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*A TRIAL LAWYER'S ETHICAL OBLIGATIONS TO
SMOOTH THE PATH FOR A SUCCESSFUL APPEAL*

ROBERT S. DEAN, ESQ., RISA GERSON, ESQ., AND LAWRENCE T. HAUSMAN, ESQ.



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**A TRIAL LAWYER'S ETHICAL OBLIGATIONS TO SMOOTH THE PATH
FOR A SUCCESSFUL APPEAL**

By Robert S. Dean, Risa Gerson, & Lawrence T. Hausman

January 15, 2012

Introduction

This outline covers the ethics and law surrounding notices of appeal, appeal waivers, guilty pleas and practical tips as to how to reduce trial counsel's exposure to ethical violations and 6th Amendment claims.

I. Trial Lawyer's Responsibility Vis-a-Vis Filing a Notice of Appeal

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 Dept. 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:"

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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, 397-398 (2010); Campusano v. United States, 442 F.3d 770 (2d Cir. 2006). See also Roe v. Flores-Ortega, 528 U.S. 470 (2000) (a lawyer who

disregards a defendant's specific instruction to file a notice of appeal acts in a manner that is professionally unreasonable within the meaning of the 6th Amendment).

Practice Tips:

- 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.
- 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. People v. Ventura, 17 NY3d 675 (2011).

II. The Trial Lawyer's Responsibility Where the People Are Appealing

"... [R]epresentation at the trial court stage means, at a minimum:"

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j. Following a disposition from which the prosecutor has a right to appeal: (i)-advising the client of the possibility that the prosecutor will pursue an appeal; (ii)-advising the client of the client's right to appointment of counsel should the prosecutor appeal; (iii)-assisting the client in applying for appointment of counsel if the client requests.

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

For a People's notice of appeal from an adverse order to be considered timely, it must be filed within 30 days of the date the defendant, the prevailing party in trial court, formally serves the order on the People with notice of entry. People v. Washington, 86 N.Y.2d 853 (1995). Hence, the People's mere receipt of the order from the court does not start the time to run, nor would defense counsel's sending the notice to the People without notice of entry. Id. See also People v. Lynch, 195 Misc.2d 814, 815 (N.Y. City Crim. Ct. 2003).

A. For counties within the jurisdiction of the Appellate Division, First Department (i.e., Manhattan and the Bronx) (§606.5[d]): If trial counsel receives a favorable order from the court which is appealable by the People pursuant to CPL Article 450, retained or assigned counsel has the duty

to forthwith notify defendant in writing that the People have the right to take an appeal, the consequences of the People's appeal and the defendant's rights, including the right to retain appellate counsel or, if indigent, to apply or leave to appear as a poor person.

Thus, counsel should not wait to get a notice of appeal from the People before notifying the defendant of the possibility of a People's appeal.

Once the People file a notice of appeal and serve a copy on counsel, moreover, unless counsel takes action the next thing that will happen is that you are served with a copy of the People's appellate brief and appendix. It would then be incumbent on assigned trial counsel to

make diligent efforts to locate the defendant and notify the defendant, in writing, that the People have filed a brief, the consequences of the People's appeal and the defendant's rights, including the right to retain appellate counsel, or if indigent, to apply for leave to appeal as a poor person.

Unless assigned trial counsel is also on the appellate panel, he will not be able to represent the defendant in the Appellate Division (§600.8[g]). As soon as possible, and upon receiving a copy of the People's notice of appeal if possible, assigned trial counsel should apply (with his client's permission) to the Appellate Division to assign the defendant an appellate lawyer.

B. For counties within the jurisdiction of the Appellate Division, Second Department (§671.3): where the People are seeking to appeal an adverse order, they must serve a copy of the notice of appeal on the defendant's last-appearing trial attorney (§671.3[d]), whose duties are then as follows:

(e) If, pursuant to CPL 460.10, subdivision 1(c), the People as appellant elect to serve a copy of their notice of appeal in the first instance upon the attorney who last appeared for the defendant in the court in which the order or sentence being appealed was entered, or if they serve the attorney as required in subdivision (d) hereof, it shall be the duty of the attorney so served to give, either by mail or personally, written notice to his client confirming the fact that such appeal has been taken by the People. Such notice shall also advise his client of his right (1) to retain counsel to represent him as respondent on the appeal, or (2) to respond to the appeal pro se, or (3) upon proof of his financial inability to retain counsel and to pay the cost and expenses of responding to the appeal, to make application to the appellate court, for the following relief: for the assignment of counsel to represent him as the respondent on the appeal; for leave to respond to the appeal as a poor person and to dispense with printing; and, if stenographic minutes were taken, for a direction the clerk and the stenographer of the trial court that a typewritten transcript of such minutes be furnished without charge to the respondent's assigned counsel or, if the defendant appears as respondent pro se, to respondent. In such notice counsel shall also request the

written instructions of his client, and, if the client thereafter gives counsel timely written notice of his desire to make such application, counsel shall proceed promptly to do so.

In the event trial counsel was assigned, however, there is a special rule requiring trial counsel to stay with the case unless otherwise relieved:

(f) In the event, however, the attorney was the defendant's assigned counsel in the court in which the order or sentence being appealed was entered such assignment shall remain in effect and counsel shall continue to represent the defendant as the respondent on the appeal until entry of the order determining the appeal and until counsel shall have performed any additional applicable duties imposed upon him by these rules, or until counsel shall have been otherwise relieved of his assignment. In the event the assignment remains in effect as herein provided, the written notice to the client as provided in subdivision (e) hereof may be dispensed with, except to the extent of confirming the fact that such appeal has been taken by the People.

Under such circumstances, unless trial counsel is able and willing to respond to the People's appeal, he or she, upon service of the People's notice of appeal, should apply to the Appellate Division for other, appellate, counsel to be assigned to respond to the appeal.

Counsel's merely letting the People's appeal proceed without submitting a brief would constitute ineffective assistance, People v. Brun, 15 NY3d 875 (2010), which claim could be raised via writ of error coram nobis. Id.

C. For counties within the jurisdiction of the Appellate Division, Third Department, the only relevant rule is §800.14(h), governing expedited People's appeals from orders dismissing counts of an indictment or dismissing an indictment with directions to file a prosecutor's information. In that circumstance, assigned trial counsel may continue to represent the defendant on this appeal, or may ask the Appellate Division to assign appellate counsel. No guidance is offered regarding other People's appeals.

D. For counties encompassed by the Fourth Department, there is no relevant rule. Presumably, the People never have reason to appeal.

Practice Tips:

- As soon as the trial court issues an order dismissing an accusatory instrument or count thereof, or any other order which is appealable by the People, and counsel has reason to believe that the People will appeal, trial counsel should formally serve the People with a copy of the court's order with notice of entry, to start the 30 days running.
- As soon as the People file their notice of appeal, you should take steps to obtain appellate representation for your client on People's appeal. You should have your client fill out and get notarized an in forma pauperis application and (unless trial counsel plans on handling the appeal) make a motion in the appellate court to have counsel assigned to represent the defendant on appeal. Do not wait until the People's appellate brief lands on your desk. If it turns out that the People don't end up appealing, no harm no foul.

III. Tardy Notices of Appeal

Notices of appeal from judgments of conviction must be filed within 30 days. CPL § 460.10(1)(a).

The time to appeal runs from the date sentence is imposed, not the date sentence is "executed." People v. Syville, 15 NY3d 391, 394 (2010). Trial counsel must bear this in mind if the defendant is sentenced in absentia, or if sentence is imposed on one count of an indictment while a retrial or separate trial is planned on another count of the same indictment. See also, People v. Torres, 179 AD2d 358 (1st Dept. 1992).

An up-to-one-year extension of time beyond the 30 days may be sought by motion to the Appellate Division pursuant to CPL §460.30, based upon a trial attorney's "improper conduct" or a lapse in communication with the defendant. There is no problem with the trial counsel making this motion.

Beyond the year and 30 days, CPL 460.30 is inoperative. Where the failure to file a timely notice of appeal is due to ineffective assistance of counsel, the right to appeal may be restored by bringing a writ of error coram nobis in the Appellate Division. People v. Syville, 15 NY3d 391 (2010). The trial attorney should not be the one to bring this motion.

Failure to file a notice of appeal due to trial counsel's omission, where that omission deprives the defendant of his right to appeal constitutes ineffective assistance. Syville, supra, at 397-398.

Practice Tips:

- Filing a notice of appeal is real simple. Filing a motion for permission to file a late notice of appeal (within one extra year) is difficult and time-consuming. Being the subject of a coram nobis petition based upon your ineffectiveness in not filing a notice of appeal even within the year and 30 days is downright embarrassing. File the notice of appeal right away. If in doubt, just file the notice of appeal.
- If you do not file the notice of appeal but you are within the year and 30 days, do not panic. You'll have to make the motion, but the court will almost certainly grant it.
- 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.

IV. Trial Attorney Obligation to Assist the Client in Applying for Assignment of Appellate Counsel.

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.

Practice Tips:

- 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.

V. Trial Attorney's Obligation to Cooperate Fully with Appellate Counsel.

Assigned trial counsel must "cooperat[e] fully with appellate counsel...." NYSBA Revised Standards for Providing Mandated Representation. I-7(i)(iv).

Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in trial court.

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

It is possible that trial counsel will receive a call from appellate counsel asking why trial counsel took certain actions during trial. If this occurs, trial counsel should be guided by the following:

(a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.

(b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense reasonably believes necessary, even though this involves revealing matters which were given in confidence.

ABA Standards for Criminal Justice, Defense Function, 4-8.6.

A trial attorney's threats to, or verbal abuse of, successor/appellate counsel over the latter's seeking relief on the grounds of alleged trial-counsel ineffectiveness constitutes professional misconduct. See In re Dilmaghani, 78 AD3d 39 (1st Dept. 2010).

Practice Tips:

- Keep your trial file available to you after the case is over, and make it available to appellate counsel on request. You are

required to comply with such a request. Sage Realty Corp. v. Proskauer Rose, 294 AD2d 190 (1st Dep't 2002).

- Respond promptly to all reasonable requests of appellate counsel for information.
- If your conduct is “drawn into question” you are not “precluded from disclosing the truth concerning the accusation,” even if it reveals client confidences, to the extent reasonably necessary. However, you are not required to respond to a prosecutor’s inquiries, absent court order.

VI. Trial Attorney’s Obligation Regarding Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

(b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

NLADA Performance Guidelines for Criminal Defense Representation Guideline 9.3.

VII. Effect of Bargained-For Waivers of the Right to Appeal on Counsel’s Obligations

Short answer: There is no effect. The failure to advise the defendant of his right to appeal is improper even if there is an appeal waiver. People v. June, 242 AD2d 977 (4th Dept. 1997). See also Campusano v. United States, 442 F3d 770, 771-772 (2d Cir. 2006).

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. As the Court of Appeals explained in People v. Callahan, 80 NY2d 273, 284-285 (1992):

CPL 450.10(1) authorizes defendants to appeal to the Appellate Division, as a matter of right, from a judgment of conviction. Moreover, as we held in People v. Pollenz (67 NY2d 264, 268), the duty of the Appellate Division “to entertain all appeals from final judgments in criminal cases” is of constitutional dimension (see, NY Const., art. VI, §4[k]). Since these three appeals were all taken from final judgments of conviction, they were clearly within the mandatory subject matter jurisdiction of the Appellate Division and were therefore, without more, appealable to that Court.

It appears from the Appellate Division’s dismissals in these cases, that the Court assumed that the defendants’ waivers had the effect of ousting it from its customary sphere of subject matter jurisdiction (but cf., Robinson v. Oceanic Steam Nav. Co., 112 NY 315, 324; Siegel, NY Prac §8, at 10[2d ed][parties may not confer subject matter jurisdiction by agreement]). However, that assumption is inconsistent with cases preceding Seaberg in which appeals were entertained despite enforceable waivers. In those cases, the appellate courts simply affirmed the judgment rather than dismissing, thereby signaling their view that the parties’ waiver agreements had not altered the court’s subject matter jurisdiction (People v. Williams, 43 AD2d 884, aff’d 36 NY2d 829, cert. denied 423 US 873; People v. Esajerre, 43 AD2d 541, aff’d 35 NY2d 463; People v. Irizarry, 32 AD2d 967, aff’d 27 NY2d 856; but see, People v. Stephens, 52 NY 306). [footnote omitted]

Moreover, a conclusion that agreements to waive the right to appeal operate to deprive the appellate courts of subject matter jurisdiction leads to a logical anomaly in this context. As is apparent from our holdings in these three appeals, an agreement to waive appeal does not foreclose appellate review in all situations. If the agreement to waive were itself sufficient to divest the court of subject matter jurisdiction, the court would

then be deprived of the very jurisdictional predicate it needs as a vehicle for reviewing the issues that survive the waiver.

Accordingly, the better view is that a bargained-for waiver of the right to appeal does not affect the appealability of a judgment that is otherwise appealable under CPL 450.10(1) and does not operate to deprive the appellate court of its jurisdiction of the appeal. Instead, it merely forecloses appellate review of all claims that might be raised on appeal, except, of course, those categories of claims that survive such waivers under our case law.

Thus, even a valid appeal waiver does not waive the right to appeal; it merely forfeits the right to raise certain issues on appeal -- although, as discussed below, most appellate issues that arise in guilty plea appeals are not forfeited by even an otherwise valid waiver. And, as also discussed below, many waivers are invalid as executed.

A. General Requirements for a Valid Waiver

Even most issues which ordinarily survive a guilty plea can be forfeited by a valid waiver of the right to appeal as part of a plea or sentence bargain. People v. Seaberg, 74 N.Y.2d 1 (1989).

Due process requires that the waiver be knowing, voluntary, and intelligent. People v. Callahan, 80 N.Y.2d 273, 280 (1992). Relevant factors in this determination include “the nature and terms of the [plea] agreement and the age, experience, and background of the accused.” People v. Seaberg, 74 N.Y.2d 1, 11 (1989). Waiver will not be upheld if “unfair” or “coerced to conceal error or misconduct.” Id., at 12.

Courts are not required to engaged in any “particular litany” in eliciting the waiver. People v. Moissett, 76 N.Y.2d 909, 911 (1990). The waiver need not be in writing, but even a written waiver is insufficient if unaccompanied by an on-the-record inquiry of the defendant regarding whether he/she understands its implications and agrees to it. People v. Callahan, 80 N.Y.2d 273, 283 (1992).

Despite the lack of a requirement of a specific appeal-waiver “litany,” many allocutions purportedly waiving the right to appeal are not upheld by the appellate courts. A court’s statement to a defendant that “when you plead guilty you waive your right to appeal,” or that “by pleading guilty you give up your right to appeal,” or that “if you had gone to trial and lost you would have the right to appeal, but by this plea you are waiving

your right to appeal,” or that otherwise characterizes an appeal as but one of many rights extinguished by a guilty plea, or that otherwise conflates the right to appeal with the right to go to trial, invalidates the waiver. People v. Moyett, 7 N.Y.3d 892 (2006); People v. Lopez, 6 N.Y.3d 248 (2006).

In People v. Muniz, 91 N.Y.2d 570 (1998), the Court of Appeals upheld a general waiver as encompassing all issues not expressly excluded by the waiver’s terms. A general waiver even encompasses Article 710 motions to suppress. People v. Kemp, 94 N.Y.2d 831(1999).

As noted above, valid appeal waivers do not rob the appellate court of subject matter jurisdiction. Thus, even a defendant who has waived “the right to appeal” retains an appeal as of right to the intermediate appellate court. All he or she has done by waiving the right to appeal is to waive the right to prevail on some, but hardly all, issues in the appellate court. People v. Callahan, 80 N.Y.2d 273, 284-285 (1992).

B. Appellate Issues Ordinarily Surviving a Guilty Plea that May be Waived

Certain issues ordinarily survive a guilty plea, but validly may be waived as part of a plea bargain. The most prominent of these are:

- Excessive sentence. People v. Seaberg, 74 N.Y.2d 1, 7 (1989).
- Article 710 suppression issues. People v. Williams, 36 N.Y.2d 829, 830 (1975).
- Sentencing procedures. People v. Callahan, 80 N.Y.2d 273, 281 (1992).
- Constitutional double jeopardy. People v. Allen, 86 N.Y.2d 599 (1995).

C. Appellate Issues that May Not be Waived as Part of a Plea Bargain

Other issues may not be foreclosed even by an otherwise valid waiver because they implicate “society’s interest in the integrity of the criminal process”. Prominent among these are:

- Constitutional speedy trial. People v. Callahan, 80 N.Y.2d 273, 280 (1992).
- The legality of the sentence. Id.
- The defendant's competency to stand trial/plead guilty. Id.
- The knowing and voluntary nature of the plea itself. Id.

D. Unsettled Areas of the Law on Waivers

The intermediate appellate courts in New York City are gradually becoming less indulgent of imperfect waivers. The best appellate lawyers attack the waiver whenever it is poorly-taken, if the alternative is to do an Anders brief.

The Court of Appeals has held that a "general unrestricted waiver" of the right to appeal (*i.e.*, one not mentioning any particular appellate issue) encompasses a waiver of all aspects of the case, including an excessive sentence argument, even if the defendant did not know the specific sentence he/she would receive at the time of the waiver. People v. Hidalgo, 91 NY2d 733 (1998). Hidalgo has been held inapplicable, and thus the otherwise valid waiver is inapplicable as to excessive sentence, where the defendant was not advised of the range of sentencing options available, including the maximum available sentence, at the time of the waiver. People v. Eldridge, 8 AD3d 294 (2d Dept. 2004); People v. Cormack, 269 AD3d 815 (4th Dept. 2000); People v. Shea, 254 AD2d 512 (3d Dept. 1998). Whether an appeal waiver covers an enhanced sentence, *i.e.*, a sentence higher than the one promised at the time of the execution of the waiver, depends upon whether the defendant was advised before the waiver that the higher sentence could be imposed if the defendant violated a condition of the plea bargain. Compare People v. Eldridge, 8 AD3d 294 (2d Dept. 2004) and People v. Sundown, 305 AD2d 1075 (4th Dept. 2003) (waiver not encompass enhanced sentence since defendant not advised of possibility of enhanced sentence), with People v. White, 3 AD3d 543 (2d Dept. 2004) (waiver encompasses enhanced-sentence claim since defendant was informed enhanced sentence could be imposed if he failed to comply with conditions of bargain).

The scope and limitations of appeal waivers is an area of the law that is constantly in flux, with the various Appellate Division Departments in disagreement. See Marks et. al., New York Pretrial Criminal Procedure, §11.17 (2d. Ed. 2007). This makes it hard for trial lawyers to authoritatively advise their clients of the specific effects of any waiver of the right to appeal.

In fact, since most judges and prosecutors, and many defense attorneys at the trial level, do not understand the appellate process, including the appellate issues ordinarily surviving the guilty plea, many of the waiver allocutions misadvise a defendant as to what he is giving up by the waiver. In such a circumstance, most or all institutional appellate providers assail the validity of the waiver rather than doing an Anders (no merit) brief.

Practice Tips:

- If the court or prosecutor insists on a general appeal waiver as part of the plea deal, counsel should see if they will agree to make the waiver specific to certain enumerated issues, e.g., Article 710 motions or other litigated motions. That will assist the appellate lawyer in being able to raise the various other issues presented in the record (e.g., a subsequent VOP or other sentence enhancement).
- Many oral appeal waivers are poorly executed by the court, with on-the-record misadvice to the defendant about what he or she is waiving. The poor execution of the waivers undercuts their validity and allows appellate counsel to raise the various issues on appeal. Defense counsel should not intervene to make the waiver colloquy better. Neither the defendant nor defense counsel will suffer if the waiver is improperly executed. The two issues that can bite defense counsel later on – ineffective assistance of counsel and involuntariness of the plea – cannot be waived anyway.
- Since many appeal waivers are invalidly entered, and since even valid ones do not waive all appellate issues, the presence of an appeal waiver should not deter counsel from filing a notice of appeal and advising defendant how to obtain appellate counsel, if counsel would have done so absent the waiver. Even with a valid appeal waiver, the defendant retains the right to appeal, he or she just forfeits the right to raise certain appellate issues. An appeals lawyer, looking over the record, is in the best position to determine if valid appellate issues survive the purported waiver. Hence, the appeal waiver process should not in itself, deter defendants from appealing.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK, : NOTICE OF MOTION FOR
ASSIGNMENT OF COUNSEL
-against- :
XXXXXXXXXXXXXXXXXXXXX, : NEW YORK COUNTY
Defendant-Appellant. : IND. NO. XXXXXXXX

----- X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmation of _____, and all the prior proceedings herein, the undersigned will move this Court, at the Courthouse, 27 Madison Avenue, New York, New York 10010, on _____, 2011, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order granting poor person's relief and assigning counsel to represent defendant-appellant on her appeal from a judgment of the Supreme Court, New York County, dated _____, 2011, convicting defendant of _____ and imposing sentence and for such other and further relief as this Court deems just.

Dated: New York, New York
, 2011

Yours, etc.,

Attorney for Defendant
New York County Defender Services
225 Broadway, Suite 1100
New York, NY 10007
(212) 803-5142

TO: HON. SUSANNA ROJAS
Clerk
Appellate Division, First Department
27 Madison Avenue
New York, NY 10010

HON. CYRUS R. VANCE, JR.
District Attorney, New York County
One Hogan Place
New York, NY 10013

NAME OF DEFENDANT
[Address]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : AFFIRMATION

-against- :

XXXXXXXXXXXXXXXXXXXXX, :

Defendant-Appellant. :

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

_____, an attorney admitted to practice in the Courts of this State, hereby affirms under the penalties of perjury that the following statements are true, except for those made on information and belief, which he believes to be true:

1. I am associated with New York County Defender Services, which was assigned in trial court to represent _____ on New York Ind. No. _____. In trial court, defendant was determined to be financially unable to afford retained counsel.

2. Defendant was convicted in Supreme Court, New York County of _____ and sentenced on _____, 2011, to 3 years in prison plus 3 years post-release supervision (_____, J.).

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK,	:	
Appellant,	:	NOTICE OF MOTION
-against-	:	FOR ASSIGNMENT OF
	:	COUNSEL
	:	Ind. No.
_____	:	
Defendant-Appellant.	:	New York County

-----X

PLEASE TAKE NOTICE that upon the annexed affirmation of _____, the undersigned will move this Court, at a term for motions thereof, to be held on _____ at the Courthouse, 27 Madison Avenue, New York, New York 10010 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order assigning Defendant-Appellant appellate counsel on his/her appeal and for such other relief as this Court deems proper.

Dated: New York, New York
_____, 201_

[Attorney for Defendant]
Or
[Defendant Pro Se]

TO: MOTION CLERK
Appellate Division
First Department
27 Madison Avenue
New York, New York 10010

HON. CYRUS R. VANCE, JR.
District Attorney
New York County
One Hogan Place
New York, New York 10010

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK, :
Appellant, : AFFIDAVIT
-against- : Ind. No. _____
, :
Defendant-Appellant. : New York County

-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF)

_____, [an attorney duly admitted to practice before the courts of this State] or [Defendant Pro Se], hereby swears under penalty of perjury, that the following statements are true, except those made upon information and belief, which he/she believes to be true:

1. [I am] [defendant is] appealing from a judgment of the Supreme Court, New York County (Hon. _____), dated _____, convicting me [him/her] of

_____, and sentencing [me] [him/her] to _____.

2. A notice of appeal was filed on _____, 201_ (copy attached).

5. [I am] [Defendant is] financially unable to retain counsel to prosecute this appeal (see attached In Forma Pauperis affidavit).

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

Affidavit in Support of Motion to
Proceed as a Poor Person Upon
Appeal

_____, :

Ind. No. _____

Defendant-Appellant. :

-----X
STATE OF NEW YORK)
COUNTY OF _____) ss.:

_____, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case, and I make this affidavit in support of the attached motion to proceed in forma pauperis.
2. I am presently in the custody of the Superintendent of _____ at _____, pursuant to judgment of the Supreme Court, _____ County, rendered on _____, convicting me of _____, and sentencing me to _____.
3. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently incarcerated and am earning \$_____ per week in income.
4. I own \$ _____ worth of real property.
5. I do / do not own a car.

6. I have \$_____ in savings.
7. I do/ do not collect unemployment benefits.
8. I do/ do not collect alimony or support.
9. I do/ do not collect a pension.
10. I do/ do not have other sources of income.

11. I was represented in the Supreme Court by:

an attorney employed by

- The Legal Aid Society The Bronx Defenders Neighborhood Defender Service
 New York County Defender Services

OR

- a member of the 18-b Assigned Counsel Plan

OR

- other assigned counsel (explain)

OR

- retained counsel (explain retainer, including who paid it, their relationship to you, and why those funds are not now available to hire appellate counsel) _____

12. During the Supreme Court proceedings, I was (check one box)

incarcerated;

OR

released on my own recognizance

OR

released on bail in the sum of \$ _____, which was posted by (fill in details, including who posted the bail, their relationship to you, and why those funds are no longer available to hire appellate counsel) _____

_____.

Wherefore, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and that I be furnished with the stenographic transcript of this action without fee and that I be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

Defendant-Appellant

Sworn to before me
this ____ day of _____, _____

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :
Appellant, : NOTICE OF ENTRY
-against- : New York County
LUIS ARANA, : Ind. No. 8645/88
Defendant-Respondent. :
-----X

PLEASE TAKE NOTICE, that the within is a true copy of an Order duly filed and entered in the above-entitled action in the Office of the Clerk of the Supreme Court, Appellate Division, First Department on August 17, 2006.

Dated: New York, New York
August 21, 2006

Yours, etc.,



ROBERT S. DEAN
CENTER FOR APPELLATE LITIGATION
74 TRINITY PLACE - 11th Floor
New York, New York 10006
212-577-2523

TO: HON. ROBERT M. MORGENTHAU
DISTRICT ATTORNEY, NEW YORK COUNTY
APPEALS DIVISION
One Hogan Place
New York, NY 10013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK,	:	
Appellant,	:	NOTICE OF MOTION
-against-	:	FOR ASSIGNMENT OF
	:	COUNSEL
	:	Ind. No.
_____,'	:	
Defendant-Respondent.	:	New York County

-----X

PLEASE TAKE NOTICE that upon the annexed affirmation of _____, the undersigned will move this Court, at a term for motions thereof, to be held on _____ at the Courthouse, 27 Madison Avenue, New York, New York 10010 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order assigning Defendant-Respondent appellate counsel on this People's appeal and for such other relief as this Court deems proper.

Dated: New York, New York
_____, 201_

[Attorney for Defendant]
Or
[Defendant Pro Se]

TO: MOTION CLERK
Appellate Division
First Department
27 Madison Avenue
New York, New York 10010

HON. CYRUS R. VANCE, JR.
District Attorney
New York County
One Hogan Place
New York, New York 10010

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK, :
Appellant, : AFFIDAVIT
-against- : Ind. No. _____
, :
Defendant-Respondent. : New York County

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF)

_____, [an attorney duly admitted to practice before the courts of this State] or [Defendant Pro Se], hereby swears under penalty of perjury, that the following statements are true, except those made upon information and belief, which he/she believes to be true:

1. The People are appealing from an Order of the Supreme Court, New York County (Hon. _____), dated _____,

_____.

2. The People filed a notice of appeal on _____, 201_ (copy attached).

5. The defendant is financially unable to retain counsel to defend against this appeal (see attached In Forma Pauperis affidavit).

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Appellant, :

-against-

: Affidavit in Support of Motion to
: Proceed as a Poor Person Upon
: Appeal by the People

_____, : Ind. No. _____

Defendant-Respondent. :

-----X

STATE OF NEW YORK)
COUNTY OF _____) ss.:

_____, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case, and I make this affidavit in support of the attached motion to proceed in forma pauperis.
2. I am unable because of my indigence to pay the costs, fees, and expenses necessary to defend against this People's appeal.
3. I am currently earning \$_____ per week in income.
4. I own \$_____ worth of real property.
5. I do / do not own a car.
6. I have \$_____ in savings.
7. I do/ do not collect unemployment benefits.
8. I do/ do not collect alimony or support.
9. I do/ do not collect a pension.

10. I do/ do not have other sources of income.

11. I was represented in the Supreme Court by:

an attorney employed by

The Legal Aid Society The Bronx Defenders Neighborhood Defender Service

New York County Defender Services

OR

a member of the 18-b Assigned Counsel Plan

OR

other assigned counsel (explain)

OR

retained counsel (explain retainer, including who paid it, their relationship to you, and why those funds are not now available to hire appellate counsel) _____

12. During the Supreme Court proceedings, I was (check one box)

incarcerated;

OR

released on my own recognizance

OR

[] released on bail in the sum of \$ _____, which was posted by (fill in details, including who posted the bail, their relationship to you, and why those funds are no longer available to hire appellate counsel) _____

_____.

Wherefore, I respectfully ask for an order permitting me to defend against this appeal by the People as a poor person and that I be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

Defendant-Respondent

Sworn to before me
this ____ day of _____, _____

**ADVANCED GUILTY PLEA/
APPELLATE WAIVER SCENARIO**

During voir dire, your client pleads guilty to intentional assault and unlawful imprisonment as a misdemeanor. He agrees to waive his right to appeal, and later receives the promised determinate sentence, in excess of the legal minimum.

Exercise 1

Prior to the guilty plea, the following issues arose:

- Motion to dismiss indictment, as based upon the procurement of false evidence, denied
- CPL 240.40 motion, for discovery of certain material in the prosecutor's file, denied
- Motion to dismiss count of the indictment, for failure to state a crime, denied
- Motion to dismiss count of the indictment, because the statute making the defendant's alleged actions a crime is unconstitutional, denied
- Motion to dismiss indictment based upon the People's resubmission of a case to a second grand jury without first having obtained court permission, denied
- CPL 30.30 dismissal motion denied
- Statutory Double Jeopardy motion denied
- Federal Constitutional Double Jeopardy motion denied
- Motion to suppress suggestive lineup ID (Wade) denied after a hearing

- Motion to preclude ID testimony, based on lack of statutory notice, denied
- Motion to suppress involuntarily obtained statements (Huntley) denied without a hearing
- Denial of Batson motion challenging prosecutor's use of peremptory strikes
- Sandoval ruling allowing cross of defendant's 30 prior felony convictions

Step one: Circle all the issues which, but for the appeal waiver, could be raised on appeal despite the guilty plea.

Step two: Of the issues you circled, cross out any issues which are forfeited on appeal by virtue of the appeal waiver.

Exercise 2

During the plea allocution described in Exercise 1, the defendant denies intending to hurt the victim and says it was an accident. The judge ignores this statement. No motion to withdraw the plea is ever made.

Were there no appeal waiver, could the defendant seek plea withdrawal on appeal, even though he did not move to withdraw his plea? If the answer is yes, does the appeal waiver operate to forfeit this issue for appeal?

Exercise 3

At the sentencing proceeding described above, the first thing the defendant does is move to withdraw his plea based upon your misadvice concerning the SORA implications of the conviction. You do not say anything, and the judge denies the defendant's motion without any inquiry.

The defendant asks you if he can raise the plea withdrawal issue on appeal. What do you tell him?

Exercise 4

At the sentencing proceeding described above, the prosecutor proffers a second violent felony offender statement, alleging that defendant is a second violent felony offender based on a Massachusetts felony. You do not challenge the predicate and the client admits it.

You file a notice of appeal and later the defendant asks the Appellate Division to assign a lawyer to represent him on appeal. The People cross-move to dismiss the appeal because of the appeal waiver. Which of the following is the Appellate Division likely to do?

- Grant the People's motion
- Deny the People's motion
- Nothing. This a trick question. The People's motion was never made because no prosecutor would be stupid enough to think that such a motion might ever be granted.

The Appellate Division assigns appellate counsel. After reviewing the record, the appellate lawyer looks up the Massachusetts statute on Westlaw and sees that, while it has all elements of a New York felony, it does not contain all the elements of a New York violent felony. What can the appellate lawyer do?

Exercise 5

Upon reviewing the court file papers that constitute part of the record on appeal, appellate counsel notices that the fee and surcharge amounts are illegally high, based upon when the crime was committed (as opposed to when sentence was imposed). Can the appellate lawyer do anything?

Exercise 6

In her review of the record, appellate counsel pays particular attention to the wording of the waiver allocution as well as the written waiver.

What is the likelihood that the appellate lawyer will argue in the appellate court, with some confidence, that the waiver was defectively taken and thus unenforceable:

- No likelihood at all
- From purely a statistical point of view, pretty likely

Exercise 7

In her review of the record, appellate counsel sees that the judge imposed a longer period of PRS than what was promised at the time of the plea. The court did not explain its reasons, and you did not object.

In light of the appeal waiver, is there anything that the appellate lawyer can do on appeal?

Exercise 8

Reviewing the record, the appellate lawyer determines, correctly, this is one of the unusual cases where there are no non-frivolous issues to raise on appeal. What is the appellate lawyer's likely course of action:

- Call you up and criticize you for filing a notice of appeal
- Immediately turn you over to the Disciplinary Committee
- Make a motion to vacate the notice of appeal as improperly filed
- Write the client and suggest that the appeal be withdrawn, at the same time offering the client parole advocacy and re-entry services; if the client will not withdraw the appeal by stipulation, the lawyer will file an Anders brief with the appellate court, explaining why there are no non-frivolous issues and asking that the conviction be affirmed.

Exercise 9

In the case described above, while the appeal is pending the defendant writes you and complains that you did not correctly explain the immigration consequences to him, that he is about to be deported, and that he wants his plea back. The record is silent on this matter, but you recall that you did discuss immigration consequences with him.

What should you do?

Guilty Plea CLE Questionnaire

Please answer all the questions below to the best of your ability. No consulting with colleagues, no peeking!

1. Your client pleaded guilty. Can she still appeal?
 - Yes
 - No

2. The client pleaded guilty and waived her right to appeal. The waiver seems valid. Can she still appeal?
 - Yes
 - No

3. The client pleaded guilty and waived her right to appeal. Do you still have to advise her of her right to appeal?
 - Yes
 - No

4. The client pleaded guilty and waived her right to appeal. She asks you to file a notice of appeal for her.
 - a. Are you required to do so?
 - Yes
 - No

 - b. If you do so, can the judge hold you in contempt?
 - Yes
 - No

 - c. If you do so, can the prosecutor withdraw her consent to the plea?
 - Yes
 - No

 - d. If you refuse or fail to do so, could a judge in the future find that you have violated your client's right to the effective assistance of counsel?
 - Yes
 - No

Guilty Plea CLE Questionnaire

5. The client pleaded guilty with a promise of Probation and waived her right to appeal. She received Probation but later violated it and got a heavy prison sentence. Does the appeal waiver preclude an appellate argument that the prison sentence is harsh and excessive?
- Yes
 No
6. The client pleaded guilty with a sentence promise of 3½ years in prison, provided she met certain conditions. She also waived her right to appeal. At sentence the judge imposed 6 years, saying that your client violated one of the conditions. You object that the condition was not, in fact, violated. Does the appeal waiver preclude an appellate argument that your client should have gotten the 3½ because the condition was not violated?
- Yes
 No
7. Your client pleaded guilty with a promise of 3½ years and waived her right to appeal. Although you had advised the client, off the record, prior to the plea, about post-release supervision, the judge failed to mention it at the plea. At sentence, the judge imposed post-release supervision without objection. Does the guilty plea, the appeal waiver, and/or the failure to object preclude an appellant argument that your client should get her plea back?
- Yes
 No
8. Your client pleaded guilty, waived her right to appeal, and received the sentence she was promised. After you and the client have left the courtroom, the court clerk adds onto the paperwork a \$1,000 SORA surcharge that the client was not, in fact, eligible for. You are never notified that the surcharge was imposed. Your client foolishly seeks to appeal anyway and her appellate lawyer, on receiving the Record on Appeal, notices the unauthorized surcharge. Does the appeal waiver preclude an appellate argument that the surcharge should be vacated as unauthorized?
- Yes
 No
9. Your client pleads guilty with a promise of 5 years as a second felony offender, waives her right to appeal, and ultimately receives the promised sentence. Your client foolishly seeks to appeal anyway, and the appellate lawyer, upon examining the predicate felony statement, notices that the tolling dates indicate, in fact, that the predicate was outside of the 10-year period. Does the guilty plea,

appeal waiver, and/or failure to object preclude an appellate argument that the defendant should be resentenced as a first felony offender?

- Yes
- No

10. You file a constitutional speedy trial motion on the defendant's behalf, and the court denies it. Later your client is offered a windfall plea bargain provided she waives her right to appeal. She takes the deal, and the waiver specifically encompasses the speedy trial motion. At sentence you ask the court to adjudicate your client, who is eligible, a Youthful Offender. The court refuses to consider it, in light of the appeal waiver. At this point, your client asks to withdraw her plea, and the court denies that application without any inquiry. Which, if any, of these issues could still be raised on appeal despite the waiver?

a. Constitutional Speedy Trial?

- Yes
- No

b. Denial of YO Consideration?

- Yes
- No

c. Summary Denial of the Plea Withdrawal Motion?

- Yes
- No

11. Your client is pleading to the entire indictment without a sentence promise from the court or prosecutor. The judge will not take the plea unless the defendant also waives her right to appeal, which she then does. Is the appeal waiver valid?

- Yes
- No

12. Your client does not seem to be mentally "all there," but wants to take the plea offer. She pleads guilty and waives the right to appeal. Does the guilty plea, appeal waiver, and/or the lack of a defense objection preclude the defendant from arguing on appeal that she was incompetent to stand trial and that therefore her plea should be vacated?

- Yes
- No

Guilty Plea CLE Questionnaire

13. Your client is offered a favorable plea (albeit not to minimum sentence available). During the plea allocution, when the judge asks her if she understands the waiver of the right to appeal, she is hesitant and the judge suggests you confer with her. The client tells you that she would like to appeal the following issues:

- Denial of §30.30 Release Motion
- Denial of §190.50 Motion
- Refusal to Order a Mapp Hearing
- Sufficiency of Evidence before the Grand Jury
- Denial of Clayton Motion
- Refusal to Sever Case from a Co-defendant
- Excessive Sentence (time cut)

Put a check mark in the box next to the issues that both (a) could ordinarily be raised on appeal despite the guilty plea but (b) are forfeited by operation of the appeal waiver.

14. Your client pleads guilty, waives her right to appeal, and receives Probation. A few days after sentence, she calls and asks you if the appeal waiver precludes her from filing a §440.10 motion claiming that the guilty plea was involuntary. The correct answer is:

- Yes
- No

15. Your client pleads guilty, waives her right to appeal and receives a fairly short prison sentence. Would the guilty plea or appeal waiver preclude the assigned appellate lawyer from assisting the client with seeking parole release, or from providing the client with re-entry services?

- Yes
- No