

CONTINUING LEGAL EDUCATION

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TOP 10 ETHICAL TIPS FOR PRACTICING LAW IN NEW YORK

MICHAEL S. ROSS, ESQ.



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**APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT
ASSIGNED COUNSEL PLAN
AND
THE NEW YORK STATE
DEFENDERS ASSOCIATION**

PRESENT:

**ETHICS FOR THE
CRIMINAL LAW PRACTITIONER:**

**“TEN IMPORTANT KEYS FOR A CRIMINAL
PRACTITIONER TO UNDERSTAND IN ORDER
TO AVOID ETHICAL DIFFICULTIES”**

**MAY 9, 2011
6:00 P.M. TO 8:00 P.M.**

**OUTLINE
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I. Understand The New Confidentiality Scheme In New York.

- A. Confidentiality Of Information (Rule 1.6) And Conduct Before A Tribunal (Rule 3.3).
1. New York Rule of Professional Conduct (“Rule”) 1.6 eliminates former New York Lawyer’s Code of Professional Responsibility Disciplinary Rule (“D.R.”) 4-101’s cumbersome use of the terms “secret” and “confidence” and replaces them with the all-encompassing term “confidential information” – which refers to all information gained during the representation, irrespective of the source.
 2. Rule 1.6(a)(2) now makes it clear that disclosure of confidential client information is impliedly authorized in order to advance the client’s best interests when it is reasonable or customary.
 3. Rule 1.6(b) has been *expanded* to permit a lawyer to reveal or use confidential client information necessary to “prevent reasonably certain death or substantial bodily harm.”

4. Rule 1.6(b)(3) – which is similar to former D.R. 4-105(C)(5) – allows lawyers “to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.”
5. Rule 1.6(b)(4) permits a lawyer to reveal confidential information in order to obtain ethics-related advice, i.e., the disclosure made be made to the extent necessary to secure legal advice about compliance with ethical rules or other laws.
6. Rule 3.3(a)(3) is a *radical departure* from the former rules. Rule 3.3(a)(3) requires a lawyer to correct a false statement of material fact or law previously made to the tribunal by the lawyer or the client and to take necessary remedial measures, including disclosure of confidential client information. That new Rule provides:

“A lawyer shall not knowingly ... offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

Thus, unlike the limits imposed upon lawyers by former D.R. 7-102(B)(1), now when a client commits a fraud on a tribunal, and refuses to correct the fraud after the attorney remonstrates, the attorney must reveal the fraud. Significantly, unlike the American Bar Association (“A.B.A.”) Model Rules, the new New York Rule does not specify an endpoint of this obligation.

Of course, only time will tell how courts will apply this clear new Rule to the conundrum of client perjury in criminal cases and whether the guidance lawyers

have is “crystal clear.” Cf. People v. Berroa, 99 N.Y.2d 134 (2002); People v. DePallo, 96 N.Y.2d 437 (2001); People v. Darrett, 2 A.D.3d 16 (1st Dept. 2003).

7. Rule 3.3(b) provides that “[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

8. *The new Rules eliminate the former New York Disciplinary Rule (i.e., D.R. 7-102[B][1]) which required disclosure of a crime or client fraud on a “person”, and substitute it with the new Rule 3.3 which is limited to disclosure of client fraud on a “tribunal.” Note that A.B.A. Model Rule 4.1(b), which requires disclosure of facts necessary to avoid assisting a client fraud or crime where the lawyer’s services have been used (and where the information is not protected by Rule 1.6’s confidentiality provision), is not incorporated into the newly adopted New York Rules.*

9. Two Recent And Important Ethics Opinions.

New York County Lawyer’s Association, Committee on Professional Ethics Formal Opinion 741 (March 1, 2010).

Opinion 741 addressed the important issue of how the adoption of Rule 3.3 in New York (effective April 1, 2009), impacts what a lawyer must do after learning, after the fact, that a client has lied about a material issue in a civil deposition. (Author’s Note: The reasoning of Opinion 741 would, of course, apply equally to false testimony at a trial.) Stated simply:

“A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstrations with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses

the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information.

...

[T]his opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially."

Opinion 741 makes it clear that Rule 3.3 must be given its plain effect even if that means making disclosures adverse to the client. The lawyer's duty of confidentiality is trumped by Rule 3.3(c), which requires a lawyer to remedy a client's false testimony "even if compliance requires disclosure of information otherwise protected by Rule 1.6." False testimony by a client (or witness) at a deposition is considered a "tribunal" and remedial action must be taken. Although the literal language of Rule 3.3(a)(3) applies when a lawyer "has offered material evidence" which the lawyer later comes to learn was false, under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial. While not formally adopted as part of the Rules, Comment "1" to Rule 3.3 explicitly contemplates the applicability of Rule 3.3 to depositions:

"This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal....It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition."

Opinion 741 concludes that testimony at a deposition is governed by Rule 3.3 in part because false testimony at a deposition may constitute the crime of perjury, and the victim of the perjury is the adverse

party, which may rely on the false testimony, as well as the justice system as a whole – even if the deposition is not submitted to a court, or not submitted to a court for months or even years after the testimony is reduced to transcript form.

Opinion 741 also addresses how an attorney should remediate the false testimony at a deposition:

“As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony....Also, the process of remonstrations may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See [Rule] 1.13 (organization as client).

Only if remonstrations efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another’s detriment.”

Finally, Opinion 741 restated that Rule 3.3 is triggered by “knowledge” of falsity and not mere suspicion. The duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer “comes to know of its falsity....” The lawyer *may refuse to introduce*, in a civil case, evidence “that the lawyer reasonably believes is false.” Rule 3.3(a)(3) (emphasis added). It is only when the lawyer knows that the prior testimony is false that the Rules trigger not only the option of taking corrective action, but the *duty* to do so.

New York State Bar Association Opinion 837 (March 16, 2010).

Opinion 837 began by noting that New York’s new Rule 3.3 – which was long ago adopted in most states – represents a “radical break” from former D.R. 7-102(B)(1) because it provides that if a lawyer or the lawyer’s client has offered evidence to a tribunal and the lawyer later comes to “know” that the evidence is

false, the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Rule 3.3(c) makes crystal clear that the disclosure duty applies even if the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6).

Opinion 837 also points out another difference between the old Code and the new Rules is that former D.R. 7-102(B)(1) required a “fraud” to have been perpetrated. Rule 3.3(b) likewise applies only in the case of “criminal or fraudulent” conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.

As to the vexing question concerning the duration of the duty to take remedial measures, Opinion 837 explains that the New York State Bar Association had recommended that New York Rule 3.3(c) track A.B.A. Model Rule 3.3(c), and thus include the proviso that “[t]he duties stated in paragraphs (a) and (e) continue to the conclusion of the proceeding. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation.” See Proposed Rules of Professional Conduct, pp. 132-38 (Feb. 1, 2008). But the State Bar’s proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel’s obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. Opinion 837 also expressed the view “that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3.”

II. Understand The Duty To Communicate.

- A. Under the new Rules, proper “communication” with a client is finally defined. Rule 1.4 codifies a lawyer’s duty to communicate effectively with the client, including keeping the client reasonably informed about the status of the matter, promptly complying with a reasonable request for information, etc. Rule 1.4 explains that:

“(a) A lawyer shall:

- (1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

- B. Illustrative of the common-sense application of the interplay between the duty to communicate and the allocation of authority between client and attorney is United States v. Velez, 2010 WL 4455558 (S.D.N.Y. 2010). In Velez, a defendant moved to withdraw his guilty plea because, among other things, his lawyer did not file the motions the defendant insisted be filed and because the lawyer only visited him four or five times and would "always encourage him to plead guilty." In a classic application of Rule 1.2(a) (without referencing the Rule)¹, the Court found:

¹Rule 1.2(a) provides:

"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

(continued...)

“An attorney has the responsibility to decide what motions should be filed, ... and Velez has not shown that any of the motions he lists had any merit or would have been granted. Any attorney would be wary of providing an incarcerated client in a criminal case with legal advice by email, assuming that prisoners have access to electronic communications from counsel. In any event, Velez has failed to identify any information or advice that his counsel failed to give him and that he needed in order to understand the charges against him and the options open to him. For this same reason, Velez has not shown that more visits to prison by his attorney deprived him of adequate representation. In particular, while the decision to enter a plea must be the defendant’s, a criminal defense attorney has an obligation to advise her client of the course of action the attorney believes it is in the client’s interest to follow....Velez has not shown that counsel was ineffective in advising him to plead guilty.” (Internal citations omitted.)

III. Understand The Attorney’s Role In Making Tactical Decisions And How Far An Attorney’s Efforts Must Extend.

- A. Rule 1.2 now defines the scope of representation and allocation of authority between client and lawyer.

Previously, New York lawyers had to draw on case law or the A.B.A. Model Rules in order to understand the scope of their authority. Now Rule 1.2 sets out a lawyer’s obligation to abide by a client’s decisions regarding the objectives of representation, including whether to settle a civil matter or to enter a plea, waive a jury trial or testify in a criminal matter.

Rule 1.2(a) provides: “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.” (For a classic

¹(...continued)

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.”

application of Rule 1.2(a), United States v. Velez, 2010 WL 4455558 (S.D.N.Y. 2010), discussed supra.)

- B. In Graham v. Portuondo, 01-cv-06911 (E.D.N.Y. Aug. 13, 2010), in the context of a defense based on mental illness, Judge Weinstein explored the contours of defense counsel's duty to investigate possible defenses and noted that "the duty to investigate does not require counsel to conduct a searching investigation into every defense ... or to scour the globe on the off-chance that something will turn up.... Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." (Internal citations omitted.)
- C. In People v. Reid and Thomas, 918 N.Y.S.2d 863 (Sup. Ct. N.Y.Co. 2011), the court provided a helpful insight into when judges will consider a decision not to investigate as constituting inadequate assistance of counsel (and it explained the somewhat slippery approach of judges to the "everything to gain and nothing to lose" theory of investigation):

"Defendant argues that he was denied effective assistance of counsel, because his attorney failed to investigate evidence that would have undermined the People's case and created reasonable doubt as to his complicity in the theft. Defendant alleges the existence of potential witnesses (ACS personnel who could corroborate his presence at their office), documentary evidence (the ACS payment voucher and Metrocard printout) and physical evidence (subway surveillance footage) that would tend to support his claim that he boarded the Lexington Avenue express train at the Broadway/Nassau stop – not at the 42nd Street station, where Officer Rodriguez testified that he saw defendant on the platform seconds before he got on the train with Jones and Thomas.

Because Rodriguez is the only eye witness, the jury relied on his observations to establish defendant's ties to Jones and Thomas and to draw the inference that the three were acting in concert. It behooved defense counsel, therefore, to consider bringing forth evidence that would cast doubt on Rodriguez's testimony. This is where defendant's lawyer failed.

Counsel had a duty to search for evidence potentially favorable to the defense which could have been utilized at trial. At a minimum, he should have visited or sent an investigator to visit the ACS office, obtained a printout of defendant's Metrocard and inquired about subway surveillance tapes. An

adequate investigation would have provided defendant's attorney with enough information to make an informed, deliberate decision about whether such evidence existed and whether to introduce it.

On the eve of trial, defense counsel learned that Jones, his only witness, refused to testify and could not be located. Jones was, therefore, unavailable as a matter of law. *At that critical juncture, the attorney had everything to gain and nothing to lose from undertaking an investigation that would likely have revealed a creditable source of reasonable doubt.* By failing to seek an adjournment for that purpose, counsel left unpursued the only remaining defense.

Defendant's attorney offered no sound reason for his derogation of duty. His failure to investigate was not part of a legitimate strategy, it was the result of neglect. Because defendant was denied meaningful representation, he is entitled to a new trial." (Emphasis added.)

D. Consider these other informative cases:

1. In People v. Henriquez, 3 N.Y.3d 210 (2004), the New York Court of Appeals rejected the defendant's claim of ineffective assistance of counsel based upon the defense attorney, in effect, abandoning all decision making ability and honoring his client's instructions to put on no defense. During Henriquez' murder trial, he specifically instructed his attorney not to cross-examine any witness; not to object to any line of cross-examination; not to call any witnesses; not to object to evidence; not to present a summation; etc. Following Henriquez' conviction, he claimed that his constitutional right to a fair trial was violated because "the trial court and defense counsel respected his desire to refrain from presenting a defense." N.Y.3d at 212, 214-15, 785, N.Y.S.2d at 386-87. Rejecting Henriquez' claim of ineffective assistance of counsel – the Court noted that because "the right to defend is given directly to the accused ... the Constitution does not force a lawyer upon a defendant"; and, therefore, the defense attorney could not be charged with failing to provide effective representation because Henriquez had knowingly, voluntarily and intelligently waived his right to effective assistance of counsel. Id. (internal citations omitted). Contrary to the somewhat unusual outcome of the Henriquez case, the general principles which should act as a guide to members of

the defense bar as to the allocation of authority between defense lawyers and their clients are well-established. For example:

“The extent of a lawyer’s authority when a lawyer represents a person accused of a crime has been comparatively well worked out, perhaps because the issues have so frequently been litigated. Courts generally agree that in fact the accused must explicitly consent to very few critical decisions on the part of the defendant’s lawyer. The four decisions to which client consent is required are those involving (1) the plea that will be entered; (2) whether to forgo the right to jury trial; (3) whether the accused should testify; and (4) whether to appeal.”

2. In People v. Rodriguez, 95 N.Y.2d 497 (2000), the New York Court of Appeals found that the trial court did not err by declining to consider pro se motions submitted by a represented defendant. Rodriguez’ defense attorney was aware of his client’s pro se motions, but declined to adopt the motions and present them to the court on the ground that the defense attorney believed that both motions were frivolous. Based upon these circumstances, the Court of Appeals found that the trial court had no further duty to entertain the defendant’s motions, noting that:

“By accepting counseled representation, a defendant assigns control of much of the case to the lawyer, who, by reason of training and experience, is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings.” Rodriguez, 95 N.Y.2d at 501-02, 719 N.Y.S.2d at 210-11; see also id. (noting that many jurisdictions have refused to recognize a right of counseled defendants to act on their own defense [internal citations omitted]).

3. United States v. Diaz, 176 F.3d 52 (2d Cir. 1999) (Despite at least one medical report suggesting that the defendant was incompetent to stand trial or to commit the offense alleged, an attorney's failure to raise a diminished capacity defense was not ineffective assistance. In failing to raise the particular defense, the attorney relied on other medical reports, which suggested the defendant's mental problems might be maligned. The attorney's decision to rely on certain medical reports over others was found to fall within the Strickland Standard of "reasonable professional assistance.").
4. Perez v. Greiner, WL 22137013 (S.D.N.Y. 2003) (An attorney's failure to raise a justification defense, specifically self-defense, was not ineffective counsel because the attorney reasonably relied on the evidence of the murder in question. The attorney's reasonable reliance was confirmed when the jury found that the defendant was the instigator of the occurrence, the victim had not confronted the defendant with force, and the defendant had ample time and space to retreat.).
5. There are, however, several general instances during the trial stage where courts have found attorneys' failures to be ineffective assistance, as opposed to deferential strategical decisions. Specifically, attorneys have been found to have provided ineffective assistance when:
 - Strategy or recommendations are based on the wrong law, a misapprehension of the law, misapplication the law, or a misunderstanding of the law. See, e.g., U.S. v. Hansel, 70 F.3d 6 (2d Cir. 1995) (An attorney's failure to inform the defendant that two counts against him were time-barred and the attorney's failure to object to those counts as untimely, resulting in a waiver of a statute of limitations affirmative defense when the defendant entered a guilty plea, were found to constitute ineffective assistance because the defendant would not have pled guilty but for the attorney's recommendation based on his misunderstanding or ignorance of

the law); Shiwlochan v. Portuondo, 345 F. Supp.2d 242 (E.D.N.Y 2004) (An attorney's failure to inform the defendant of the maximum possible sentence that he could receive, resulting in the rejection of a plea offer due to his misapprehension of how the judge would sentence the defendant if found guilty by the jury, was ineffective assistance. The defendant was found guilty at trial and received a maximum sentence of 41 ½ years to life, which was far lengthier than the 15 years to life that his attorney had suggested.).

- Failing to prepare any defense at all. See, e.g., Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001) (An attorney's failure to prepare a defense in an effort to reduce his amount of labor and to avoid preparing a defense that might prove unnecessary was ineffective assistance despite the fact that the attorney believed the case would be dismissed, upon motion, after the prosecution presented its case in chief.).
- Failing to call a fact witness when the factual testimony contradicts or would cast doubt upon the prosecution's theory of guilt. See, e.g., Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001) (An attorney's failure to call a fact witness whose testimony would have cast doubt on the time frame proposed by the prosecution and would have offered a reasonable explanation for otherwise incriminating evidence, when that decision was neither based on "plausible strategic calculus or an adequate pre-trial investigation" nor based on an attempt to further his client's interest, but was mainly to avoid work, was ineffective assistance. The factual testimony that was never heard by the jury would have corroborated the defendant's testimony of an innocent explanation

for the only physical evidence presented at trial and would have cast doubt on the victim's testimony as to when the defendant had the opportunity to commit the crimes that he was accused of.)

- Failing to consult and call an expert witness when critical testimony of another witness is called into question by a medical/psychological condition in expert's field of expertise. See, e.g., Bell v. Miller, 2007 WL 2469423 (2d Cir. 2007) (An attorney's failure to consult a medical expert regarding the reliability of the prosecution's witness' identification of the defendant as his assailant, was ineffective assistance because the attorney knew that the witness had suffered memory loss due to excessive blood loss, which called into question the accuracy of the witness' identification. If consulted and later questioned about the witness' medical condition and its effect on his memory, the medical expert would have called into question the witness' memory and ability to identify the defendant, which was the only evidence tying the defendant to the alleged crime); Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005) (An attorney's failure to consult and call an expert medical witness in a sexual abuse case was ineffective assistance because beyond the purported medical abuse presented by the prosecution, the entirety of the case was dependent upon the defendant's and the prosecution's witnesses' credibility. The attorney failed to consult or call a medical expert, who would have testified that the prosecution's evidence was not entirely indicative of sexual penetration, which would have simultaneously contradicted the only physical evidence presented by the prosecution and bolstered the credibility of the defendant).

- Failing to consult and call character witnesses when the trial becomes a credibility contest and the outcome of the trial depends on who the trier of fact believes. See, e.g., Noble v. Kelly, 89 F. Supp.2d 443 (S.D.N.Y. 2000) (An attorney's failure to comply with an alibi notice statute, which precluded him from calling an alibi witness who would have testified that the defendant was with him at the time of the alleged shooting was ineffective assistance. The only incriminating evidence presented at trial was testimony by four eye-witnesses with contradicting accounts of the events. Therefore, testimony enhancing the credibility of the defendant could have resulted in the jury finding the defendant not guilty).

IV. Understand The Collateral Estoppel Doctrine.

A criminal defense practitioner should remember that a court's finding that the attorney acted improperly may trigger the collateral estoppel doctrine in a later disciplinary proceeding. The doctrine of collateral estoppel precludes a party from re-litigating an issue which has previously been decided by a court when that party has had a full and fair opportunity to be heard on that issue. See In re Abady, 22 A.D.3d 71, 81 (1st Dept. 2005) (Applying the doctrine of collateral in context of an attorney disciplinary proceeding, and stating that the two requirements for application of the doctrine are: "first, the identical issue necessarily must have been decided in the prior action and be decisive in the present action, and second, the party to be precluded must have had a full and fair opportunity to contest the prior determination"), citing Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455 (1985) and Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65 (1969).

V. Understand The "Self-Defense Exception" To Rule 1.6.

- A. Rule 1.6(b)(5)(i) provides in relevant part that "a lawyer may reveal or use confidential information^[2] to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."

²Rule 1.6(a) defines "Confidential information" as consisting "of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

- B. However, recently in A.B.A. Formal Opinion 10-456 (July 14, 2010), the A.B.A. announced a rather controversial view of the attorney-client privilege in the context of claims of ineffective assistance of counsel. The Opinion expressed the view that a criminal defense attorney whose ex-client brings an ineffective assistance claim may not unilaterally provide information about the client's case to the prosecution. *Curiously, the Opinion notes that even though the attorney is accused of legal incompetency, nonetheless, the defendant's motion or habeas petition is not a criminal charge or civil claim against which the lawyer must defend.* Thus, the Opinion indicates that only in rare situations will a lawyer be able to provide information absent a court directive (such as a court-directed declaration or testimony). The Opinion expressed the view that allowing an attorney to assist law enforcement authorities by providing them with client protected information may "chill" future defendants from fully confiding in their counsel. Also, because certain such claims are dismissed before an attorney is required to testify, the need for the attorney's testimony can only be determined by a court.

VI. Understand Conflict Of Interest Waivers.

- A. Written waivers of conflict of interest must be in writing pursuant to Rule 1.7(b)(4). At last, New York lawyers have been given a bright-line requirement that a waiver of a conflict of interest in connection with current clients can only occur when, in the words of Rule 1.7(b)(4), "each affected client gives informed consent, confirmed *in writing.*" (Emphasis added.)

- B. "Confirmed in writing" is now a defined term under Rule 1.0(e):

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

- C. "Informed consent" is a defined term in Rule 1.0(j). Now lawyers are told that informed consent has the element of risks and alternatives. Specifically, Rule 1.0(j) provides:

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the

lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

This clear definition of informed consent is now incorporated into various individual conflict of interest rules.

D. Waivers must be real, and they are often required to be given in court.

1. A waiver by a defendant to conflict-free representation at a “Curcio hearing” may later be determined to be inadequate because: (1) the conflict is so severe as to be unwaivable; or (2) the waiver was not knowing or intelligent. See United States v. Schwarz, 283 F.3d 76, 95 (2d Cir. 2002). “An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney’s representation.” Id.
2. Before a defendant can knowingly and intelligently waive a conflict, the court must: (1) advise the defendant about potential conflicts; (2) determine whether the defendant understands the risks and conflicts; and (3) give the defendant time to digest and contemplate the risks, with the aid of independent counsel if desired. See, e.g., United States v. Kliti, 156 F.3d 150, 153 n.4 (2d Cir. 1998).
3. In the state courts, the conflict hearing is referred to as a “Gomberg hearing.” See, e.g., People v. Leary, 303 A.D.2d 256, 756 N.Y.S.2d 205 (1st Dept. 2003) (noting that failure to hold a Gomberg hearing was not a reversible error because the defendant failed to demonstrate that defense counsel’s relationship with a potential witness constituted a potential conflict of interest or that such conflict in fact affected the conduct of the defense. After a Gomberg hearing, a court may have sufficient basis to conclude that a defendant made an informed decision [i.e., voluntary and intelligent] to proceed with potentially conflicted counsel); People v. Alexander, 255 A.D.2d 708, 681 N.Y.S.2d 109 (3d Dept. 1998).
4. The New York Court of Appeals noted in People v. Harris, 99 N.Y.2d 202, 753 N.Y.S.2d 437 (2002), that: 1) a lawyer simultaneously representing two clients whose interests “actually conflict” cannot give either undivided loyalty for purposes of effective

counsel issues; 2) in the context of joint representation of codefendants, once the presence of an actual conflict situation is established, prejudice is assumed but can be rebutted by a factual showing to the contrary; and 3) both the prosecution and the defense have a duty to recognize potential conflict situations.

5. Under the Supreme Court's decision in Wheat v. United States, 486 U.S. 153 (1988), in order to avoid lurking potential conflicts and to preserve the public's confidence in the integrity of the judicial system, a trial judge has the discretion – which is virtually unreviewable on appeal – to reject a defendant's waiver of an actual or potential conflict. See also United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003). The Wheat decision has been cited with approval by New York State courts. See, e.g., People v. Scotti, 142 A.D.2d 616, 530 N.Y.S.2d 271 (2d Dept. 1988).

VII. Understand The No-Contact Rule.

- A. Communication with a represented person is now addressed in Rule 4.2. Rule 4.2 provides that:

“(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.”

- B. This new Rule takes the place of former D.R. 7-104(A), which provided that “[d]uring the course of the representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate on the subject of the representation with a *party* the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” (Emphasis added.) Thus, the new Rule continues to utilize the word “party” and not “person.” The New York State Bar Association's Committee on Standards of Attorney

Conduct (“COSAC”) had proposed that the term “party” be replaced with the term “person” to give broader reach to the no-contact rule, but the Appellate Divisions declined to change the Rule; and, indeed, in 1999, the Appellate Divisions’ amendment to the Rule specifically used the term “party” and not “person.”

- C. The interesting question becomes whether or not courts and/or grievance and disciplinary committees will find that there nonetheless still exists a *supposed* dichotomy between the Rule’s application to civil and criminal cases. Previously, New York’s D.R. 7-104(A) had been interpreted not to apply to attorneys in criminal cases based upon the language of D.R. 7-104(A) which contains the language of “party” not “person.” See, e.g., Grievance Committee for Southern District v. Simels, 48 F.3d 640 (2d Cir. 1995); People v. Kabir, 13 Misc.3d 920 (Sup. Ct. Bronx Co. 2006). Other ethics opinions suggest that in civil cases, the former Rule would be applied broadly to “persons.” New York State Bar Assoc. Op. 735 (2001); New York State Bar Assoc. Op. 656 (1993) (“we have [previously] described DR 7-104’s scope as applicable to represented ‘persons,’ not merely technical parties”). *By clearly keeping the term “party” and not “person,” have the Appellate Divisions announced that Rule 4.2 is applicable only to parties represented by counsel and is not applicable to the broader category of persons represented by counsel?*

VIII. Understand Representing Clients With Diminished Capacity.

- A. Rule 1.14 provides guidance to a lawyer whose client has diminished capacity. The guidance is drawn from the A.B.A. Model Rules and was much needed. A lawyer make take action to protect the client from substantial physical and financial harm, and permits disclosure of confidential client information to the extent reasonably necessary to protect the client’s interests. Rule 1.14 provides:

“(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or

entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

B. How does this new Rule apply to children? As one recent article explained:

"What does the new rule mean for lawyers who represent children? Most significantly, it proscribes substituting judgment unless a child will be at risk of substantial harm if the lawyer takes no protective action. It is no longer ethically permissible to substitute judgment for issues that arise in the course of representation of a child client, even if the client has diminished capacity and cannot act in his own interests, unless that high level of risk exists. Rather than simply deciding some risk to [a child client] exists, before substituting judgment, [the child]'s lawyer must now do a careful assessment of how serious the risk is that [the child] will die because her medication will not be administered properly if she is returned home. She should also assess whether alternative measures such as visits by a home health care worker might significantly reduce the risk to [the child].

Under the new rule, whether substitution of judgment is permissible becomes an issue-by-issue assessment requiring differential diagnosis – it can vary for the same client with the same capacity, depending on the severity of risk the issue presents to the client. A client who wants his lawyer to take a position that, while not in the client's best interests, does not put the client at substantial risk of harm, is entitled to have an advocate for that position.

The new rules also reinforce the guidance given by the New York State Bar Association, the Juvenile Rights Division and many others that a lawyer should always attempt to resolve any differences of opinion with a client through traditional lawyering duties, such as

intensive client counseling. Through normal counseling, lawyers will often be able to explain to a client why a particular option may serve the client's best interests, and may even be persuaded by a client that the position of the client is the most sensible." (Andrew Schepard and Theo Liebman, "New Professional Responsibility Rules and Attorney for the Child," N.Y.L.J., March 11, 2009, p. 3, col. 1 [footnote omitted])

IX. Understand The False Defense Doctrine.

- A. Rule 3.3 prohibits a lawyer from knowingly offering evidence that the lawyer knows to be false. Yet because of the nature of the adversary system, the prohibition against introducing false testimony does not prohibit a lawyer from attempting, through cross-examination, to discredit the truthful testimony of witnesses. See C. Selinger, The "Law" On Lawyer Efforts To Discredit Truthful Testimony, 46 OKLA. L. REV. 99 (Spring 1993). For an intelligent "give and take" discussion of the issues relating to presenting "false defenses" in criminal cases, see H. Subin, Is This Lie Necessary? Further Reflections On The Right To Present A False Defense, GEO. J. LEGAL ETHICS, Vol. 1, p. 689 (1988); J. Mitchell, Reasonable Doubts Are Where You Find Them: A Response To Professor Subin's Position On the Criminal Lawyer's "Different Mission", GEO. J. LEGAL ETHICS, Vol. 1, p. 339 (1987); H. Subin, The Criminal Lawyer's "Different Mission": Reflections On The 'Right' To Present A False Case, GEO. J. LEGAL ETHICS, Vol. 1, p. 125 (1987); cf. D. Baker, "Shredding," ABA J., (October 1999), p. 40 (discussing application of the ethical prohibition against asserting facts with no factual basis and prohibition against asserting frivolous position, in the context of attacking victim-witnesses' credibility in the courtroom).
- B. These authorities notwithstanding, one federal district court judge has ruled that he would not permit a defense lawyer to introduce evidence either on cross-examination or during direct-examination of the defense witnesses which was inconsistent with evidence which had been suppressed in a pretrial hearing. United States v. Lauersen, 2000 WL 1693538 at *9 (S.D.N.Y. Nov. 13, 2000) (WHP). In Lauersen, Judge Pauley had found that a pretrial "proffer" of the defendant could not be used by the government to impeach the defendant's testimony, should she testify, because the defendant had not knowingly waived her rights. On the other hand, the court would not allow defense counsel to cross-examine witnesses or introduce affirmative evidence on the defense case in a manner which would be inconsistent with the proffer. The court took this position because it felt that it was "duty bound to protect the integrity of the proceeding and to ensure that matters presented to the jury are grounded in good faith. See, e.g., N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.33 [D.R. 7-102] (2000)." Id. at *9.

- C. In contrast to the reasoning of the Lauersen court, Justice White's dissenting opinion in United States v. Wade, 388 U.S. 218, 258 (1967) – an opinion joined in by Justices Harlan and Stewart – expressed the view that the legitimate role of defense counsel includes:

“If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course....[D]efense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable of defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for the truth.”

- D. Criminal practitioners should be aware of People v. Lyons, 29 Misc.3d 1216(A) (Sup. Ct. Queens Co. 2010), in which the trial judge prevented a defense attorney from cross-examining a victim-witness using snippets from a private diary because “[i]t was appropriate that the defense be barred from injecting a spurious, unfounded claim of mental illness into this case, in the hope that the jury would speculate that the complainant caused the injuries to herself, when there was no evidence of such.” (Author’s note: the court did not cite, but could have, Rule 3.4(d)(1), which provides that a lawyer shall not “in appearing before a tribunal on behalf of a client ... state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”) The court also noted in a concluding footnote:

“Although not a subject of the instant motion, the Court finds it necessary to comment on the conduct of defense counsel during the course of this trial. This is not something that the Court does lightly. However, there were too many instances throughout these proceedings where counsel sought to control the direction of this trial in violation of this Court’s rulings, made self-serving and gratuitous statements in front of the jury, some of which were actual misrepresentations, and even indicated that some of the People’s requests were ‘ploys’. Defense counsel’s conduct caused the Court to admonish her at one point, and at another point, the People moved for sanctions against her. The Court chose not to stigmatize the attorney, and denied the People’s application. The Court finds defense counsel to be an extremely intelligent attorney, yet also a very

emotional advocate. However, counsel is, in addition to being an advocate, an officer of the Court. It would serve her well in her future endeavors to keep that in mind....In retrospect, it may be that in the long view of time, the Court's decision not to impose sanctions upon defense counsel may prove to have been a disservice to her. One hopes that counsel can acquire a sense of proportion without the future need for harsh measures. See, Jennifer M. Granholm, *Nobility in the Practice of Law*, 78 Mich. B.J. 1397 [1999]."

X. Understand The Limits Of Legitimate Investigative Techniques.

- A. A frequently asked question is whether there is a "good purpose" exception to the mandate that a lawyer may not engage in deceit and misrepresentation.³ Indeed, this issue becomes crystallized in the context of deceit which could be used by a lawyer to uncover otherwise relevant and admissible evidence. One court has pointedly made it clear that even if the motives of civil litigants are proper, they may not engage in "sting" operations for the purpose of uncovering misconduct, because only "[l]aw enforcement authorities are afforded license to engage in unlawful or deceptive acts to detect and prove criminal violations." Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 663 (D. Colo. 1992). The Sequa court went on to observe that such conduct could only be done by a "[criminal] prosecuting attorney...." Id.
- B. There is one much talked about federal district court decision which might arguably suggest that a good purpose may, in limited circumstances, justify deception by a lawyer. In Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp.2d 119 (S.D.N.Y. 1999), an attorney used undercover private investigators to meet with, and tape record conversations with, a salesperson of a company (the eventual defendant in the litigation) which was believed to be violating a federally registered trademark. The investigators misrepresented themselves to the corporate salesperson as being interior designers. The defendant sought to prevent the introduction of the damaging investigators' testimony and their tape recordings by arguing, among other things, that the tapes were the unethical product of attorney deceit and misrepresentation, in violation of D.R. 7-102(A)(4). The court refused to find a violation of this disciplinary rule, calling the use of undercover investigators "an accepted investigative technique."

³Rule 8.4(c) prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" and Rule 8.4 (a) prohibits an attorney from directing another person to do that which the attorney is not permitted to do himself or herself.

- C. However, in Gidatex, the court certainly did not declare that deceit would henceforth be acceptable lawyer behavior whenever a lawyer claimed to be acting for a valid purpose; rather, the court seemingly balanced the theoretical benefit of the general anti-deceit rule against the proposition that “enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof.” Certainly, attorneys should exercise extreme caution before taking the position that their “good purpose” can justify deceit or misrepresentation. See generally Isbell and Salvi, “Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct,” GEO L.J., Vol. 8, No. 4, pp. 805-07 (Summer 1995); Arizona State Bar Committee on the Rules of Professional Conduct, Op. 99-11 (9/99) (Citing the Isbell and Salvi article, the Arizona’s State Bar’s ethics panel advised that the State’s ethics rules do not prohibit lawyers from employing private investigators or “testers” who misrepresent their identity for the purpose of investigating a client’s potential discrimination claim before filing suit).
- D. Although New York County Bar Association Opinion 737 (2007) provides a limited basis for an attorney to supervise an investigator who “dissembles” (i.e., uses deception), the scope of the Opinion is narrow:

“Non-government attorneys may ... ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer’s conduct and the investigators’ conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the ‘no-contact’ rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.”

Notably, “dissemblance” in this context included concealment or misstatement of identity and purpose in the process of evidence gathering.

- E. In Schalk v. State, 943 N.E.2d 427 (Ind.App. 2011), the court rejected a defense attorney's claim that he was immune from prosecution for having arranged an illegal drug buy from a state witness and delivery of the marijuana to law enforcement or trial court for use in defending his client. In finding that a defense attorney did not fit within the statutory definition of a "law enforcement officer" who would be authorized to conduct an illegal drug buy, the court explained:

"An attorney is not exempt from the criminal law even if his only purpose is the defense of his client. 'Under the Code of Professional Responsibility an attorney is charged with defending and advancing the interests of his clients within the framework of our legal system.' [Internal citation omitted.] 'It should be abundantly clear that an attorney cannot resort to illegal means in order to obtain a favorable disposition for his client.' *Id.* This is not a close case." (943 N.E.2d at 432.)