICTS OF
INTEREST**

Presented by:

**THE ASSIGNED COUNSEL PLAN IN ASSOCIATION
WITH THE SUPREME COURT APPELLATE
DIVISION FIRST JUDICIAL DEPARTMENT**

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At

**NEW YORK COUNTY, SUPREME COURT
60 CENTRE STREET, NEW YORK, NY 10007**

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INTRODUCTION

The purpose of this CLE is to update the criminal practitioner respecting developments in the law as it relates to attorney conflicts and the problems that arise in both the trial and disciplinary context. Conflict problems result in disqualification of counsel, reversal predicated upon ineffective assistance grounds and their attendant ethical parallels. The prepared material presents selected Rules of Professional Conduct and applicable cases respecting this challenge.

Clients who raise conflict issues between trial counsel and the defendant, in the form of direct appeal or CPL 440 Motion, have a sympathetic ear with trial and appellate judges. It is the responsibility of the trial attorney to weed out any prospective conflict issues as soon as representation commences. In cases where a conflict is not readily apparent at the inception of the case, the trial attorney must be ever conscious that the issues of conflicts are viable and relevant in terms of appellate briefs, CPL 440 Motions, and complaints to the Disciplinary and or Grievance Committees.

Significant in today's presentation will be an explanation of how to avoid consequences with respect to conflicts of interest with a current or prior client. Lack of due diligence in conflict matters may subject the attorney to sanctions under the Rules of Professional Conduct (RPC). More specifically flagrant violations of Rules 1.6, 1.7, 1.9 and 1.10, potentially expose the defense advocate to a license related conundrum.

The CLE will attempt to address the legal strategies and options available to the attorney who perceives an actual or apparent conflict. In order to avoid a potential disciplinary proceeding in defense of the attorney client relationship, the defense advocate must tread a fine line between the rights of a client and compliance with the Rules of Professional Conduct.

Mr. Raskin is available in the event any questions arise with respect to the Rules or the content of this CLE.

APPLICABLE NEW RULE DEFINITIONS

While many of the old Code rules are included in the new Rules of Professional Conduct, there are some additions and changes of moment for your reference. In particular, the terminology (definitions under Rule 1.0) contain Sections (e) - confirmed in writing; (j) - informed consent; (k) - knowingly; (q,r,s) - (reasonable/reasonably and (x) - writing or written. The terminology is referenced in the Rules of Professional Conduct effective April 1, 2009. It appears that the new Rules expand the lawyer's obligation to inform the client with respect to significant issues involving his/her case.

(e) "Confirmed in writing," denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

A complete list of terminology can be found in Rule 1.0 of the New York Rules of Professional Conduct (22 NYCRR Part 1200).

RULE 1.6:
CONFIDENTIALITY OF INFORMATION

(a) 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, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.9:
DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

**RULE 1.10:
IMPUTATION OF CONFLICTS OF INTEREST**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(a) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(b) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(c) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

- (1) the firm agrees to represent a new client;
- (2) the firm agrees to represent an existing client in a new matter;
- (3) the firm hires or associates with another lawyer; or
- (4) an additional party is named or appears in a pending matter.

(d) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

**RULE 1.11:
SPECIAL CONFLICTS OF INTEREST FOR
FORMER AND CURRENT GOVERNMENT
OFFICERS AND EMPLOYEES**

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(1) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

**RULE 1.18:
DUTIES TO PROSPECTIVE
CLIENTS**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(ii) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom;
and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

RELEVANT CASES

People v. Carncross, 14 NY3d 319 - The Court of Appeals held that a trial court, in order to protect a defendant's Sixth Amendment right to effective representation, may properly disqualify a retained attorney of defendant's choosing due to the attorney's conflicts, actual or a potential, even in the face of defendant's waiver of such conflicts. In Carncross, defendant's father and girlfriend testified before the grand jury that voted to indict the defendant. Defendant's retained attorney also represented both of those individuals. Four months before trial, the prosecutor moved to have defendant's attorney disqualified, because both defendant's father and girlfriend were to be prosecution witnesses. Defendant objected and, after court inquiry, waived the conflict. Despite this, the trial judge disqualified defendant's attorney. Ultimately, neither the defendant's father nor his girlfriend testified at the trial. The Court of Appeals held that the judge correctly granted the disqualification application because at the point in the proceedings where the disqualification motion was made, the parties were operating under the assumption that these witnesses might well be called. The trial court reasonably concluded that if defense chose a particular strategy at trial, it was highly likely that the prosecution would call both defendant's father and girlfriend. Both defendant's father and girlfriend possessed adverse evidence indicating that defendant had, indeed been culpable of the crime. This would have placed the attorney in a very awkward position where prejudice to the defendant need not be precisely delineated but must be presumed. The Court cited as authority People v. Ortiz, 76 NY2d 652 at 656 in holding "A lawyer simultaneously representing two clients whose interest actually conflict cannot give either client undivided loyalty." In applying the Gomberg standard the Court held that the Constitutional Right of effective assistance of counsel may be substantially impaired under these circumstances and therefore the Trial Court did not abuse its discretion in disqualifying retained counsel. The Court of Appeals affirmed the conviction.

People v. James McDonald, 68 NY2d 1- The Court of Appeals reversed the conviction because the attorney representing the defendant charged with an arson also represented the corporation who's building the defendant is alleged to have damaged and whose corporate officer gave testimony tending to prove defendant's guilt. This case involves a palpable conflict of interest which deprived the defendant of effective assistance of counsel. An example of the conflict occurred when, during cross examination, defense counsel acknowledged before the witness "It is very uncomfortable to call you Mr. Lazaro," and thereafter referred to the witness as "Dean." The Court held that the defendant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment, absent inquiry by the Court and the informed consent of defendant, defense counsel represents interests which are in actual conflict with those of the defendant.

People v. Konstantinides, 14 NY3d 1 - Defendant appealed, inter alia, on ineffective assistance grounds. He argued that he was deprived of his right to conflict free representation. On the first day of jury selection at defendant's trial an attorney for whom Defendant had worked while on parole (attorney #2) joined the defense team to assist the primary attorney (attorney #1) who had represented the defendant for eight months preceding the trial. The prosecutor informed the defense that attorney #2 had a contentious if not threatening conversation with a witness for the prosecution. The prosecutor stated that this fact may create a credibility issue in so far as attorney #2 and the witness are concerned. Accordingly, the prosecutor asked the Judge to disqualify attorney #2 and have the defendant proceed with just attorney #1. The Court asked attorney #2 if he wished to continue. After consultation with attorney #1 and defendant, attorney #2 stayed on the case. The defendant, having originally been indicted for kidnapping, attempted murder, and weapons charges, was convicted of weapons charges. The Court held that there is a two prong standard for a conflict based claim of ineffective assistance of counsel:

1. The Court must determine whether there was a conflict of interest, People v. Abar, 99 NY2d 406.

2. The defendant must show that the conduct of his defense was in fact affected by the operation of the conflict of interest or that the conflict operated on the representation. People v. Ortiz, 76 NY2d 652.

While the Court held that the attorney #1 was compromised by the potential conflict, the defendant failed to establish that the potential conflict with the second attorney operated on the defense such that he is entitled to a new trial. The Court went on to state that the conflict issues only affected the kidnapping charge for which the defendant was acquitted. It did not affect any aspect of the weapons charges for which the defendant was convicted. The Court of Appeals declined to adopt a per se rule for reversal where a defense attorney is accused of criminal misconduct (witness tampering, bribery and suborning perjury) in relation to a witness in his client's case. Accordingly, to obtain relief, defendant must demonstrate at a hearing on his 440.10 application that "the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation."

People v. Wandell, 75 NY2d 952- The defense attorney, during representation of the defendant's case also represented the prosecution's primary witness on an unrelated civil matter. The Court, applying the Gomberg principal at 38 NY2d 307, held in reversing the conviction, that a potential conflict that arises from defense counsel's representation of important prosecution witnesses comes under the Gomberg Rule. The Court held that both prosecution and defense counsel are under a mandatory affirmative obligation to recognize the existence of a potential conflict and to alert the Court to the facts and circumstances surrounding that potential conflict. The Court of Appeals noted that the failure of prosecution and defense counsel in this case to bring the underlined facts to the Courts attention was inexcusable. The Court reproached both counsel in its reversal opinion.

People v. Abar, 99 NY2d 406 - The defendant sought to set aside his conviction on the ground that during his attorney's time as an Assistant District Attorney, the attorney had actually prosecuted defendant on the very case. That attorney became a public defender and was assigned to represent defendant on the case. Defendant argued that this automatically denied him effective assistance of counsel. The Court defined effective assistance as "representation that is reasonably competent, conflict free and single mindedly devoted to the client best interest. People v. Harris, 99 NY 2d 202.. In Abar the Court stated that a conflict based ineffective assistance of counsel claim involves two (2) inquiries: "First, the court must assess whether there was a potential conflict of interest. Second: a 'defendant much show that the conduct of his defense was in fact affected by the operation of the conflict of interest or that the conflict operated on the representation.'" According to the Court the issue of "[w]hether a conflict of interest operates on the defense is a mixed question of law and fact." Abar at 409. In Abar, defense counsel, in a sworn affidavit, stated that she visited defendant in jail and inquired of him whether he was comfortable with her being assigned to represent him as his attorney in light of her prior position as a prosecutor. At that point, defendant agreed that she could continue to be his lawyer. Defendant even acknowledged this conversation. He also affirmatively advised the Trial Court at the first plea allocution that he was satisfied with the legal services provide by his lawyer. The Court of Appeals held that there was ample support in the record for a finding that the conflict did not "operate" on the defense. And, the Court declined to adopt an "automatic reversal of conviction" rule in such situation. Because the issue presented a mixed question of law and fact, and the Court found support in the record for the appellate division's affirming the conviction, the Court of Appeals affirmed as well.

People v. Ortiz, 76 NY2d 652 - During defendant's drug possession trial the attorney for defendant called as a witness a prior client who had told the lawyer that he was the owner and possessor of the drugs and the defendant "really had nothing to do with that." Counsel put the former client on the witness stand. Defendant was convicted notwithstanding the witness's testimony. The Court held that defense counsel did not serve defendant's interest with a single-minded devotion constitutionally required for effective assistance of counsel. The Court held that counsel's divided loyalty affected the conduct of the defense and the conviction was reversed. The Court reaffirmed that the right to effective assistance to counsel encompasses the right to conflict free counsel People v. McDonald, 68 NY2d 1. A lawyer simultaneously representing two clients whose interest actually conflict cannot give either client undivided loyalty. The right to effective assistance of counsel is violated when a lawyer represents both a defendant and the chief prosecution witness. People v. Wandell, 75 NY2d 951. Similarly, the right to effective assistant to counsel is violated when an attorney represents a defendant accused of a crime and the victim of that crime. People v. McDonald, supra, at page 9. The Court went on to state "Even though a representation had ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets." People v. Alicea, 61 NY2d 23. (Rule 1.9)

People v. Cristin, 30 Misc 3d 383 (Bronx County, 2010, Judge Fabrizio). This case involves two (2) matters; People v. Palmero and Cristin and People v. Callistro. These cases address potential violations of Rule 1.6 and 1.7 of the New York Rules of Professional Conduct. These cases involve matters of obvious conflict that were meticulously addressed by the Trial Court. People v. Gomberg, 38 NY2d 307 (1975). Rule 1.9 (Duties to Former Clients). Both matters dealt with the fundamental Sixth Amendment, right of a Defendant under The United States Constitution to have the assistance of counsel of his own choosing, free from conflict. It is significant to note that the ultimate decision lies with the Court in protecting the Defendant's Sixth Amendments right. In this regard a Trial Court may properly disqualify an attorney of a defendant's choosing due to the attorney's conflict, actual or potential "even in the face of defendant's waiver of such conflict."

The Palmero and Cristin case began as a four defendant matter, where the top charge for each defendant was Criminal Possession of a Controlled Substance in the First Degree. Ms. Palmero and Ms. Cristin exercised their right to retain counsel of their choosing and hired the same attorney. The arraignment judge conducted a Gomberg inquiry, and Judge Fabrizio conducted his own inquiry post-indictment. Each defendant also executed a written and informed consent waiver pursuant to Rule 1.7 (b) (4). The cases proceeded through motion practice. Ms. Cristin had posted a \$200,000 bond and was at liberty; Ms. Palmero had been unable to post bail and remained incarcerated. Vigorous plea discussions took place. Counsel advocated for a no-jail disposition for Ms. Cristin; the People said that they might consider that, but only if Ms. Palmero pled guilty and received a prison sentence. Then, counsel asked to be relieved from representing Ms. Palmero because he said that the conflict prevented him from zealously representing each client. He wanted to remain as Ms. Cristin's attorney, and Ms. Cristin wanted him to be her attorney. He left it up to the Court to decide. Ultimately, it is the Court who must rule on the efficacy and wisdom of a client's decision to permit her retained counsel to continue representation. In this case, the Court, guided by Rule 1.9 (a) of the Rules of Professional Conduct, refused to permit said representation. In the Cristin matter Ms. Cristin was given ample opportunity to retain new counsel since the originally retained attorney presented an unambiguous conflict, and Ms. Palmero, as a now former client, refused to waive the conflict and consent to having her former counsel represent Ms. Cristin.

The Cristin conflict was distinguishable from issue presented in Callistro. Mr. Callistro did not have an absolute right to counsel of his choosing because he required appointed counsel. In the Callistro matter it is clear that assigned Bronx Defenders had an unmistakable conflict in view of their representation of a co-defendant unbeknownst to both defendants and the representing attorney. By virtue of the fact that Bronx Defenders had previously been assigned by another Judge to represent a co-defendant this conflict was inescapable. Ultimately, Mr. Callistro was assigned representation by the conflict free Legal Aid Society.

People v. Watson, 124 AD3d 95. The primary issue on appeal of Watson's conviction for criminal possession of a weapon was whether the Trial Court violated defendant's right to counsel by disqualifying defense counsel. Defendant was sentenced as a persistent felony offender to a term of 20 years to life. At a pre-trial calendar call, defendant's attorney from New York County Defenders Service (NYCDS), who had been representing defendant for 8 months advised the court that the discovery material turned over that day brought to light a co-defendant on the matter was represented by another attorney from NYCDS with respect to the same incident. Defendant's attorney advised the Court that this created a conflict. Counsel's request notwithstanding, Watson expressed that he wanted to keep Mr. Fisher as his attorney. Fisher was unsure whether this was appropriate. The Court adjourned the matter for a hearing. At the hearing Mr. Fisher described internal conflict protocols at his office in a very candid fashion. After explaining to the Court in the presence of Mr. Watson why he felt it would be a conflict Mr. Watson continued to express his intention to waive the conflicts and continue with Mr. Fisher. The District Attorney took the position that Mr. Fisher should be relieved. Ultimately, Mr. Fisher stated that he could not cross-examine the co-defendant witness because he was represented by another attorney from NYCDS. The defendant protested that he still wanted Mr. Fisher. The Court was sympathetic to the defendant but concluded that substitution was in order. The Court ordered new counsel to represent Mr. Watson. The Appellate Court concluded..... "While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm, we do not believe the same rationale should apply to the large public defense organization such as The Legal Aid Society." The Court further concluded that there was not an implication of a "full flow of client information between staff attorneys" at a large public defender organization. The Court noted that the co-defendant's case related to Watson had been concluded by the time of the disqualification. The majority concluded that the Trial Court abused its discretion in disqualifying defense counsel. The matter was reversed and remanded for a new trial. Judge Tom dissented.

Mayers v. Stone Castle Partners, 2015 NY Slip Op 00295. The issue presented in this civil matter was whether or not the moving party seeking disqualification of an opponent's counsel had met the heavy burden to grant removal of said counsel. The client wished to maintain current counsel notwithstanding the apparent conflict. The First Department reversed holding that a party has a right to be represented by counsel of its choice and any restrictions on that right must be carefully scrutinized. The movant claimed that opposing counsel may have disclosed confidential information obtained in a telephone interview that was protected by the attorney-client fiduciary obligation under RPC 1.18. The lower Court granted the application for disqualification. The Appellate Division reversed holding that disqualification of counsel was not required because the information at issue "could not be significantly harmful" to the party on a same or related matter. RPC 1.18 (c). The Appellate Court acknowledged that while the subject of this application was in fact confidential information under RPC 1.6 (a), disqualification was not warranted because the conveyed information did not have the potential to be significantly harmful to the client.

People v. Shinkle, 51 NY2d 417. The Executive Director of the Legal Aid Society represented defendant at the beginning stages of a criminal action. His attorney later joined the District Attorney's Office and remained there during the course of the prosecution of defendant's action, notwithstanding that means were designed and scrupulously pursued to insulate him from defendant's case. Defense counsel, when he resigned from the Legal Aid Society was appointed Chief Assistant District Attorney for Sullivan County. Defense counsel made conscious efforts regarding the risk of conflict of interest matters. In fact he had "CONFLICT" stickers placed in all pending cases in which the defendants were or had been represented by the Legal Aid Society during his tenure of office. Furthermore, members of the District Attorney's Office were ordered to refrain from discussing any such cases with the attorney and he was denied access to files in those cases. The Court held that the mere fact that the attorney who had originally represented the defendant was now Chief Assistant in the office of the prosecutor in the months preceding and during defendant's trial inescapably gave both defendant and the public the unmistakable appearance of impropriety and created the continuing opportunity for abuse of confidences entrusted to the attorney. The Court further opined that it was not dispositive that the defendant could not offer any evidentiary proof of actual prejudice. The Court held that the inherent impropriety of the situation was obvious and indisputable. In this case the attorney himself gave an affirmation in support of the People's position not to overturn the verdict. The Court held, "Defendant, and indeed the public at large, are entitled to protection against the appearance of impropriety and the risk of prejudice attendant on abuse of confidence, however slight." The Court of Appeals, in recognizing that this case may impede the transfer of attorneys between the offices of Legal Aid or Public Defender and the District Attorney said the circumstance however affords no basis to deny the defendant the right to both the fact and appearance of unswerving and exclusive loyalty on the part of attorneys who represent him. The Court made specific reference to Canon 9 now RPC Rule 1.11 in its decision.

People v. Herr, 86 NY2d 638. Moving pursuant to CPL 440.10, the defendant sought to vacate an Erie County conviction for various sex offenses. Defendant was represented by a part time village prosecutor whose designation was limited to prosecuting traffic violations and Penal Law violations only. As a village prosecutor defendant's attorney was not an attorney from the Erie County District Attorney's office. The trial judge characterized his representation as "outstanding and beyond reproach." Defendant, in his 440 Motion, cited People v. Shinkle, 51 NY2d 417 in contending that his representation was conflicted and therefore ineffective. The Court distinguished Shinkle in concluding that there was no opportunity for the abuse of confidences comparable to those cited in Shinkle and any appearance of impropriety, if any existed at all, was inconsequential. This attorney could not prosecute the crimes for which defendant was charged and did not try cases in a prosecutorial capacity in the County Court where defendant's trial was held. Conviction affirmed. (Rule 1.11)

People v. Adams, 20 NY3d 608. The complainant was a sitting judge in Rochester City Court and accused defendant, her neighbor, and ex paramour of committing a crime by sending her 3 offensive text messages. A visiting judge from a neighboring county was assigned to hear the case. Defense counsel made numerous efforts to reach a plea deal but none were forthcoming. The Public Defender filed an Omnibus Motion including a request that the Monroe County District Attorney be disqualified and that a Special Prosecutor be appointed. The motion also requested assignment of new defense counsel on the basis of the conflicting duties of the Public Defender to cross examine complainant vigorously and to represent indigent clients seeking favorable treatment from her in City Court. The motion of assignment of new counsel was granted. The motion for appointment of a Special Prosecutor pursuant to County Law Section 701 (1) was denied. In the Court of Appeals decision it clearly reproached the District Attorney's Office for taking an inflexible position with respect to this otherwise routine case. In addition, when accused of taking an unusually hard line position in this particular case, the District Attorney's Office replied with nothing more than conclusory denials, failing to rebut the allegations with even a single example of comparable case it had similarly refused to resolve with an ACD or violation. The Court held that the District Attorney's Office failed to take steps to dispel the appearance of inappropriate disparate treatment. The Court ultimately concluded that this was one of the rare cases where a significant appearance of impropriety was created requiring disqualification. . The Court reversed and remitted the case to Rochester City Court for further proceedings

People v. English, 88 NY2d 30. The defendant's former counsel became employed by the District Attorney's Office of Kings County while the prosecution of defendant was pending. The Court noted that 3 indictments were pending against the defendant. A special Prosecutor was appointed to handle 2 of those indictments. The only one left to be resolved was the case where a Special Prosecutor was not appointed. The Court of Appeals decision noted that the case involved attorney Michael Vecchione, who was originally representing the defendant but relieved in January of 1992, when he commenced his duties with the Kings County District Attorney's Office. Vecchione contended that he was not in the bureau that prosecuted defendant and he further denied discussing the case or disclosing any of his conversations with defendant to any of the District Attorney's staff. The Court held in English that in order for the defendant to prevail he must establish actual prejudice or substantial risk of an abused confidence. The defendant merely claimed that the risk of abuse is obvious and disqualification was necessary to protect and honor confidences shared during the attorney-client relationship. In holding against the defendant the Court found that Vecchione was a prosecutor in "a huge metropolitan office." It further concluded that Vecchione had no contact with the ADA prosecuting defendant and never discussed the case with his fellow assistants or disclosed the contents of any conversations he had with defendant. Furthermore, both, the bureau chief and the trial assistant, swore they had never discussed the case with Vecchione. Conviction affirmed. (Rule 1.11)

People v. Good, 62 AD3d 1041 (Third Department). The defendant was charged in Broome County with Sexual Abuse in the First Degree and other charges. The attorney assigned to represent him was later granted permission to withdraw because he was hired by the Broome County District Attorney's Office as a prosecutor. New counsel was appointed. Defendant ultimately entered a plea at the start of the suppression hearing. At the date set for sentencing, defendant represented by newly retained counsel, moved to withdraw the plea. Neither of his grounds alleged any conflict or ineffectiveness by his original counsel. A Special Prosecutor was appointed at the People's requested. Trial Court denied defendant's motion to withdraw his plea. The defendant appealed. The Appellate Division reversed. It distinguished the Broome County prosecutor's office from the "huge" metropolitan office described in People v. English, 88 NY2d at 34. The Court held that defendant's right to counsel was violated given the substantial risk of an abuse of confidence and not merely an appearance of impropriety. The original attorney, now an ADA expressed a willingness to testify at a hearing on a motion concerning knowledge he acquired as defense counsel. The Court interpreted his willingness to testify as a potential breach of confidentiality. Conviction reversed. (Rule 1.11)

People v. Antwon Dennis, (NYLJ 3/23/15-Kings County Supreme Court). The defendant brought a motion to vacate his judgment of conviction asserting that his Sixth Amendment Right to Counsel was violated because his prior attorney joined the District Attorney's Office during the pendency of his case. The Trial Court eschewed People v. English at 88 NY2d 30 and adopted the principal established in Shinkle, 51 NY2d 417. The Court did not accept the "huge prosecution office" defense. The Trial Court adopted the principle that disqualification and reversal is required in instances where "the risk of prejudice attendant on the abuse of confidence, however slight... is necessary to prevent situations in which former clients must depend on the good faith of their former lawyers turned adversaries to protect and honor confidences shared during the now extinct relationship. In those situations the risk of abuse is obvious." The defendant's motion to vacate the judgment was granted and a new trial ordered. (Rule 1.11)

People v. Cioffi, 105 AD3d 971 (Second Department). THIS MATTER WAS REVERSED ON OTHER GROUNDS. The issue relevant to this CLE rests on the defendant's application to vacate the conviction based upon the conflict of interest within the District Attorney's office. The Appellate Division decision did not detail the alleged conflict. The Court held that the contention was unpreserved. The Court went on to say "The defendant failed to establish actual prejudice arising from a demonstrative conflict of interest or substantial risk of an abuse of confidence." (Rule 1.11)

People v. David A. Brown, 81 AD3d 1305 (Fourth Department). The defendant contended that the Trial Court erred in denying his motion seeking a change of venue or the appointment of a Special Prosecutor based on an alleged conflict of interest of the District Attorney. He contended that the District Attorney was a defendant in a civil action commenced by Mr. Brown in a totally unrelated matter. The Trial Court properly determined that a prosecutor should be removed only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or substantial risk of abuse of confidence. Conviction Affirmed.

People v. Zimmer, 51 NY2d 390. The District Attorney who prosecuted the charges against defendant was, at the time he presented the case to the grand jury, counsel to and a stockholder of the corporation in the course of whose management the defendant is alleged to have committed the crimes with which he was charged. Defendant contends that the District Attorney's involvement with the corporation disqualified him from representing the People at all stages of this matter. The Appellate Division affirmed defendant's conviction. The Court of Appeals Reversed and dismissed the indictment without prejudice. The Court of Appeals held that the District Attorney's paramount obligation is to the public and he must never lose sight of the fact that a defendant is entitled to a full measure of fairness. The District Attorney's mission is not so much to convict as it is to achieve a just result. The Court held that the District Attorney, as guardian of this public trust, should have abstained from identification in appearance as well as in fact with more than one side of the controversy. The Court concluded that it would have been better had the District Attorney recused himself. By not doing so he ran afoul of the standard of reasonable perception of prejudice. Having failed to do so, it was error to deny the original motion for dismissal of the indictment. The conviction was reversed and indictment dismissed without prejudice to an application for resubmission of this matter another grand jury. (Rule 1.11)

People v. Allah, 80 NY2d 396 - This was a case of robbery, assault and criminal possession of a weapon. The three (3) defendants, Robinson, Thomson and Allah were each represented by an independent counsel. The Court of Appeals reversed the Appellate Division and ordered a new trial where the defendant's attorney absented himself during jury deliberation and attorneys for two (2) co-defendants assumed the defendant's representation. After the charge to the jury, counsel for co-defendant Robinson stated that he had a medical emergency and that counsel for co-defendant Thomson would assume the representation of his client. His client consented. Immediately thereafter counsel for defendant Allah said that he would be out of town for a few days and that counsel for the two (2) co-defendants (Thomson and Robinson) would represent defendant Allah. Counsel for defendant Allah never gave a reason for his absence. The defendant Allah consented to representation by the other attorneys on the record. The jury returned the verdict acquitting the co-defendants Robinson and Thomson and convicting Allah. The Court of Appeals held that the absence of Allah's defense counsel during jury deliberation through the verdict and joint representation by counsel for Thomson and Robinson deprived Allah of his fundamental right to effective assistance of counsel. The Court held that it was the trial court's duty to inquire on the record whether each defendant had an awareness of the

potential risks involved in that course and has knowingly chosen it. The Court held that only after sufficient admonition by the trial court of the potential pitfalls of joint representation can it be said that defendant's decision is informed and his right to effective assistance of counsel is adequately safe- guarded. The Court of Appeals opined that it was the trial court's obligation to make a proper inquiry and take the necessary precautions to insure that the defendant perceived the potential risks inherent in joint representation by counsel at this critical stage of the criminal proceeding.

