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IT'S NOT OVER TIL IT'S OVER: PROVIDING EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING PROCEEDINGS

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It's Not Over Til It's Over: Providing Effective Assistance of Counsel at Sentencing Proceedings

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Center for Appellate Litigation

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Table of Contents

I. DETERMINING YOUR CLIENT'S SENTENCING RANGE

Because counsel has the obligation to offer advice as to the advisability of any plea, you need to know your client's potential sentencing range prior to engaging in plea bargaining or taking any plea.

Missouri v. Frye, 132 S.Ct. 1399 (2012): recognizing that because 97% of federal and 94% of state court cases determined by plea bargaining right to effective assistance of counsel during plea negotiations is necessary.

Lafler v. Cooper, 132 S.Ct. 1376 (2012): where client rejected plea following deficient advice from counsel, defendant entitled to relief on IAC grounds; need to show a reasonable chance that prosecution would have offered plea, that court would have accepted it and as a result outcome would have been more favorable. Right to effective assistance of counsel is not a trial right, but extends to all critical stages of criminal proceedings.

Padilla v. Kentucky, 130 S.Ct. 1473 (2009): counsel engaged in deficient performance by failing to advise his client that his plea made him subject to automatic deportation.

A. Predicate Status

Why it's so important to get it right:

-A predicate adjudication is "binding upon that defendant in any future proceeding in which the issue may arise." C.P.L. § 400.21(8). A predicate adjudication cannot thereafter be challenged when then made a persistent felony offender. See People v. Cooper, 241 A.D.2d 553 (2d Dep't 1997). And cannot thereafter be challenged in a DLRA resentencing. People v. Dais, 2012 N.Y. Slip Op. 04201 (N.Y. May 31, 2012).

-A predicate adjudication (at least for an out-of-state offense) cannot even be challenged on appeal unless objection made below. See People v. Samms, 95 N.Y.2d 52 (2000); People v. Smith, 73 N.Y.2d 961 (1989). And, at least in the First Department, cannot be challenged directly in a C.P.L. § 440.20 motion. See People v. Kelly, 65 A.D.3d 886 (1st Dep't 2009).

-Failure to properly determine your client's predicate status constitutes ineffective assistance of counsel. See Mask v. McGinnis, 28 F. Supp. 2d 122 (S.D.N.Y. 1989) (counsel's failure to recognize that defendant was a second felony offender, rather than a persistent felony offender constituted ineffective assistance of counsel), aff'd., 233 F.3d 132 (2d Cir. 2000); see also People v. Garcia, 19 A.D.3d 17 (1st Dept. 2005).

-Thus, the only way to challenge an out-of-state predicate as being invalid when not challenged by counsel at sentencing is to allege ineffective assistance of trial counsel in a C.P.L. § 440.20 motion. But, the burden is then on the defendant to prove the relevant facts and produce the relevant documents. See C.P.L. § 440.30(6).

1. Out of State Predicates

a. The Statute

Penal Law § 70.06(1)(b)(i) ("For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply: The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.10 (persistent felony offender); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

b. The Factors

(i) Looking at the foreign "conviction"; so the statute under which the defendant was convicted, not the underlying facts or the arrest.

(ii) Foreign statute must be a felony in that state ("a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized").

(iii) Foreign statute must criminalize acts that in New York would be felony.

c. The Case Law

In determining whether an out-of-state conviction qualifies as a valid predicate under this provision, a court "must examine the elements of the foreign statute and compare them to an analogous Penal Law felony," for "it is the statute upon which the indictment was drawn that necessarily defines and measures the crime." See People v Gonzalez, 61 N.Y.2d 586, 589 (1984), quoting People v. Olah, 300 N.Y. 96, 98 (1949). "Any recital in the indictment beyond what was provided in the foreign statute would be 'immaterial and surplusage." See People v. Olah, 300 N.Y. at 102. The test is one of "strict equivalency" such that "technical distinctions between the New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing." People v. Ramos, 19 N.Y.3d 417, 419 (2012) (quoting Matter of North v. Board of Examiners of Sex Offenders of State of N.Y., 8 N.Y.3d 745, 751 (2007)). Thus, "[w]hen a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a felony in New York, the foreign statute may not serve as a predicate." People v. Yusuf, 19 N.Y.3d 314, 321 (2012).

When a foreign statute can be violated in ways that constitute both a felony and a misdemeanor in New York, courts can look to the foreign accusatory instrument to determine which section of the foreign statute was violated. See People v. Muniz, 74 N.Y.2d 464 (1989). Courts cannot, however, look to superceded or preliminary charging documents, such as criminal court complaints. See People v. Yancy, 86 N.Y.2d 239 (1995).

Example #1

Your client was previously charged in New Jersey with breaking into a home, raping a child, assaulting an adult, and taking some property. He ended up pleading guilty to one count on the indictment which stated that he was "guilty of third-degree burglary because, with purpose to commit a theft therein he unlawfully entered a building."

New Jersey Statute Annotated § 2C:18-2, provides that a person is guilty of third-degree burglary when, "with purpose to commit an offense therein he knowingly and unlawfully enters a building."

New York Penal Law § 140.20 provides that "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein."

Example #2

The predicate felony statement alleges that on December 15, 2004, in the Circuit Court, Greensville County, in the State of Virginia, defendant was convicted of assault on a corrections officer in violation of Va. Code Ann. § 18.2-55(A).

The Virginia indictment alleges that on May 12, 2004, while your client was "confined in a state correctional facility he knowingly and willfully inflicted bodily injury on a corrections officer by stabbing him with a shank."

The Virginia statute (Va. Code Ann. § 18-2-55) provides, in relevant part, that:

> *A. It shall be unlawful for a person confined in a state, local or regional correctional facility . . . to knowingly and willfully inflict bodily injury on an employee thereof; or*
> *B. It shall be unlawful for an accused, probationer or parolee under the supervision of . . . a probation or parole officer . . . to knowingly and willfully inflict bodily injury on such officer while he is in the performance of his duty, knowing or having reason to know that the officer is engaged in the performance of his duty.*

New York Penal Law § 120.05(7) provides that: "A person is guilty of assault in the second degree when: Having been charged with or convicted of a crime and while confined in a correctional facility . . pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person" [D felony]

New York Penal Law § 120.08 provides that: "A person is guilty of assault on a peace officer, police officer, fireman or emergency medical services professional when, with intent to prevent a peace officer, police officer, a fireman, or an emergency medical service paramedic or emergency medical service technician, from performing a lawful duty, he causes serious physical injury to such peace officer, police officer, fireman, paramedic or technician" [C felony]

2. **Out of Sequence Predicates**

a. The Statutes

Penal Law § 70.06(1)(b)(ii) ("sentence upon such prior conviction must have been imposed before commission of the present felony."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.10 (persistent felony offender); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

Thus, "to serve as the basis for predicate status, a sentence must have been rendered before the commission of the instant underlying felony." Murray v. Goord, 298 A.D.2d 94 (2002) ("imposition of sentence, not date of conviction, . . . criterion of predicate status"), aff'd 1 N.Y.3d 29 (2003)

A "sentence" as the word is used in the statutes is the sentence imposed at the final judgment, or when a legal sentence is imposed upon resentencing. See People v. Bell, 73 N.Y.2d 153 (1989), reversing for reasons stated in dissenting opn 138 A.D.2d 298 (1st Dep't 1988) (Sullivan, J., dissenting).

b. PRS Resentencings

People v. Sparber, 10 N.Y.3d 457 (2008), has led to the resentencing of approximately 20,000 violent felony offenders due to the failure of the original sentencing judge to pronounce post-release supervision at sentencing.

People v. Sanders, 2012 N.Y. Slip Op. 07028 (1st Dep't Oct. 18, 2012) ("Defendant's resentencing at the behest of the Division of Parole for the purpose of imposing a period of PRS on one of defendant's prior violent felony convictions occurred after he committed the instant offense. In this situation, the resentencing date controls whether the convictions meets the sequentiality requirement for sentencing as a persistent violent felony offender."); see also People v. Butler, 88 A.D.3d 470 (1st Dep't 2011) (same). But see People v. Naughton, 93 A.D.3d 809 (2d Dep't 2012) (adopting opposite rule). See generally People v. Acevedo, 17 N.Y.3d 297 (2011) (in badly fractured opinion, five judges vote to say that a PRS resentencing instigated by the defense for purposes of unsequencing a predicate conviction constitutes gamesmanship that will not work to disqualify a predicate offense).

c. DLRA Resentencings

In 2004, 2005, and 2009 the Legislature passed three Drug Law Reform Acts which, among other things, provided retroactive resentencing relief to convicted A-I, A-II, and B drug offenders. While the A-I and A-II provisions generally required that a defendant still be in custody on his drug offense at the time of resentencing, the provisions governing class B resentencings seemingly permit a defendant out on parole (in the "custody" of the "Department of Corrections and Community Supervision") to be resentenced. So although rare that an A-I or A-II drug predicate will be out of sequence, not uncommon to see a defendant who might have an out-of-sequence class B drug offense.

3. Out of Time Predicates

a. The Statutes

-Penal Law § 70.06(1)(b)(iv) ("Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted.")

-Penal Law § 70.06(1)(b)(v) ("In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

-C.P.L. § 400.15(2) ("such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation").

b. Case Law

People v. Johnson, 196 A.D.2d 408, 410 (1st Dep't 1993) (finding the requirement that the predicate felony statute set forth timing to be "mandatory" and finding that the failure "to comply with the statutory mandate" renders the sentence fatally defective); see also People v. Ortiz, 19 A.D.3d 281, 282 (1st Dep't 2005) ("Defendant was improperly sentenced as a second violent felony offender because, even with the tolling period relied upon by the People in their predicate felony statement, defendant's predicate offense occurred more than 10 years before the instant offense.").

4. Constitutionality of Predicate

a. PRS: The failure to advise the defendant of the post-release supervision component of his sentence renders the plea involuntary and unknowing. See People v. Catu, 4 N.Y.3d 242 (2005).

b. Padilla: The failure of counsel to advise the defendant of the immigration consequences of his plea constitutes ineffective assistance of counsel. See Padilla v. Kentucky, 130 S.Ct. 1473 (2009). Padilla is retroactive (at least for now and at least in the First Department). See People v. Baret, 2012 N.Y. Slip Op. 06550 (1st Dep't Oct. 2, 2012).

c. Lafler: Deficient advice regarding the advisability of taking a plea constitutes ineffective assistance of counsel. See Lafler v. Cooper, 132 S.Ct. 1376 (2012). Plea bargaining constitutes a critical stage of proceedings.

B. Ex Post Facto Considerations

The Ex Post Facto Clause forbids a state from enacting or enforcing "any statute . . . which makes more burdensome the punishment for a crime, after its commission." Beazell v. Ohio, 269 U.S. 167, 169 (1925); see also Kellogg v. Travis, 100 N.Y.2d 407 (2003). In determining whether a statute makes a punishment for a crime more burdensome, the "ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." California Dep't of Corr. v. Morales, 514 U.S. 499, 517 (1995) (quoting Lindsay v. Washington, 301 U.S. 397, 401 (1937)). As such, a criminal defendant "is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." Dobbert v. Florida, 432 U.S. 282, 300 (1977); accord Miller v. Florida, 482 U.S. 423, 432 (1987).

This is an issue in New York nowadays given the plethora of new sentencing laws and changes. See, e.g., Sex Offenders Management & Treatment Act, L.2007, c.7 (eff. April 13, 2007) (creating a host of new offenses and new sentencing schemes for sexual offenses); Sentencing Reform Act of 1995, L.1995, c.3, § 9 (eff. Oct. 1, 1995) (mandating determinate sentences for second violent felony offenders and increasing sentences for first violent offenders); Jenna's Law, L.1998 c.1 (eff. Sept. 1, 1998) (increasing sentences for second violent felony offenders and mandating determinate sentences for first felony offenders; adding post-release supervision to all determinate sentences); see also Drug Law Reform Acts of 2004, 2005, and 2009.

C. Consecutive vs. Concurrent Sentences

Consecutive sentences are not authorized, under Section 70.25 of the Penal Law, "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other." "Thus, sentences imposed for two or more offenses may not run consecutively: '(1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other.'" People v. Ramirez, 89 N.Y.2d 444, 451 (1996) (quoting People v. Laureano, 87 N.Y.2d 640, 643 (1996)). The defendant "benefits if either prong is present, and the prosecution's burden is to countermand both prongs." People v. Day, 73 N.Y.2d at 211.

Generally, courts compare the actus reus of the offenses to determine the propriety of consecutive sentences because if the actus reus is the same for both offenses or if the actus reus for one offense is a material element of the second offense, then concurrent sentences are required. See People v. McKnight, 16 N.Y.3d 43 (2010); People v. Frazier, 16 N.Y.3d 36, 41 (2010). Continuing offenses, however, such as weapon possession present special issues that might preclude consecutive sentences. See People v. Wright, 19 N.Y.3d 359 (2012). Other offenses, such as bail jumping or escape, may be required to run consecutively, but only in specified circumstances. See Penal Law §§ 70.25(2-c), (2-d).

II. CREATING A SYMPATHETIC SENTENCING PITCH

A. Why?

Sentencing is a critical stage of the proceedings at which a defendant is entitled to effective representation. People v. Stella, 188 A.D.2d 318, 319 (1st Dept. 1992), citing People v. Gonzalez, 43 A.D.2d 914, 915 (1st Dept. 1974).

1. An Effective Sentencing Pitch Benefits the Client Immediately.

First and foremost, an effective sentencing pitch has enormous potential to impact the sentencing court and the actual sentence imposed. Inevitably, courts are given discretion to choose among a range of sentencing options. An effective pitch requires familiarity with the facts of the case and the client's background in order to place both in the most sympathetic light to maximize the possibility of a sentence in the lower part of the available range. See People v. Wiggan, 242 A.D.2d 549, 550 (2d Dep't 1997), citing People v. Edmond, 84 A.D.2d 93 (4th Dep't 1981)(at sentencing all defendants are entitled to "an opportunity to be represented by counsel sufficiently familiar with the case and the defendant's background to make an effective presentation on the question of sentence").

2. If You Fail To Persuade the Sentencing Judge, There's Another Shot On Appeal.

The Appellate Divisions have broad authority to modify an unduly harsh sentence, even one within the permissible range that does not constitute an abuse of discretion. People v. Delgado, 80 N.Y.2d 780, 783 (1992). The modification may be imposed without deference to the sentencing court. Id. The appellate court will consider the crime charged, the personal circumstances of the individual before the court and his criminal history. People v. Farrar, 52 N.Y.2d 302, 305 (1981). Consideration must also be given to the sentence that will achieve the traditional goals of punishment: deterrence, societal protection, rehabilitation as well as maximizing a persons's successful re-entry into society. See Penal Law § 1.05. The Appellate Division is not precluded from reducing a sentence just because the sentence was imposed as part of a negotiated plea. See People v. Thompson, 60 N.Y.2d 513 (1983); People v. Coleman, 30 N.Y.2d 582 (1972).

3. Beyond the Appeal, The Sentencing Pitch Can Influence Future Parole Decisions.

By statute the sentencing minutes are mandated to accompany a convicted defendant to prison in cases where an indeterminate sentence has been imposed. See C.P.L. § 380.70. The Pre-sentencing report will also accompany the client. See C.P.L.§ 390.60. These documents will be considered during the parole process, either by the institutional parole officer, who will interview the client in anticipation of his appearance before the board or by members of the parole board themselves. For this reason, it is important to set forth the most sympathetic sentencing pitch possible as most clients do not have access to parole advocacy and your sentencing pitch will serve for these purposes as well.

Practice Tip: Because the sentencing minutes and pre-sentencing report have a long-lasting impact on the amount of time your client may spend in prison it is essential to correct any inaccuracies that crop up during the sentencing proceedings. Misstatements or misrepresentations should be corrected immediately. Particularly with the pre-sentencing reports a request should be made for a new report to be issued because the court's copy, even if corrected by the judge, will not necessarily follow the client to prison.

B. How To Create An Effective Sentencing Pitch

There are an infinite variety of ways to effectively advocate on a client's behalf during a sentencing proceeding but it cannot be done without adequate preparation. The following checklist is designed to help maximize the likelihood of a successful result.

1. Start Early – even before a guilty verdict is reached or plea is entered; from the outset of the case get a sense of the support your client enjoys among his family, friends, community members, teachers, employers, etc.

2. Marshal Support – start asking for letters in support of mitigation; if a client is out during the pendency of the case, encourage him to use that time productively to garner and marshal additional support through appropriate programming or community involvement; keep especially well drafted letters on file to provide as examples to those who might want to write a letter but don't know where to start;

3. Research the law applicable to your case:

- appropriate sentencing ranges, including ranges relating to terms of PRS;
- the permissibility of consecutive versus concurrent sentences,
- your client's predicate status;
- Consider whether the prosecution is going to ask the court to rely on improper factors such as:

  -unreliable or inaccurate information, see People v. Outley, 80 N.Y.2d 702, 712 (1993) ("To comply with due process ... the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate."); see also Gardner v. Florida, 430 U.S. 349 (1977).

  -acquitted conduct, see People v. Maula, 163 A.D.2d 180, 181 (1st Dep't 1990) (where jury accepted defendant's justification defense on manslaughter count, error for court to consider death of victim in determining gun possession count); People v. Santiago, 277 A.D.2d 258, 259 (2d Dep't 2000) (sentencing court cannot consider crimes of which the defendant was acquitted);

-unreliable evidence of prior bad acts, see Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736, 740 (1948); People v. Naranjo, 89 N.Y.2d 1047 (1997).

-exercising the right to go to trial; if there are co-defendants find out what sentences they received to make an argument that your client should not receive any greater sentence just because he did not plead guilty. While a sentence imposed after trial may lawfully be greater than the sentence offered during plea negotiations, the disparity may not be so great that it raises serious questions as to whether the defendant is being penalized for exercising his constitutional right to trial. See Wasman v. United States, 468 U.S. 559, 567-68 (1984); People v. Brown, 70 A.D.2d 505 (1st Dep't 1979); People v. Cosme, 203 A.D.2d 375 (2d Dep't 1994). "To punish a person because he has done something that the law plainly allows him to do is a due process violation of the most basic sort." United States v. Goodwin, 457 U.S. 368, 372 (1982), quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978);

-exercising the right to appeal (where prosecutor is asking for greater sentence after remand): Due process requires that a defendant be free of a "retaliatory motivation on the part of the sentencing judge." North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (holding that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."). New York has expanded upon that principle in recognizing that even if the presumption of vindictiveness under Pearce is inapplicable, the "Due Process Clause of the New York State Constitution requires the application of the presumption . . . as a procedural safeguard against punitively toughened sentences," anytime a sentence is increased, unless the sentencing court is able to articulate some event that became known or available only after the first sentence and that justifies the harsher sentence. People v. Van Pelt, 76 N.Y.2d 156, 161 (1990).

4. Prepare Your Client – speak to your client about the sentencing process. Prepare him for speaking with the Department of Probation. Also determine whether he wants to address the court at the time of sentencing and provide guidance about whether he should do so. Clients should be accompanied to the PSI interview. If you decide a client should address the court, then listen to what he is going to say. Also, you can request that family members address the court prior to sentencing. This is within the judge's discretion to hear.

5. Ensure Accuracy – make sure that the minutes and pre-sentencing report are accurate by noting any objections during the proceedings; consider preparing your own pre-sentencing memorandum to supplement the PSI done by the Department of Probation and submitting it in time for the court (and your adversary) to actually read it;

6. Follow up – make sure that after sentencing you follow up, e.g., request a new report, file a notice of appeal, make sure that all relevant documents make their way into the court file to be used on appeal.

III. WHEN THINGS GO WRONG AT SENTENCING

A. What to Do When the Client Complains about You at Sentencing

1. The Law

At any time prior to imposition of sentence, the court has discretion to permit a defendant who has pleaded guilty to withdraw that plea and be returned to pre-pleading status. C.P.L. § 220.60 (3). The motion need not be in writing or on notice to the People.

On such a motion, the defendant "should be afforded reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" as to the knowing and voluntary nature of the plea. People v. Brown, 14 N.Y.3d 113, 116 (2010); People v. Tinsley, 35 N.Y.2d 926, 927 (1974). The nature and extent of the court's inquiry rests largely within the court's sound discretion and often a "limited interrogation" by the court will suffice. Id. Only rarely will an evidentiary hearing be required; allowing the defendant and his counsel to speak normally meets the procedural requirements. Id.; see People v. Albergotti, 17 N.Y.3d 748 (2011).

A presentence pro se motion to withdraw the guilty plea based on ineffective assistance of counsel grounds places both defense counsel and the court in a difficult position. While counsel is unlikely to support his client's claim, she cannot, while still serving as counsel, argue against it. The court, for its part, must assess the merits of the motion, but must also decide whether to relieve current counsel and appoint a new one for the purposes of the motion.

If the court plans to hold a separate hearing on the defendant's motion, the court should assign new counsel. See People v. Rozzel, 20 N.Y.2d 712 (1967). Indeed, anything beyond a court's "minimal inquiry" of current counsel should lead the court to assign new counsel. People v. Gonzalez, 253 A.D.2d 668 (1st Dep't 1998); People v. Santana, 156 A.D.2d 736 (2d Dep't 1989).

As to current defense counsel, she is not required to support or argue on behalf of her client's motion. See People v. Brooks, 299 A.D2d 226 (1st Dep't 2002); People v. Chaney, 294 A.D.2d 931 (4th Dept. 2002); People v. Castro, 242 A.D.2d 445 (1st Dep't 1997). Neither, however, should counsel, either voluntarily or at the court's insistence, take a position adverse to the motion. See People v. Vega, 88 A.D.3d 1022 (2d Dep't 2011); People v. Clendinen, 4 A.D.3d 116 (1st Dep't 2004).

Where current counsel actively controverts the defendant's motion or makes statements which undermine it, the court should appoint new counsel. E.g. People v. Humbert, 219 A.D.2d 674 (2d Dep't 1995); People v. Bernard, 242 A.D.2d 387 (2d Dep't 1997). More neutral

statements by counsel will not require appointment of new counsel. See People v. Cross, 262 A.D.2d 223 (1st Dept. 1999); People v. Benitez, 290 A.D.2d 363 (1st Dept. 2002).

If the sentencing court erroneously fails to assign new counsel, the appellate court will generally hold the appeal in abeyance and remit the case for a de novo determination of the motion, with new counsel. People v. Vega, 88 A.D.3d at 1022; see People v. Chaney, 294 A.D.2d 931, 932 (4th Dep't 2002).

The First Department has repeatedly rebuffed appellate arguments that the lower court was wrong to reject the defense pro se motion without assigning new counsel. E.g., People v. Redd, 64 A.D.3d 418 (1st Dep't 2009); People v. Grace, 59 A.D.3d 275 (1st Dep't 2009). However, there is Second Circuit law that is favorable. See Hines v. Miller, 318 F.3d 157, 162-64 (2d Cir. 2003); Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995).

2. The Ethical Rules

RULE 1 .1 : Competence:

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1 .2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * *

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

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).

* * *

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

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

RULE 1 .8: Current Clients: Specific Conflict of Interest Rules

* * *

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

3. Practical Pointers

a. Should the client complain about you on the record at sentencing, immediately ask the judge to relieve you and assign other counsel. Do not volunteer any information which undercuts the client's position.

b. If the judge asks you to explain something in response to the defendant's complaints, respectfully demur, citing, perhaps, Rule 1.1 (c) (2). If the judge is insistent, you may stand your ground; if necessary, you may make some neutral observation such as, "I filed the omnibus motion on July 5th."

c. You should not give any other information to the court or prosecutor to rebut the defendant's claims outside of a hearing, if ordered, where the defendant is represented by other counsel.

d. You should make your file available to successor counsel, if any, and may give successor counsel, if any, privileged information about the case.

B. What to Do When the Court Wants to Break its Sentencing Promise

1. The Law

In People v. Selikoff, 35 N.Y.2d 227, 240 (1974), the Court held that, where a court cannot or will not impose a promised sentence, it should "specify on the record" the information or circumstance relied upon for the proposed enhancement. The court must do so to avoid "arbitrariness or trifling with the legitimate expectations of pleading defendants," and to allow appellate review. Id.; see also People v. Outley, 80 N.Y.2d 702, 712 (1993) ("To comply with due process ... the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate.").

Under Selikoff and Outley, therefore, a "sufficient inquiry" is necessary whenever the defendant asks for specific performance of the plea promise and opposes the enhanced sentence.

"[P]lea bargaining is a practice vital to the efficient administration of the criminal justice system, and 'an integral part of the plea bargaining process is the negotiated sentence.'" People v. Avery, 85 N.Y.2d 503, 506 (1995). Where the defendant violates a condition of the plea agreement, the court is not bound by the promised sentence. People v. Figgins, 87 N.Y.2d 840, 841 (1995). But in that event, the court must conduct an inquiry sufficient for the record to reflect that the defendant indeed materially breached a condition of the plea promise. People v. Outley, 80 N.Y.2d at 702. Absent such a record, the court must either keep its promise or allow the defendant to withdraw the plea. People v. Selikoff, 35 N.Y.2d at 239. Were courts to arbitrarily decide to impose enhanced sentences, defendants and their lawyers would lose faith in the plea bargaining process, and refuse to enter into such agreements.

2. Practical Pointers

a. Should the sentencing court indicate that it is not going to keep its sentence promise, have the court place on the record its precise findings about what the client has done –or what has changed–since the time of the promise, to justify an upward departure.

b. Unless the client agrees, or the record is otherwise absolutely clear, that the defendant has fallen short in some way or that circumstances have materially changed, protest that an insufficient showing has been made that an upward departure is justified. Place on the record any facts you have in support of your position. Mark any documents you have in support for identification. If appropriate, ask for an evidentiary hearing.

c. If the client wants his plea back in light of the court's intended upward departure, make such an application. If the client does not want his plea back, or if plea vacatur is no longer available to render the client whole, then protest the upward departure and ask for specific performance.

d. None of the above might get the judge to give your client the originally promised sentence, but you will have preserved the record for appellate review. (Said issue is not covered by an appeal waiver.)

IV. OBLIGATIONS AFTER SENTENCE HAS BEEN IMPOSED

A. Filing a Notice of Appeal

1. The Client's Informed Decision

The decision whether to take an appeal belongs to the defendant, not the lawyer. Jones v. Barnes, 463 U.S. 745 (1983).

> Where there has been a conviction after trial or otherwise ... it shall be the duty of counsel, retained or assigned, immediately after the pronouncement of sentence ..., to advise the defendant ... in writing of his right to appeal ..., the time limitations involved ... in the manner of instituting an appeal and of obtaining a transcript of the testimony, and of the right of a person who has an absolute right to appeal ... and is unable to pay the cost of an appeal to apply for leave to appeal as a poor person. It shall also be the duty of such counsel to ascertain whether defendant ... wishes to appeal and, if so, to serve and file the necessary notice of appeal ....

22 N.Y.C.R.R. §606.5(b)(1) (First Dept.) (emphasis added); see also §671.3(a) (Second Dept.), 821.2(a) (Third Dept.), and 1022.11(a) (Fourth Dept.).

The failure to notify the defendant of his right to appeal, in writing, even where there has been an appeal waiver, is improper and violates court rules. People v. June, 242 A.D.2d 977 (4th Dep't 1997).

> (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) Defense counsel should take whatever steps are necessary to protect the defendant's right of appeal.

ABA Standards for Criminal Justice, Defense Function, 4-8.2.

> (a) Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal ....
>
> (b) Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any post trial proceedings that might be pursued before or concurrent with an appeal. While counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice.

ABA Standards for Criminal Justice, Defense Function, 21-2.2.

> (a) Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's right to appeal, such as ordering transcripts of the trial proceedings.
>
> (b) Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.

NLADA Performance Guidelines for Criminal Defense Representation. Guideline 9.2(a)(b)

> [R]epresentation at the trial court stage means, at a minimum. . .
>
> i. Following a final disposition other than a dismissal or acquittal: (i)-advising the client of the right to appeal and the requirement to file a notice of appeal; (ii)-filing a notice of appeal on the client's behalf if the client requests; (iii)-advising the client of the right to seek appointment of counsel and a free copy of the transcript;....

NYSBA Revised Standards for Providing Mandated Representation. I-7(I).

An attorney has a constitutionally imposed duty to consult with a defendant whenever there is reason to think that (a) a rational defendant would want to appeal, or (b) the defendant has reasonably demonstrated to counsel that she is interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

A trial attorney who fails to file a notice of appeal requested by her client is constitutionally ineffective, even where there has been a waiver of the right to appeal. People v. Syville, 15 N.Y.3d 391, 397-98 (2010); Campusano v. United States, 442 F.3d 770 (2d Cir. 2006).

2. Practical Pointers

- Filing a notice of appeal is a simple clerical task and does not necessarily mean that an appeal will ensue. Nor does it require that trial counsel take any additional steps beyond sending the client a copy of the notice of appeal with instructions as to what he needs to do next in order to continue with the appeal.

- There is no downside for the client in filing a notice of appeal. It will not automatically result in vacating the hard-fought plea bargain. Most appeals do not ask for plea vacatur, and the appellate court vacates no plea unless the defendant specifically asks for that relief, after being advised by their appellate lawyer about the risks involved in plea withdrawal.

- Since all the filing of the notice of appeal does is preserve the client's right to appeal should he wish to do so at some future point, counsel should err on the side of filing the notice.

- The ability to file a notice of appeal, and your obligation to do so, is not restricted by the fact that your client pleaded guilty, and/or that he waived his right to appeal.

- Particularly with respect to guilty plea cases, clients who seem content with their lot at the time of sentence often change their minds once they are sent upstate. Hence, counsel should, as a general rule, file a notice of appeal if their client is being sent upstate.

- If the client pleads guilty to a felony and receives probation, the impetus to appeal the conviction may not be there; however, should the client's probation be violated and a state prison sentence imposed, the client's view may change. The 30 days to appeal the underlying judgment runs from the date of the original sentence, however, not the date of the VOP (which is separately appealed). Counsel should keep this in mind when considering whether to file a notice of appeal following the imposition of a probationary sentence.

- The ability to file a notice of appeal, and your obligation to do so, is not affected by a purported pending deportation, since in many cases the right to appeal survives deportation. See People v. Ventura, 17 N.Y.3d 675 (2011).

- If your client is sentenced in absentia, (1) file a notice of appeal and (2) do it right away. Do not wait for execution of sentence after the client is eventually taken into custody. That will be too late.

- If your client is sentenced on one count of the indictment but other counts remain open (for retrial, for example), file the notice of appeal within 30 days of that sentence. Do not wait until all the counts are disposed of. That will be too late.

B. More Stuff You Have to Do

1. Helping with the IFP Application

Assigned trial counsel is obligated not only to advise the client of the right to seek assignment of counsel to an appeal, but also to "assist[ ] the client in applying for appointment of counsel ... if the client requests...." NYSBA Revised Standards for Providing Mandated Representation. I-7(i)(iv).

The appellate court will assign counsel to represent a defendant on appeal only upon defendant's submission of a detailed notarized affidavit, pursuant to CPLR 1101(a), setting forth facts sufficient to establish that the defendant has no funds or assets with which to prosecute the appeal, including the amount and sources of his income and listing his property with its value.

If trial counsel was retained, the affidavit should set forth the terms of the retainer agreement, the amount and sources for trial counsel's fees and an explanation of why similar funds are not available to prosecute the appeal.

If bail was posted pretrial, the affidavit must set forth the amount and sources of the bail, the disposition of the bail money, and an explanation as to why similar funds are not available to prosecute the appeal.

2. More Practical Pointers

- Upon filing a notice of appeal, send a copy to the client with instructions on how to proceed further.
- Include in these instructions an IFP affidavit for the client to fill out and get notarized. If the client retained trial counsel or made bail, make sure the affidavit form prompts the defendant to explain why this money is no longer available to pursue the appeal.
- Optimally, the instructions should also include a form motion for assignment of counsel.
- In some cases, counsel should consider making the IFP motion on the client's behalf.

3. The Effect of an Appeal Waiver

Since most convictions result from guilty pleas, and in many unenlightened jurisdictions the People or the court insist on an appeal waiver as a part of any bargain, the question becomes, "what effect does the appeal waiver have on the defendant's right to appeal?"
Put another way, when does an appeal waiver cut off the New York State defendant's right to appeal? The answer: never.

Even if the appeal waiver is validly structured and allocuted – a very big if – the waiver does not actually forfeit the right to appeal. See People v. Callahan, 80 N.Y.2d 273, 284-85 (1992). However, many waivers are invalid as executed. Moreover, the legality of a sentence may not be waived as part of a bargain. Id. at 280. The issue whether an upward departure, over objection, was justified is also not waived. People v. Maracle, 19 N.Y.3d 925 (2012).