

**THE APPELLATE DIVISION, FIRST DEPARTMENT,
ASSIGNED COUNSEL PLAN**

PRESENTS:

**“AN INTRODUCTION TO THE NEW STATEWIDE
UNIFORM DISCIPLINARY PROCEDURES
AND A 2016 ETHICS UPDATE FOR
CRIMINAL LAW PRACTITIONERS”**

A CONTINUING LEGAL EDUCATION COURSE

**MARCH 24, 2016
6:00 P.M. TO 8:00 P.M.
NEW YORK COUNTY SUPREME COURT
111 CENTRE STREET
NEW YORK, NEW YORK**

**ETHICS MONOGRAPH
PREPARED BY:**

**MICHAEL S. ROSS, ESQ.
ONE GRAND CENTRAL PLACE
60 EAST 42ND STREET
FORTY-SEVENTH FLOOR
NEW YORK, NEW YORK 10165
(212) 505-4060
michaelross@rosslaw.org**

**COPYRIGHT © 2016 BY MICHAEL S. ROSS, ESQ.
ALL RIGHTS RESERVED**

DISCLAIMER

This ethics-related monograph is aimed at providing general information to the lawyers who read it. This monograph is not intended to give legal advice, nor does it create any type of attorney-client relationship between its readers and the Law Offices of Michael S. Ross and/or its staff. Moreover, readers should keep in mind that, although this monograph summarizes various court decisions, bar association opinions and articles, this summarization should not be considered an endorsement or approval of any particular court holding, bar association opinion or article.

Ethics issues can be particularly challenging, and readers of this monograph should not make ethics-related decisions, or any other type of legal decision, without carefully and thoroughly researching the relevant factual and legal issues and retaining outside counsel where appropriate.

ACKNOWLEDGMENTS

I would like to gratefully acknowledge the assistance of my staff in the preparation of this monograph, with special thanks to James D. Liss, Esq., and Josephine Paz.

Michael S. Ross
March 2016

TABLE OF CONTENTS

	<u>PAGE</u>
I. THE NEW STATEWIDE UNIFORM RULES FOR ATTORNEY DISCIPLINARY MATTERS	1
A. AN OVERVIEW OF THE NEW STATEWIDE UNIFORM RULES.	1
B. QUESTIONS RAISED BY THE NEW STATEWIDE UNIFORM RULES.	2
II. 2016 ETHICS UPDATE FOR CRIMINAL LAW PRACTITIONERS.	3
A. INTRODUCTION.	3
B. ATTORNEY-CLIENT PRIVILEGE.	3
C. CONFLICTS OF INTEREST AND DISQUALIFICATION.	7
D. INEFFECTIVE ASSISTANCE OF COUNSEL.	19
1. THE ATTORNEY’S ROLE IN MAKING TACTICAL DECISIONS AS IT RELATES TO THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL.....	19
2. CONFLICTS OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.....	29
E. WITHDRAWAL OF DEFENSE COUNSEL WHEN THE ATTORNEY-CLIENT RELATIONSHIP HAS BROKEN DOWN.	35
F. ISSUES ARISING WHEN A RELATIVE OF A CLIENT PAYS THE CLIENT’S FEES.	35
G. ADEQUACY OF DEFENDANT’S WAIVER OF RIGHT TO APPEAL IN CONNECTION WITH ENTERING A GUILTY PLEA.	37
H. DEFINITION OF “KNOWLEDGE” THAT TRIGGERS DUTY TO REPORT FRAUDULENT TRIAL CONDUCT TO THE COURT.	39

I.	PROSECUTORIAL CONDUCT AND MISCONDUCT.	42
1.	FAILURE OF PROSECUTION TO PRODUCE <i>BRADY</i> MATERIAL.	42
2.	FIFTH AMENDMENT RIGHTS AND THE ADEQUACY OF <i>MIRANDA</i> WARNINGS.....	43
3.	PREEMPTION OF APPLICATION OF STATE ATTORNEY ETHICS RULES TO FEDERAL PROSECUTORS.....	46
J.	JUDICIAL RECUSAL.....	48

THE APPELLATE DIVISION, FIRST DEPARTMENT,
ASSIGNED COUNSEL PLAN

PRESENTS:

“AN INTRODUCTION TO THE NEW STATEWIDE
UNIFORM DISCIPLINARY PROCEDURES
AND A 2016 ETHICS UPDATE FOR
CRIMINAL LAW PRACTITIONERS”

A CONTINUING LEGAL EDUCATION COURSE

ETHICS MONOGRAPH
PREPARED BY:

MICHAEL S. ROSS, ESQ.
ONE GRAND CENTRAL PLACE
60 EAST 42ND STREET
FORTY-SEVENTH FLOOR
NEW YORK, NEW YORK 10165
(212) 505-4060
michaelross@rosslaw.org

I. THE NEW STATEWIDE UNIFORM RULES FOR ATTORNEY DISCIPLINARY MATTERS.¹

A. AN OVERVIEW OF THE NEW STATEWIDE UNIFORM RULES.

- The new Statewide Uniform Rules for Attorney Disciplinary Matters (the “Uniform Rules”), which go into effect on July 1, 2016, are the product of an extraordinary effort by the four Appellate Divisions; the Court staff; the Commission on Statewide Attorney Discipline; and the public which provided significant input.
- The Uniform Rules represent a compromise among the four Appellate Divisions, each of which had to concede to changes in their independent disciplinary processes.

¹A printout of the new Statewide Uniform Rules For Attorney Disciplinary Matters (22 N.Y.C.R.R. Part 1240) is attached hereto. The new Uniform Rules are also available online at https://www.nycourts.gov/ad3/COPS/22_NYCRR_Part_1240.pdf.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

- The new Uniform Rules represent a “work in progress” inasmuch as each of the four Appellate Divisions will have to amend/change their current Rules to conform to the new Uniform Rules and fill in gaps with respect to the new Rules. In addition, the new Uniform Rules provide latitude for each of the four Appellate Divisions with respect to implementation and mechanical issues in each Department.
- The new Uniform Rules were not intended to create overly simplistic uniformity as to sanctions; rather, they were intended to create a uniformity in the *types* of sanctions imposed (i.e., no longer will there be different forms of “Letters of Dismissal With Guidance,” “Letters of Caution,” etc.).²

B. QUESTIONS RAISED BY THE NEW STATEWIDE UNIFORM RULES.

- Standardization of sanction: Is it needed; how is it achieved; etc.? Do the new Uniform Rules provide better standards to achieve this?
- The discipline by consent provisions (i.e., plea bargaining): Were they needed? If so, should it be permitted in advance of charges being lodged? And to what extent will there be charge and sanction bargaining?
- The discovery provisions: Are they an improvement on the present system? Is the option of seeking discovery from the Appellate Division a change to and/or improvement over the current system?
- From the point of view of “process,” do the provisions dealing with a Statement of Disputed Facts (which is similar to a pretrial order in a civil case) make a meaningful change to the disciplinary process? Are there challenges presented by the terms or timetable in the Uniform Rules as to the Statement of Disputed Facts?

²At its January 26, 2016 Annual Meeting, the New York State Bar Association’s (“NYSBA’s”) General Practice Section & Committee on Professional Discipline presented a program on the new Uniform Rules, entitled “New Era in Attorney Ethics and Discipline: Ethics and Procedure of Attorney Discipline Under the New Uniform Rules,” which the author of this monograph moderated. The NYSBA subsequently published an article in the March/April 2016 edition of the State Bar News, covering the program and discussing the new Uniform Rules. C. Couto, “Meaning of new Uniform Rules on attorney discipline,” State Bar News, March/April 2016, p. 26 (a copy of which article is attached hereto).

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

- More generally, do the new Uniform Rules provide for timetables which are fair and workable?
- How will the provision allowing the Committee Staff to argue sanction impact the disciplinary process?
- Is the ability of an attorney to challenge an Advisement important?
- How will the provisions dealing with diversion for impaired attorneys impact the disciplinary process?
- Are the provisions dealing with foreign discipline and, by implication, collateral estoppel, a change to the former disciplinary process?
- Have the rules governing reinstatement of disbarred and suspended attorneys changed in any meaningful way?

II. 2016 ETHICS UPDATE FOR CRIMINAL LAW PRACTITIONERS.

A. INTRODUCTION.

To be an ethical criminal defense attorney, a lawyer must have a keen understanding of ethical rules as they impact criminal cases. This monograph provides an update to New York criminal law practitioners concerning recent ethics-related developments in the following areas: 1) attorney-client privilege issues; 2) conflicts of interest and disqualification issues; 3) issues relating to claims of ineffective assistance of counsel; 4) the ethics of withdrawing from a case; 5) legal fee issues; 6) issues relating to a defendant's waiver of the right to appeal a guilty plea; 7) issues concerning the duty to report trial misconduct to the court; 8) issues relating to prosecutorial conduct and misconduct; and 9) issues concerning judicial recusal. The discussion of these topics below should provide criminal defense attorneys with a resource to consider in addressing these issues in their everyday practice.

B. ATTORNEY-CLIENT PRIVILEGE.

In United States v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS 126881 (S.D.N.Y. Sept. 22, 2015), the court held that a corporate employee cannot assert an advice of counsel defense which would require the disclosure of information protected by the corporation's attorney-client privilege, if the corporation refuses to waive its privilege. Put another way, a corporate employee who wishes to pursue an advice of counsel defense cannot force the corporation to waive the attorney-client privilege. As the court noted, this was an issue of first impression within the Second Circuit. The court stated that the result was arguably harsh in the context of this case, but it also concluded that

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

the result was required by binding Supreme Court precedent and was consistent with this country's commitment to the values underlying the privilege. Id. at *1-3.

This opinion arose out of a civil fraud case brought by the United States against Wells Fargo and a Wells Fargo employee (Lofrano) which alleged that the defendants engaged in misconduct with respect to government-insured home mortgage loans. Wells Fargo vigorously contested the Government's claims, but did not reply upon an advice of counsel defense. Lofrano, in contrast, invoked an advice of counsel defense, claiming that he relied on the advice of at least two Wells Fargo attorneys regarding the legal issues involved in the Government's civil fraud case, and that he had acted in conformance with that advice. Id. at *3-4. Wells Fargo refused to waive the attorney-client privilege and, following much preliminary motion practice, the court took up the question of whether Lofrano could, in effect, require that Wells Fargo waive the corporate attorney-client privilege. Id. at *4-7.

The court noted, at the beginning of its analysis, that the issue was a difficult one because it “involves a conflict between two indisputably weighty principles”:

“On the one hand, fundamental fairness and due process generally require that a person accused of wrongdoing – whether criminally or civilly – have an opportunity to present every available defense. On the other hand, the attorney-client privilege is one of the oldest recognized privileges for confidential communications, and promote[s] broader public interests in the observance of law and the administration of justice.” Id. at *7-8 (citations and internal quotation marks omitted).

Lofrano initially argued that “his constitutional right to present every available defense” overrode Wells Fargo's attorney-client privilege. The court, however, stated that this assertion was “plainly wrong,” and noted that it was well-established that, even in a criminal case, where defendants enjoy the enhanced protections provided by the Sixth Amendment, the right to present all available defenses is not absolute. The court further noted that the Supreme Court and the lower federal courts had made it clear that defendants do not have an “unfettered right” to present evidence that is privileged. Id. at *9. Rather, the courts have recognized that certain values, such as the values undergirding the attorney-client privilege, are, in some instances, more important than permitting an unimpeded judicial search for the truth. Id. at *10-11.

The court then stated that since it was clearly established that parties do not have an unfettered right to present any potentially helpful evidence in a judicial proceeding, Lofrano must be relying upon a more nuanced argument, i.e., Lofrano was arguing that his right to present an effective defense and Wells Fargo's right to assert its privilege must be weighed through a balancing

NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE

test and that, in this case at least, fundamental fairness and due process considerations tipped the balance in Lofrano's favor. The court, however, concluded that an appeal to a balancing test was "all but foreclosed" by the Supreme Court's opinion in Swidler & Berlin v. United States, 524 U.S. 399 (1998).

In Swidler & Berlin, the Supreme Court had held that the attorney-client privilege survives the death of a client. What was significant for the court in Wells Fargo was that the Supreme Court, in addition to holding that the privilege *generally* survives the death of client, rejected the argument that there should be an exception to this general rule for cases where maintaining the attorney-client privilege would result in "extreme injustice" or where the privileged information at issue was of "substantial importance." 2015 U.S. Dist. LEXIS 126881, at *11 (citing Swidler & Berlin, 524 U.S. at 406-09). According to the Wells Fargo court, the Swidler & Berlin opinion stated that an *ex post facto* balancing of interest (that is, a judicial balancing that is performed long after a client has communicated with a lawyer in the belief that the communication was privileged) would inject substantial and harmful uncertainty into the attorney-client privilege. 2015 U.S. Dist. LEXIS 126881, at *11-12. Thus, the Supreme Court had explicitly "rejected use of a balancing test in defining the contours of the privilege." *Id.* (quoting Swidler & Berlin, 524 U.S. at 409).

The Wells Fargo court did observe that Swidler & Berlin addressed the question of whether the information at issue was or remained privileged, and did not address the question of whether the privilege could be overcome. The court further noted that a footnote in Swidler & Berlin left open the possibility that, in exceptional circumstances involving a criminal defendant's constitutional rights, there *might* be a justification for breaching the privilege. 2015 U.S. Dist. LEXIS 126881, at *12 (citing Swidler & Berlin, 524 U.S. at 408 n.3). The court, however, stated that because the case against Lofrano was a *civil* case, the possible existence of an extraordinary circumstances exception in some *criminal* cases was irrelevant to the matter before the court.

The court concluded that the reasoning of Swidler & Berlin "compels the conclusion" that subjecting claims of privilege to a balancing test in any circumstances would be problematic at best. The use of a balancing test in any attorney-client privilege controversy would render the privilege uncertain, and Swidler & Berlin itself, as well as other Supreme Court opinions, had stated that it was unacceptable to inject uncertainty into the privilege. The court also expressed the view that a balancing test would transform the attorney-client privilege into a qualified privilege, which was inconsistent with Swidler & Berlin and other prior precedent. *Id.* at *13-14.

In In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014), the United States Court of Appeals for the District of Columbia Circuit interpreted the scope of Upjohn protection for attorney-client communications by company employees made during the course of an internal investigation led by company lawyers. The Circuit Court granted a petition for a writ of mandamus and vacated a District Court decision in a Fraud Claims Act action against defense contractor

NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE

Kellogg Brown & Root (“KBR”), which had ordered KBR to produce documents relating to KBR’s internal investigation of the alleged fraud. The District Court’s decision, which was vacated by the Circuit Court, had held that the documents in question were business records not protected by the attorney-client privilege and Upjohn because KBR’s internal investigation had been conducted pursuant to Department of Defense Regulations requiring defense contractors to conduct internal investigations into allegations of potential wrongdoing, rather than for the purpose of obtaining legal advice. 756 F.3d at 756, 758. In other words, the District Court had held that the attorney-client privilege did not apply because KBR had not shown that “the communication would not have been made ‘but for’ the fact that legal advice was sought.” Id. at 756.

The Circuit Court in Kellogg Brown, vacating the District Court’s decision, found that the attorney-client privilege and Upjohn protection did, in fact, extend to communications made in the course of an internal investigation, even when the internal investigation was mandated by regulation. Id. at 758-79. The Circuit Court found that:

“In our view, the District Court’s analysis rested on a false dichotomy. *So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.*” Id. at 758-59 (emphasis added).

The Circuit Court in Kellogg Brown further observed that the District Court had erred in ruling that the attorney-client privilege did not apply unless the communication in question would not have been made “but for” the fact that legal advice was sought. Id. at 759. The Circuit Court found that:

“The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court’s approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. ... The District Court’s novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and have heretofore been covered by the attorney-client privilege. And the District Court’s novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant

swath of American industry. ... We reject the District Court's but-for test as inconsistent with the principle of Upjohn and longstanding attorney-client privilege law." Id. at 759.

The Circuit Court in Kellogg Brown concluded that the "drastic and extraordinary" remedy of mandamus was appropriate in light of the "potentially broad and destabilizing effects" of the District Court's erroneous ruling on the attorney-client privilege issue. Id. at 760, 763.

In McNamee v. Clemens, 2014 U.S. Dist. LEXIS 162063, at *8 (E.D.N.Y. Nov. 19, 2014), the court held – for the second time in the same case – that certain communications which pertain to public relation strategies are not covered by the attorney-client privilege. During discovery motion practice in the case, Plaintiff Brian McNamee sought from Defendant Roger Clemens: 1) certain documents related to communications with Clemens' sports agent; and 2) communications with Clemens' public relations strategist Joe Householder, as well as Householder's firm, Public Strategies, Inc. Clemens objected to the requests and asserted that the responses were protected by the attorney-client privilege and work-product doctrine. The court found that a "select" number of documents were properly withheld as protected by the work-product doctrine because they were prepared in anticipation of litigation. Id. at *8-9. However, as to the remaining documents over which Clemens asserted privilege, the court held that those documents "pertain primarily to public relation strategies and are thus not afforded rights under the attorney-client privilege." Id. at *8.

C. CONFLICTS OF INTEREST AND DISQUALIFICATION.

In People v. Watson, 124 A.D.3d 95 (1st Dept. 2014), rev'd, 2016 N.Y. LEXIS 86 (Feb. 11, 2016), a divided First Department panel reversed a conviction on the grounds that the trial court had, in the view of the majority, improperly disqualified the defendant's counsel of choice, thereby depriving the defendant of his constitutional right to counsel. The trial court had disqualified counsel, a staff lawyer with the New York County Defender Services ("NYCDS"), because counsel had belatedly discovered that another NYCDS lawyer had represented another person who had been arrested along with the defendant and had taken a plea to a lesser offense in connection the same incident. The majority opinion ruled that the disqualification of the defendant's counsel was improper because, in the majority's view, there was no conflict. 124 A.D.3d at 101.

Less than one month ago, however, the Court of Appeals reversed the First Department's decision, concluding that, under the circumstances presented, the trial court had not abused its discretion by relieving the defendant's possibly conflicted assigned counsel and appointing conflict-free counsel to represent him. 2016 N.Y. LEXIS 86 (Feb. 11, 2016). The case was remitted to the First Department for consideration of facts and issues that had been raised by the defendant's appeal but which had not been decided by the First Department. Id. at *12.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The defendant (“Watson”) was arrested and then convicted for criminal possession of a weapon and for resisting arrest. Watson was represented by Fisher, an NYCDS lawyer. Eight months into the representation, Fisher discovered that a person named Stephens, who had been arrested at the same time as Watson, had been represented by another NYCDS lawyer with respect to the incident. Stephens had apparently entered a guilty plea to a lesser offense and was no longer a NYCDS client. Fisher promptly brought this development to the trial court’s attention and stated that, although Watson wanted Fisher to continue as his lawyer, Fisher was “not sure” if it would be appropriate for him to continue. The trial judge agreed that there seemed to be a conflict and adjourned the case to resolve the conflict issue. 2016 N.Y. LEXIS 86, at *2-3.

When the court reconvened several days later, Fisher reported to the court that he would not be permitted to examine the NYCDS file for Stephens’ matter and that Fisher was prohibited from sending any investigator to find Stephens. Fisher also told the court that his supervisors at NYCDS had reached the conclusion that Watson would have to waive the right to call Stephens as a witness if he wanted to have Fisher continue as his lawyer. Watson then stated in open court that he wanted to have Fisher continue as his lawyer and was willing to waive any right to have Stephens called as a witness and understood the implications of that decision. *Id.* at *3-5.

The prosecutor, however, expressed the view that Fisher should be relieved from the case. According to the prosecution, although they had “no intention right now of calling [Stephens] on their direct case,” that position could change if the theory of the defense turned out to be that someone other than Watson had the gun. That would raise the issue of whether Fisher or anyone else at NYCDS could, consistent with conflicts rules, cross-examine Stephens, a former NYCDS client, with respect to the same matter in which NYCDS had previously represented Stephens. In fact, Fisher’s supervisors had told him that he could not cross-examine Stephens should the People call him as a witness. 124 A.D.3d at 98-100.

The trial court then noted that it could not prevent the People from calling a relevant witness. The court then explained to Watson the potential conflict of interest and the difficult position confronting Fisher. Watson responded that he wanted to keep Fisher as his attorney and waive the conflict. He also stated, however, that he wanted Stephens to testify. After hearing these statements, which, according to the Court of Appeals, were incompatible with an unequivocal waiver, the trial judge relieved Fisher of his assignment and appointed a new attorney to represent Watson. 2016 N.Y. LEXIS 86, at *3-4.

Watson argued on appeal that the trial court’s disqualification of Fisher had improperly deprived him of his constitutional right to counsel of his choice because: 1) there was no conflict of interest; or 2) even if there was a conflict, the conflict was too remote to require disqualification and any conflict could have been cured by a knowing and intelligent waiver. 124 A.D.3d at 100-101. The majority concluded that Fisher did not have a conflict because he did not represent Stephens and

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

was not privy to any of his confidential information and that, accordingly, the relationship between NYCDS and Stephens did not constitute a conflict for Fisher. The dissent, in contrast, took the position that, at the very least, a potential conflict existed, and that, accordingly, the trial court properly acted within its discretion in disqualifying counsel. 2016 N.Y. LEXIS 86, at *4.

The Court of Appeals' opinion began by stating that a determination to substitute or disqualify counsel "falls within the discretion of the trial court," and that a trial court's discretion is "especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review." *Id.* (citations and internal quotation marks omitted).

The court then stated that this was precisely the situation which had confronted the trial court. According to the Court of Appeals, a criminal case in which defense counsel allegedly suffers from a conflict of interest requires the court to balance two constitutional rights, i.e., the right to be represented by conflict-free counsel and the right to be represented by one's chosen counsel:

"Thus, a court confronted with an attorney or firm that represents or has represented multiple clients with potentially conflicting interests faces the prospect of having its decision challenged no matter how it rules – if the court permits the attorney to continue and counsel's advocacy is impaired, the defendant may claim ineffective assistance due to counsel's conflict; whereas, if the court relieves counsel, the defendant may claim that he or she was deprived of counsel of his or her own choosing." *Id.* at *4-5.

The Court of Appeals also cautioned that, while a court should not "arbitrarily interfere with the attorney-client relationship, it must also protect a defendant's right to effective assistance of counsel. *Id.* at *5-6.

According to the Court of Appeals, a "particularly relevant" consideration in Watson, was the fact that "the presumption in favor of a client being represented by counsel of his or her choosing may be overcome by demonstration of an actual conflict or a serious potential for conflict." *Id.* at *6. When there have been successive representations of persons who have different goals or strategies, there will be a concern that counsel may suffer from divided loyalties. That is because a lawyer owes some continuing duties to former clients, including the duty protect client confidential information. *Id.* at *6-7.

The Court of Appeals concluded that these issues and concerns were present in Watson:

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

“Here, prior to defendant’s trial, Fisher’s NYCDS supervisors noted the institutional duty of loyalty to its former client, Stephens. Those supervisors – who presumably were familiar with Stephens’s file – determined that there was a potential or actual conflict that prevented Fisher from investigating Stephens, attempting to locate him, calling him as a witness, or cross-examining him if he was called by the People. Under these circumstances, the trial court did not err in concluding that [Watson’s] statements were insufficient to waive the conflict.” Id. at *7.

The Court of Appeals then addressed Watson’s argument that Fisher did not have a conflict because the alleged conflict was caused by another NYCDS’ prior representation of Stephens. The Court noted that New York courts have held that “unlike private law firms where knowledge of one member of the firm is imputed to all, large public defense organizations are not subject to such imputation.” Id. at *8. The Court stated that, although it did not disturb the general rule against conflict imputation within large public defense organizations, the circumstances presented in Watson were critically different in a number of respects: 1) Fisher became aware of NYCDS’ prior representation of Stephens before Watson’s trial; 2) NYCDS had represented Stephens with respect to the same incident that was the subject of Watson’s representation of Watson; and 3) Fisher’s supervisors had taken several steps that had directly impinged on Fisher’s representation of Watson, e.g., Fisher was forbidden from questioning Stephens. Id. at *8-9.

The Court concluded that:

“[E]ven if the institutional representation of Stephens did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by Fisher’s supervisors, which hampered his ability to zealously and single-mindedly represent defendant. Although the court could have inquired as to why NYCDS took the position of forbidding any investigation into or questioning of Stephens, the court was in a precarious situation because such an inquiry might have intruded into confidential attorney-client information. Thus, the court did not abuse its discretion by relieving counsel once those restrictions were announced.” Id. at *9-10.

Finally, the Court of Appeals rejected Watson’s argument that, even if Fisher did have a conflict of interest, he (Watson) had validly waived that conflict when he stated in open court that he wanted to keep Fisher as his lawyer. According to the Court of Appeals, there had been no valid, knowing waiver of the conflict:

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

“Although defendant indicated that he would be willing to waive the conflict, almost immediately thereafter he said that he wanted Stephens to be called as a witness at trial. These competing statements did not clearly demonstrate a knowing waiver, or that defendant would knowingly waive Fisher’s conflict.” *Id.* at *10.

In Christeson v. Roper, 135 S. Ct. 891 (2015), the United States Supreme Court held that the district court and the Eighth Circuit had erred by refusing to appoint substitute counsel to file a Rule 60(b) motion to reopen a judgment dismissing the defendant’s federal habeas corpus petition as untimely. The Court ruled that, under the circumstances presented, the defendant was entitled to have substitute counsel appointed, because his original appointed lawyers – the attorneys who had missed the statutory deadline for filing a habeas petition – were faced with a disabling conflict of interest and could not have been expected to argue that the defendant was entitled to equitable tolling of the limitations period. This was because an equitable tolling argument would have to be premised on the argument that the lawyers had seriously breached their professional responsibilities to the defendant. 135 S. Ct. at 892.

Christeson, the defendant, had been convicted of three counts of capital murder in the Missouri state courts and had exhausted all direct appeals and collateral proceedings in the Missouri state court system. Under federal statutes, any federal habeas corpus petition must be filed within one year of the final decision in the state court proceedings and this limitations period is very strictly enforced. Because 18 U.S.C. § 3599(a)(2) requires that counsel be appointed for state death row inmates, the district court appointed two attorneys to represent Christeson in any federal habeas corpus proceedings approximately nine months before the limitations period would expire. However, as the two lawyers subsequently acknowledged, they did not even meet with Christeson until six weeks *after* the limitations period had expired and did not file a habeas petition until 117 days after the limitations period had run. The two lawyers subsequently claimed that their failure to meet with Christeson and to file the habeas petition in a timely matter was caused by a “simple miscalculation” of the limitations period. However, a legal ethics expert, who submitted a report concerning the lawyers’ handling of the habeas petition, expressed the view that “if this was not abandonment, I am not sure what would be.” *Id.* at 892.

The district court denied the habeas corpus petition as untimely, and the Eighth Circuit denied an application for a certificate of appealability. Almost seven years later, the two lawyers contacted two other attorneys (apparently capital litigation experts) to discuss how to proceed with Christeson’s case. The consulted attorneys immediately identified a serious problem. In their view, Christeson’s only hope for obtaining a review on the merits of his habeas petition would be to file a motion to reopen the final judgment dismissing the habeas corpus petition on the grounds that the statute of limitations should have been equitably tolled. This, however, would require the two lawyers who had represented Christeson in the original habeas proceeding to argue that relief was

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

appropriate because of their “malfeasance” in failing to file the habeas petition in a timely manner. And the two original lawyers ultimately refused to allow outside counsel to have access to their files. Id. at 892-93.

The lawyers who had been consulted by Christeson’s original habeas corpus counsel moved the district court, on Christeson’s behalf, to be substituted as counsel. The district court denied the motion, finding that permitting substitution of counsel at this point would not serve the interests of justice. The Eighth Circuit summarily affirmed the district court’s order, but the Supreme Court summarily reversed in a *per curiam* opinion. Id. at 893.³

The Supreme Court’s opinion noted that the Court had previously held that substitution of an appointed lawyer should be granted when it is in the interests of justice and that the district court properly recognized that the interests of justice standard was controlling in this case. It found, however, that the lower court had failed to apply that standard properly in Christeson’s case. Id. at *6-7. The Court stated that the factors which should be applied in determining whether a district court abused its discretion in denying a substitution motion include:

“the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client’s responsibility, if any, for that conflict).” Id. at 893-94.

According to the Court, the district court’s “principal error” was its failure to acknowledge the conflict of interest at work in the case. The Court stated that, under prior precedent, equitable tolling of the one-year habeas corpus limitations period based on counsel’s failure to comply with the statute of limitations is available only for “serious instances of attorney misconduct.” Id. at 894. However:

“[a]dvancing such a claim would have required [the lawyers] to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. See *Restatement (Third) of Law Governing Lawyers* §125 (1998). Thus, as we observed in a similar context in *Maples v. Thomas*, 565 U.S. ___, ___, n. 8, 132 S. Ct. 912, 925, 181 L. Ed. 2d 807, 824 (2012), a ‘significant conflict of

³Justices Alito and Thomas dissented, expressing the view that the Court should have set the case down for briefing and oral argument, rather than summarily reversing the lower courts.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

interest’ arises when an attorney’s ‘interest in avoiding damage to [his] own reputation’ is at odds with his client’s ‘strongest argument – *i.e.*, that his attorneys had abandoned him.’” Id.

The Court concluded that, because of the “obvious conflict of interest” presented in this case, Christeson’s motion to have substitute counsel appointed to pursue reopening the judgment denying his habeas corpus petition should be granted. Id. at 895-96.

In United States v. Kwiatkowski, 2014 U.S. Dist. LEXIS 88892 (W.D.N.Y. Jun. 30, 2014), the court determined that it was not required to disqualify counsel for a defendant police officer in a case in which Buffalo police officers were charged with criminal violations of the civil rights of persons who had been arrested in an incident on May 31, 2009. The prosecution had suggested that defense counsel might have to be disqualified because one of defense counsel’s partners had briefly represented one of the victims of the May 31, 2009 incident with respect to that incident in state criminal court. In addition, that victim would be a witness for the prosecution at trial and he refused to waive any conflict caused by the partner’s prior representation of him. 2014 U.S. Dist. LEXIS 88892, at *1-8.

The court recognized at the outset that the partner who had previously represented the victim/witness would be personally disqualified from representing the defendant in the civil rights prosecution. The issue was whether that lawyer’s personal disqualification would be imputed to the other lawyers in the firm. The court stated that there were two important and conflicting policies at stake in this matter. On the one hand was the Sixth Amendment’s protection of a defendant’s right to be represented by counsel of one’s choice, which would cut in favor of permitting the defendant’s lawyer to continue to represent him. On the other hand, a lawyer has an ongoing duty to a former client not to reveal confidences of the former client while subsequently representing another party in a substantially related matter. Further, if one lawyer in a firm has a disqualifying conflict in a matter, that conflict is ordinarily imputed to the other lawyers in the same law firm. Id. at *8-10.

The court also recognized, however, that, “[a]s the New York Court of Appeals and Courts within the Second Circuit have repeatedly stated, the presumption of imputed disqualification may be rebutted.” Those prior opinions had stated that a *per se* rule of imputed disqualification in any case in which a single lawyer in a firm is personally disqualified would be unnecessarily preclusive because it would disqualify all lawyers in a firm indiscriminately, whether or not they share knowledge of former client’s confidential information. And, the “determination of whether the presumption of shared confidences and disqualification has been rebutted turns on consideration of the particular facts of each case.” Id. at *9-11.

The court determined that, under the facts presented by the parties and, in particular, because of protective measures, including screening the lawyer who had previously represented the

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

victim/witness, disqualification of the law firm from representing the defendant in the present prosecution was unwarranted. Among the factors which convinced the court that the presumption of shared confidences had been rebutted were:

- The attorney who had represented the victim/witness had done so for a brief period of time, five years earlier. This attorney had never spoken with the lawyer who was representing the police officer about the prior representation and had not disclosed any client confidential information to lawyers working on the defense of the officer. Moreover, the file for the previous representation of the victim was long-closed and was stored in an off-site warehouse. Id. at *3-5, 13-14.
- The firm had immediately instituted a screening mechanism after it learned of the potential conflict of interest. Id. at *15-16.
- The attorney who had represented the victim/witness would play no part in the defense of the police officer. That attorney had previously been part of the firm's active criminal law defense group. However, he had changed his practice area to civil negligence actions and was no longer part of the criminal defense group. In addition, the criminal defense litigation group and the civil negligence litigation group were located on different floors, which made it simpler to isolate the attorney from the lawyers working on the police officer's defense. Id. at *7-8, 14-15.
- The lead attorney on the defense of the police officer had also affirmed that he had never discussed the other attorney's prior representation of the victim/witness or the current prosecution of the police officer with the other attorney and would not do so in the future. Id. at *3-4, 6-7, 14-15.
- The firm was a substantial (50 lawyers) and formally organized law firm – the type of firm where a screening mechanism can be adequate, as opposed to a small, informal firm, where courts generally refuse to recognize a screen as effective to prevent disqualification. Id. at *17-18.
- Finally, the firm had obtained the informed consent of the police officer to the firm's continued representation of him, notwithstanding the prior representation of the victim/witness with respect to the underlying incident. This consent was confirmed in a particularly detailed and thorough writing. Id. at *17-18.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

In People v. Richens, 2014 N.Y. Misc. LEXIS 2327 (App. Term, 2d Dept. May 9, 2014), the Court upheld the conviction of a defendant who had been represented, pursuant to a conflict waiver, by the sister of his co-defendant, who jointly represented both co-defendants in the case. The defendant argued that the waiver was invalid, but the Court rejected that argument. The Court noted that the trial court had held two “extensive” hearings pursuant to People v. Gomberg, 38 N.Y.2d 307 (1975), during which “every potential risk regarding dual representation was discussed. Defendant was informed, and repeatedly acknowledged his understanding, of all ‘of the possible ramifications which joint representation might spawn when conflicting interests arguably exist.’” 2014 N.Y. Misc. LEXIS 2327, at *2. In fact, “[d]efendant informed the trial court, on the record, after the court had apprised him of the potential conflicts, which he had fully discussed with counsel, that he wanted counsel to continue to represent him.” Id. Accordingly, according to the Court, the defendant’s waiver of conflicts and of his right to separate representation were valid. Id. at *2-3. The court also held that the fact the lawyer conducting the joint representation was his co-defendant’s sister did not make any conflict unwaivable. Id. at *3.

In Goodwine v. Lee, 2014 U.S. Dist. LEXIS 124414 (S.D.N.Y. Sept. 3, 2014), the court denied a motion by a habeas petitioner to disqualify the entire Westchester County District Attorney’s Office. One of the grounds asserted by the Petitioner was that disqualification was necessary under the so-called advocate witness rule, New York Rule of Professional Conduct 3.7(b), which provides, in relevant part, that, “[a] lawyer may not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer’s firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client....”

The Petitioner in this case claimed that his conviction was fatally tainted by alleged misconduct by the Assistant District Attorney (“ADA”) who had tried the criminal case. According to the Petitioner, the ADA had, among other things, improperly prevented him from being released on bail by: “pressuring” the assigned parole officer into making false allegations against Petitioner which prevented him from obtaining bail; compelling the Petitioner to participate in a post-arrest line-up by making false statements; and obtaining the indictment through fraud. 2014 U.S. Dist. LEXIS 124414, at *4-5. According to the Petitioner, this created a conflict of interest which precluded the Westchester County District Attorney’s Office from appearing in the habeas petition because the trial ADA would be a witness at trial and his testimony would purportedly be prejudicial to the District Attorney’s Office’s position at trial. Id. at *4-6.

The court rejected Petitioner’s arguments. It first noted that disqualification motions were generally disfavored in the Second Circuit and were subject to a “high standard of proof” and that mere speculation is insufficient to support a disqualification motion. Id. at *6-7. The court then noted that motions seeking “imputed” disqualification to an entire firm or office pursuant to Rule 3.7(b) were subject to particularly exacting scrutiny because they are especially subject to abuse, i.e.,

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

conclusory assertions that an adversary lawyer was likely to give testimony that would, somehow, be prejudicial to that lawyer's client. Accordingly, imputed disqualification of colleagues of a lawyer-witness is proper "only if the movant proves by clear and convincing evidence that (A) the witness will provide testimony prejudicial to the client, and (B) the integrity of the judicial system will suffer as a result." Id. at *8. Moreover, a party moving for disqualification "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring is substantial." Id.

The court concluded that the Petitioner had failed to satisfy his burden of proof for several reasons. In particular, the court concluded that the Petitioner had failed to prove that the trial ADA's testimony was necessary to his case, because he had not shown that the ADA's purported unethical behavior could not be established through evidence other than the trial ADA's own testimony. For example, the Petitioner could prove that the trial ADA exerted improper pressure on the parole officer through the parole officer's testimony, as opposed to the trial ADA's testimony. Because the Petitioner had failed to demonstrate that the trial ADA was a necessary witness, he failed to satisfy one of the essential elements for disqualification under Rule 3.7(b). For that reason alone, the disqualification motion had to be denied. Id. at *9-11.

In State v. Harter, 340 P.3d 440 (Haw. 2014), the Supreme Court of Hawai'i vacated a criminal defendant's conviction on the grounds that the trial court had denied the defendant's motion for appointment of new counsel and denied the current attorney's motion for leave to withdraw, even though there were substantial grounds to believe that the defendant's attorney had a significant personal interest conflict.

Harter arose out of a long-delayed criminal matter. Part of the delay was attributable to the withdrawal of the defendant's first lawyer after the defendant had informed the court that she was dissatisfied with her representation. 340 P.3d at 443-44. New counsel was appointed, but the trial was continued four more times. The last of these postponements occurred when the prosecution announced that it was unprepared for trial. Id. at 444-45.

During a hearing which took place on the next scheduled trial date, the defendant's lawyer made an oral motion to withdraw, informing the court that the defendant had informed her that she was unhappy with counsel's services and wanted counsel to withdraw. The court, in response, made several statements concerning what defense counsel had purportedly done in preparation for trial; defense counsel however, informed the court that many of the court's statements were inaccurate. The court also emphasized the fact that the record in the case was very short. Id.

Defense counsel then elaborated further concerning her reasons for seeking to withdraw. Among other things, counsel "suggested withdrawal was necessary for her own professional interest,

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

to protect herself from claims of ineffective assistance of counsel, and to secure [the defendant's] right to effective assistance of counsel." Counsel stated to the trial court that:

"So for those reasons, Judge, for my professional stake in this, and for [the defendant's] well-being – I mean, she is facing these criminal charges, and she is entitled to effective assistance of counsel. If I feel like perhaps there might be some later allegations of me being ineffective, me neglecting her, I certainly need to protect myself. So for those reasons, your Honor, ... I feel like I ... need to make this motion to withdraw and assure the Court that it's not any strategy on my part to try and, you know, waste this Court's time and push this case any further back than it needs to go." *Id.* at 445.

The court did not address this possible conflict of interest issue. Instead, it took note of counsel's reputation for integrity and competence and also expressed reluctance to further delay what the court viewed as a relatively simple case with a very small record. *Id.* at 445-46. The court ultimately denied the defendant's motion to appoint substitute counsel and defense counsel's motion to withdraw. The defendant was convicted and her conviction was affirmed by the Hawai'i intermediate appeals court. *Id.* at 445-55.

The Supreme Court reversed the conviction, holding that the trial court had failed to conduct a "penetrating and comprehensive examination" of the bases for a request to substitute counsel (or to grant a motion to withdraw), even though there were reasons to believe that defense counsel had a personal interest conflict. It stated that a trial judge must conduct a "penetrating and comprehensive" inquiry as to whether counsel has a conflict if the trial court "reasonably should know" that a conflict exists. The trial court's obligation is not discharged by a perfunctory inquiry into the alleged conflict. Rather, the trial court must pose "probing and specific questions" about the alleged conflict. *Id.* at 445-46.

The court then noted that, under the case law, "a conflict exists when an attorney is placed in a situation conducive to divided loyalties, and can include situations in which the caliber of an attorney's services may be substantially diluted." The court noted that under Hawai'i Rule of Professional Conduct 1.7 which, at the time of the proceedings in the lower courts, provided that, unless the client waives the conflict, "a lawyer shall not represent a client if the representation of that client may be materially limited by the ... lawyer's own interests." It also referred to the comments to Hawai'i Rule 1.7 which observed that:

"Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

conflict in effect forecloses alternatives that would otherwise be available to the client.” Id.⁴

The Supreme Court then stated that if there is a possible conflict between the interests of the defendant and the personal interest of defense counsel, the trial court should “consider” asking the following questions:

- “- the basis for the conflict of interest;
- the potential that the conflict would materially interfere with defense counsel’s independent professional judgment in considering what actions to pursue on behalf of the client;
- the possibility that the conflict might foreclose defense counsel from taking courses of action that reasonably should be pursued on behalf of a client; and
- defense counsel’s opinion on whether his or her representation would be adversely affected.” Id. at 456-57.

The Supreme Court then found that, although the record indicated that a conflict of interest did exist, the court failed to “ask any questions probative of whether a conflict of interest did in fact exist between [counsel and the defendant], whether such a conflict would adversely affect [counsel’s] performance or whether [the defendant] consented to the relationship.” Defense counsel, in fact, had specifically referred to this possibility in arguing in favor of her motion to withdraw. Id. at 457-58. The Supreme Court, accordingly, concluded that, “in the absence of any examination by the [trial court] into the underlying circumstances, the record in the case indicates that there was a conflict of interest between [the defendant and counsel]. Therefore, ‘good cause’ was demonstrated to grant the motion for withdrawal and substitution of counsel.” Id. at 458-59.

⁴New York Rule of Professional Conduct 1.7 and the NYSBA’s unofficial Comments to New York Rule 1.7, as well as comparable provisions of the ethics rules in other jurisdictions, such as the American Bar Association (“ABA”) Model Rules of Professional Conduct and the comments thereto, set forth similar standards and policies.

D. INEFFECTIVE ASSISTANCE OF COUNSEL.

**1. THE ATTORNEY'S ROLE IN MAKING TACTICAL DECISIONS
AS IT RELATES TO THE ISSUE OF INEFFECTIVE
ASSISTANCE OF COUNSEL.**

In People v. Clark, 129 A.D.3d 1 (2d Dept. 2015), leave to appeal granted, 25 N.Y.3d 1174 (2015), a divided panel of the Appellate Division, Second Department, held that trial counsel's failure to present a justification defense, which was inconsistent with and might undercut his client's claim of actual innocence and which would be contrary to the client's instruction that counsel not pursue a justification defense, did not constitute ineffective assistance of counsel. The majority expressed the view that the decision of whether to rely solely on an actual innocence defense was a decision for the client, and not the lawyer, to make. 129 A.D.3d at 3-4.

The dissenting opinion concluded that counsel's failure to present a "strong" justification defense and to instead present only a "weak" actual innocence defense constituted ineffective assistance of counsel. According to the dissent, the decision as to which defense or defenses should be presented was the lawyer's responsibility. Id. at 33-46 (Miller, J., dissenting). Clark appears to be an important decision because it addresses whether and to what extent criminal defense counsel should determine trial strategy and whether and to what extent the lawyer must follow a client's directions. In fact, the Court of Appeals has granted leave to appeal in this case. The briefing in the Court of Appeals is scheduled to be completed on April 5, 2016. Accordingly, there is a possibility that the Court of Appeals will, in the foreseeable future, hand down an important ineffective assistance opinion.

The defendant (Clark) was convicted of murdering Wisdom and of shooting Talleyrand. An eyewitness (who apparently had known Clark for approximately five years) testified that, at approximately 10 p.m. on the night of the shooting and murder, a group of four or five men confronted Clark and his cousin (Morrison) and fought with them and "beat up" Clark. When the fighting stopped, Clark retreated to the block where he and Morrison lived. The hostile group followed Clark and again beat him up. Clark and Morrison then entered the building where they lived, but soon returned to the street. The eyewitness stated that Clark was "visibly angry and upset" and quickly walked up the block, in the direction of the group that had fought with him. The eyewitness did not see Clark do anything, but heard gunshots and fled. Id. at 4-6; id. at 24-25 (Miller, J., dissenting).

Talleyrand and Clark had been friends for approximately one or two years, but then had a falling out. Talleyrand admitted to fighting with Clark on the night in question and testified that the fight ended near Clark's building. Talleyrand testified that he did not notice where Clark went afterwards. He testified that soon thereafter, while standing in the street with other individuals, he

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

saw Wisdom drop to the ground. Talleyrand turned, saw the barrel of a gun and started to flee, but was shot in the leg. He testified that he did not see and could not identify the person with the gun. Id. at 4-5; id. at 8 (Miller, J., dissenting).

Surveillance cameras located inside and outside of Clark's building recorded some of the events surrounding the shootings. The recordings showed that, at about the time the fighting had ended, a male wearing a white t-shirt and another male entered the lobby of Clark's building. The eyewitness identified the man in the white t-shirt as Clark and the other man as Morrison. The dissent credited the identification of Clark as the man in the white t-shirt, and noted that Clark's "face was clearly visible on a number of the videos from a variety of angles." Id. at 28-29 (Miller, J., dissenting).

Talleyrand testified that he was unable to make any identification from the videos. The majority opinion accepted Talleyrand's inability to identify anyone on the recordings as genuine and noted that Talleyrand had known Clark well for an extended period of time. Id. at 5. The dissent, however, suggested that Talleyrand's testimony was not believable. Id. at 28-29 (Miller, J., dissenting). The issue of whether the man in the white t-shirt was or was not Clark was significant for the Appellate Division's decision because Clark claimed that he was not the man in the white t-shirt, and then insisted on only presenting a misidentification defense. Id. at 5-6.

The surveillance recordings revealed that both the man in the white t-shirt and Morrison went upstairs. They soon came down the stairs and exited the building. The man in the white t-shirt went into the street and apparently shouted and gestured at other persons. About two minutes later, the man in the white t-shirt re-entered the building in an agitated state and retrieved a gun from Morrison. The man in the white t-shirt left the building again and went out of the cameras' range. Other evidence established that Talleyrand was shot at this point. Id. at 5.

According to the majority, the man in the white t-shirt reappeared on the recording, still holding the gun and backing up to the building lobby. He was pursued by an unarmed man who was subsequently identified as Wisdom. The two men briefly wrestled, at which point the man in the white t-shirt broke free and shot Wisdom six times. A third, unidentified person then appeared and pulled the man in the white t-shirt and Wisdom apart. The man in the white t-shirt then fled the scene. Id. at 5-6.

The dissent provided a different description of what happened after Clark (i.e., the man in the white t-shirt) re-entered the building walking backwards. According to the dissent, an unidentified person (not Wisdom) backed Clark into the courtyard of the building. Wisdom then followed the Clark and the unidentified person into the courtyard, where he confronted Clark and attacked him. Wisdom and Clark struggled and then re-entered the lobby. Wisdom fell to the ground, with Clark on top of him. The unidentified individual then pulled Clark and Wisdom apart

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

and Clark fled the lobby. *Id.* at 27-29 (Miller, J., dissenting) The difference in the interpretations of the surveillance footage appears to have led to differing views of the viability of a justification defense which led to different conclusions about the ineffective assistance issue.

After the first day of trial, Clark’s trial counsel explained to the court, on the record, why he was not raising the defenses of extreme emotional disturbance and/or justification, which seemed to be potentially available to Clark. Counsel told the court that he had raised these possible defenses with Clark, but that Clark had flatly rejected presenting those defenses as alternative defenses, and insisted on only presenting the misidentification defense. *Id.* at 6.

The court conducted a colloquy with Clark to insure that Clark understood the ramifications of his decision to rely solely on the misidentification defense. The majority opinion stated that Clark “demonstrated savvy and sophistication in his choice of defense,” and clearly stated that he did not want to present the extreme emotional distress or justification defense, and wished solely to rely on the “it’s not me” defense. *Id.* at 7-8.

During its deliberations, the jury sent the following question to the court: “[W]ith respect to Mr. Wisdom if he initiated the struggle [and the defendant] was acting defensively does that negate intent to kill[?]” When the court asked for comments from counsel, defense counsel stated that, consistent with Clark’s instructions, he objected to any reference to self-defense in responding to the jury. The prosecution objected to any reference to a justification defense on the grounds that justification had never been an issue in the case. In response to these comments, the court instructed the jury:

“Now under the law there is a concept in the law called justification, self defense. It requires a number of factors to be present. *You were not instructed on what’s commonly called the law of self defense.* What you were instructed on is the issue of intent ... That is the – what you have to focus on; whether or not the defendant intended to cause the death of Mr. Wisdom in that causing his death was his conscious objective or purpose.” *Id.* at 9 (quoting the trial court; emphasis added by court).

Following an additional day of deliberations, the jury returned a verdict finding Clark guilty of second degree murder and second degree assault. *Id.* Clark appealed and asserted, among other things, that “trial counsel was ineffective in failing to present a justification defense and to request a justification charge, notwithstanding the defendant’s own express wishes and explicit instructions to the contrary. Furthermore, he claims that the trial court erred in failing to instruct the jury, *sua sponte*, with respect to the justification defense.” *Id.* at 9-10. The majority opinion rejected these arguments.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The majority first stated that, “when a defendant accepts the assistance of counsel, he or she retains authority only over certain fundamental decisions, such as whether to plead guilty, whether to waive a jury trial, whether to testify at trial, and whether to take an appeal...” Id. at 11. In contrast, matters of “strategy and tactics” generally fall within the purview of counsel. Id. at 11. The majority provided several examples of matters that are counsel’s right and responsibility to raise, e.g., whether to request the submission of lesser-included offenses for the jury’s consideration, whether to seek or consent to a mistrial, or whether to introduce certain evidence at trial. Id.

But, according to the majority, the decision involved in Clark was *not* a strategic or tactical decision which was an attorney’s responsibility to make. The majority noted that the Court of Appeals has stated that a defendant has the right “to chart his own defense” and then noted that Clark’s “decision to pursue a defense based solely on misidentification, and to affirmatively reject an alternate defense based on justification in steadfast furtherance of that misidentification defense, involved a matter that was ‘personal’ and ‘fundamental’ to him” and “did not implicate a matter of trial strategy or tactics.” Id. at 11-12 (citations omitted). The majority concluded that, “[t]o require defense counsel in this case, over his client’s objection, to undermine that assertion of innocence by the injection into the case of a factually and logically inconsistent defense would, under the circumstances presented, impermissibly compromise that personal right.” Id. at 11-12.

The majority opinion then discussed factors that, in its view, cut against any finding that Clark had been denied effective assistance:

- Misidentification is arguably the most common defense and can be particularly effective in a case where the prosecution’s identification case rests on a single witness, which was the case in Clark. Id. at 12-13.
- Clark’s assertion on appeal that his trial counsel was constitutionally ineffective because he pursued the “weak” misidentification defense as opposed to the allegedly “stronger” justification defense would be contrary to what the majority viewed as Clark’s fundamental right to rely upon an actual innocence defense. Id. at 12-13.
- The majority stated that the test for ineffective assistance is an objective test, i.e., trial counsel has provided effective assistance if s/he has pursued “a trial strategy that might well have been pursued by a reasonably competent attorney.” Id. at 14-15 (citations omitted). According to the majority, although the misidentification defense that Clark chose to rely upon (i.e., the man in the white t-shirt in the surveillance videos was not me) “while perhaps not compelling, was at least as strong as the justification defense he now espouses on this appeal, and in fact appears to have been far more legally

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

viable, such that trial counsel cannot be faulted for favoring a misidentification defense over a justification defense.” Id. at 15-17.

- The majority concluded that, “after fully informing his client of the available defenses and their ramifications, and after having the trial court do the same, the defendant’s trial counsel adhered to the defendant’s reasonable election of a viable defense, and ably presented a tenable misidentification argument to the jury. The fact that the chosen defense proved unsuccessful, and that counsel did not pursue the questionable and inconsistent justification defense, simply cannot be equated with ineffective assistance of counsel.” Id. at 17.

The dissenting opinion appears to have rested, in part, on the conclusions that the misidentification defense was extremely weak, while the justification defense was far more compelling and viable. In view of this assumption, the dissent maintained that the trial court was required, as a matter of law, to give a charge on the supposedly strong justification defense, even if this would override Clark’s wishes. And, according to the dissent, the necessity for a justification charge was strongly reinforced by the jury note which allegedly indicated that the jury, on its own, was considering whether Clark had acted in self-defense. Id. at 33-46 (Miller, J., dissenting).

The dissent also maintained that trial counsel had not provided effective assistance of counsel because counsel “failed to exercise his own professional judgment as to matters of trial tactics and strategy throughout the course of the trial.” Although the dissent was shaped, in part, by the view that Clark’s misidentification defense was very weak, it also was based on the conclusion that, as a matter of law, the choice of which defense or defenses should be pursued at trial (even if the client wishes only to present an actual innocence defense) is ultimately a decision to be made by counsel and not the client:

“The record reflects that in defense counsel’s view, he was bound to follow the strategy and tactics dictated by his 21-year-old client throughout the course of the trial: in his opening statement, cross-examinations, summation, jury charge, and response to the jury’s note. Defense counsel’s failure at every stage of the trial to exercise any professional judgment as to basic matters of trial tactics and strategy deprived the defendant of his right to the effective assistance of trial counsel under both the state and federal constitutions.

...

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

Here, contrary to the majority's conclusion, the decision of whether to interpose a defense of justification ultimately laid with defense counsel, not the defendant. This decision required an evaluation of the case, analysis of the evidence, and learned consideration of each of the legal theories made available by the evidence). Such considerations unquestionably implicate trial strategy and tactics, the hallmarks of matters ultimately left to the professional judgment of defense counsel." *Id.* at 47-48 (Miller, J., dissenting) (citations omitted).

As noted above, the Court of Appeals has granted leave to appeal in Clark. The appeal is likely to be decided before the end of this year.

In Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015), the Ninth Circuit reversed a district court's denial of a state prisoner's habeas corpus petition, ruling that the prisoner (Zapata) had been deprived of effective assistance of counsel because of "his trial counsel's failure to object to egregious prosecutorial misconduct during closing argument." In particular, the circuit court noted, "at the end of the trial during the prosecution's closing rebuttal argument, [the prosecutor] wove out of whole cloth, with no evidentiary support, a fictional and highly emotional account of the last words [the victim] heard Zapata shout as Zapata supposedly shot him," and those fictionalized "last words" were "several despicable, inflammatory ethnic slurs." 788 F.3d at 1110. Failure to object to such "egregious" misconduct, according to the circuit court, was ineffective assistance.

Zapata had been convicted of the murder of a 19-year-old, first generation Mexican immigrant student who, apparently, was mistakenly believed by the shooter to be the member of one gang who had intruded on the turf of a rival (the shooter's) gang. The victim, apparently, was mistaken for a rival gang member because he was wearing a t-shirt associated with the rival gang. According to the only eyewitness to the shooting, the victim was talking on a pay phone in the parking lot of a 7-Eleven store, facing the telephone. Another person, who was standing two or three feet from the victim, raised his arms in anger, yelled at the person on the phone, drew a pistol from his waistband and shot the victim three times. *Id.* at 1009.

The evidence as to whether Zapata was the shooter was, as recounted by the Ninth Circuit, unclear and inconsistent and even "weak," although he was apparently a member of a subgroup of the gang whose territory was allegedly violated by the victim and had, apparently, been close to the crime scene on the night of the murder. *Id.* at 1008-09, 1117, 1118-21. In the Ninth Circuit's view, this provided the setting for the prosecutorial misconduct that ultimately led to the circuit court's conclusion that Zapata had been deprived of effective assistance of counsel.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The prosecuting attorney, according to the Ninth Circuit, made inflammatory remarks at three points during his rebuttal argument, i.e., “a fictional and highly emotional account” of the last words Zapata has shouted at the victim before he supposedly shot him. Id. at 1110. The prosecutor ascribed to Zapata several despicable, inflammatory ethnic slurs:

“Picture, if you will, the last words that [the victim] heard before the defendant shot him in the back and to make sure he was dead shot him in the chest. What were the last things he heard? What’s the reasonable inference of what was going on that precise moment the second before he’s mortally wounded? [Expletive and vulgar ethnic slur deleted]. You [expletive deleted] wetback. Can you imagine the terror and the fear [the victim] must have felt as he’s cowering into the phone. ... [Expletives deleted]. Wetback.” Id. (quoting the prosecutor’s closing argument).

The Ninth Circuit observed that the slurs were “invoked deliberately” because the prosecutor had invoked and defined those terms during his opening statement, had elicited testimony from an expert witness about those terms, and had made inflammatory statements at three times during rebuttal, including just before the jury began to deliberate. Id. at 1110-11.

The Ninth Circuit observed that the slurs were “invoked deliberately” because the prosecutor had invoked and defined those terms during his opening statement, had elicited testimony from an expert witness about those terms, and had made inflammatory statements at three times during rebuttal, including just before the jury began to deliberate. Id.

The Ninth Circuit noted that “Zapata’s counsel neither objected to the fictional, inflammatory statements in the closing argument nor asked the trial court to issue a curative instruction. The jury was then sent to deliberate. After three hours, it found Zapata guilty of first-degree murder.” Id. at 1111. The California intermediate appellate court affirmed Zapata’s conviction and the California Supreme Court denied review. Zapata then filed a federal habeas corpus petition, which was denied by the district court. Id.

The Ninth Circuit first observed that Zapata faced a daunting standard for obtaining habeas corpus relief:

“Because this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief can be granted only if the state court proceedings ‘resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

United States’ or resulted in a decision that was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” Id. at 1111.

The court, however, concluded that under this standard, “counsel’s failure to insulate the jury from the prosecutor’s grossly improper comments constituted ineffective assistance.” Id.

The Ninth Circuit noted that, in order to prevail on his ineffective assistance claim, Zapata would have to “demonstrate both that his counsel’s performance was deficient and that the deficient performance prejudiced his defense.” On habeas review, the issue was whether the state court’s application of the this standard was unreasonable. Id. at 1112. The first step of this inquiry was whether the prosecutor’s remarks constituted objectionable misconduct.⁵ The Ninth Circuit concluded that its task in this regard was made easy because the California intermediate appellate court had concluded, following a lengthy discussion, that “the prosecutor committed serious misconduct.” The state court noted, in particular, that in addition to being “pure fiction,” the prosecutor’s fiction was “both inflammatory and wholly extraneous to any issue properly before the jury.” Id. at 1113.

However, the circuit court continued, the state court had determined that it could not conclude that Zapata’s counsel had provided ineffective assistance because, although the state court could not articulate a valid tactical reason for counsel’s failure to object to the prosecutor’s inflammatory statements, the state court held that it was “simply unable to say on this cold record that there could be no conceivable tactical reason for the latter’s acquiescence in the former’s improper jury arguments.” Id. at 1115.

The Ninth Circuit ruled that the state court’s conclusion was an unreasonable application of the settled law governing ineffective assistance claims. The circuit court first noted that federal courts, on habeas corpus review, must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” and that this rule is particularly strong with respect to ineffective assistance claims premised on a failure to object during the prosecutor’s summation. Id. at 1115. The circuit court concluded, however, that, under the circumstances presented, the usual presumptions were inapplicable and the state court’s conclusion that Zapata’s counsel had not been guilty of constitutionally deficient representation was unreasonable:

“Here, however, the remarks – fabricated from whole cloth, designed to inflame the passions of the jury and delivered in the waning

⁵Zapata was unable to argue that the prosecutor’s misconduct, standing by itself, justified habeas corpus relief, because he had waived that argument.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

moments of trial – unquestionably were ‘egregious misstatements.’ Even if the first such remark could have ‘backfire[d],’ as the state court hypothesized, a timely objection would have curtailed its repetition. Instead, trial counsel’s silence, and the judge’s consequent failure to intervene, may have been perceived by the jury as acquiescence in the truth of the imagined scene – or at least, in the validity of such speculation about the victim’s last minutes.

...

Here, the record suggests ‘nothing strategic about failing to object’ to patent, inflammatory and repeated misconduct. The state court’s determination that Zapata’s attorney did not perform deficiently plainly was objectively unreasonable under § 2254(d)(1).” Id. at 1115-16 (citations omitted).

In People v. Morency, 607/2008, NYLJ 1202678616266, at *1 (Sup. Ct. Kings Co. Dec. 2, 2014), the court denied a convicted defendant’s motion to vacate his conviction on ineffective assistance of counsel grounds. The defendant had been convicted of first degree manslaughter and other offenses arising out of a shooting incident involving a physical struggle and numerous shots being fired. However, the defendant was acquitted on a murder count. Id.

The ineffective assistance of counsel issue involved trial counsel’s decision not to call his shooting incident reconstruction expert as a trial witness. The defendant asserted that the “failure to call a defense expert constituted less than meaningful representation and that counsel’s decision not to call the witness was not strategic because it was based a misunderstanding of the law regarding the utilization of expert witnesses at trial.” Id. at *1-2. Defense counsel had believed that, as a matter of law, he could either call the expert to the stand *or* have the expert be in the courtroom during the trial testimony of the prosecution’s expert and then assist defense counsel in fine-tuning his proposed cross-examination on the basis of the prosecution expert’s trial testimony. Defense counsel believed that if his expert was in the courtroom during the prosecution expert’s direct testimony, he would be precluded from giving trial testimony. Id. at *2-3.

The court stated that trial counsel had been mistaken in concluding “that he could not both utilize [the defense expert] as a defense witness and have him be present in court to listen to the testimony of the People’s experts in order to assist counsel in fine-tuning his cross-examination of those experts.” And, although trial counsel’s mistaken view of the law did not preclude him from hiring a second, trial expert, “[h]e chose not to present a testifying expert because he was convinced that his extensive consultation with [the defense expert] was sufficient to permit him to effectively counter the opinions and testimony of the People’s experts.” Id. at *8.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

However, the court then noted, although trial counsel had misunderstood this legal issue, that did not, in and of itself, mean that the defendant had been deprived of his constitutional right to effective assistance of counsel. The court stated that the standard for determining whether a defendant had been deprived of this right was that, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation reveal that the attorney provided meaningful representation the constitutional requirement will have been met.” *Id.* at *7 (citations and internal quotation marks omitted). The court concluded that, “[a] review of the trial transcript and the hearing testimony establishes that counsel in this case, despite his mistaken understanding of the law concerning expert witnesses, nevertheless provided the defendant with meaningful representation.” *Id.* at *8-9.

According to the court:

“[W]hile counsel’s subjective reason for not presenting [the] expert testimony was flawed, he nevertheless properly prepared and presented a rigorous defense based on challenging the scientific reliability of the People’s expert’s account of the shooting, upon which the People relied to disprove the defense of justification. Moreover, his decision not to call any defense expert to testify at trial was also reasonable.

Counsel’s strategy of relying on cross-examination of the People’s experts with the extensive and active assistance of a qualified defense expert, rather than presenting expert testimony is one that could reasonably have been adopted in this case by counsel not laboring under any mistaken understanding of the law.” *Id.* at *9.

The court relied, in particular, on the testimony of the expert witness at the collateral attack hearing, to conclude that the defendant had received meaningful representation. The expert testified that:

“[Defense C]ounsel spent adequate time consulting with him to understand his objections to the People’s expert’s methodology and conclusions, and that counsel had not rejected any of his opinions or recommendations. He further conceded that counsel raised in cross-examination ‘the majority’ of his expert opinions and objections to the conclusions of the People’s expert, was able to undermine the value and credibility of the expert’s testimony and to get the expert to ‘soften’ some of his conclusions. Moreover, counsel, through cross-examination of the People’s expert, obtained an acquittal of

murder, which would have been the only reasonable verdict if the expert's conclusions had been adopted wholesale. In this case, counsel, by thorough and well prepared cross-examination, was able to present the opinions of the defense expert to the jury and to raise doubts as to the scientific validity of the People's expert's opinions without exposing his own expert to similar cross-examination and questioning." Id. at *11.

2. CONFLICTS OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In United States v. Ashburn, 2015 U.S. Dist. LEXIS 61012 (E.D.N.Y. May 8, 2015), the court denied a motion to withdraw made by the attorneys representing one of the defendants ("Laurent") in a gang-related racketeering prosecution. The attorneys based their motion on the possibility that Laurent might advance an ineffective assistance of counsel argument and that, if he should do so, counsel would violate the New York Rules of Professional Conduct if they continued to represent him. The court denied the motion to withdraw, concluding that counsel's continued representation of Laurent would not cause them to violate the Rules of Professional Conduct, because any ineffective assistance claim that Laurent might make would either be without a factual basis or frivolous. Id. at *10-12.

The motion to withdraw in this case arose out of the facts that: 1) Laurent had not attended his trial following the first day of voir dire⁶; and 2) Laurent had suggested to the court, during a brief appearance in court shortly before the close of testimony, that counsel had failed to communicate with him concerning the case and the trial and that he had "no knowledge of the trial whatsoever." Id. at *3-11. The court had required Laurent to appear in court shortly before the close of the Government's case, in order to ascertain whether Laurent wanted to testify on his own behalf. During the colloquy between Laurent and the court, Laurent repeatedly claimed that he was unable to decide whether to testify because counsel had purportedly failed to keep him informed about the progress of the case and of the trial. Laurent stated to the court:

"Sir, because I wasn't able to properly assist or allow them to properly assist me in preparing a proper defense, I haven't reviewed anything of my § 3500 material, and nor have I any knowledge of the case whatsoever I have so I'm not sure if I need to testify on own my behalf." Id. at *5.

⁶The court stated that Laurent had waived his right to attend the trial by walking out of early proceedings and failing to attempt to return to the trial, and, indeed, had been excluded from the trial because of violent and disruptive behavior. Id. at *31-32.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The court initially ruled that Laurent had waived his right to testify, but subsequently gave him until 9:00 a.m. the following Monday to decide whether or not he would testify at trial. Id. at *6, 9-10.

After Laurent left the courtroom, the court questioned his lawyers with respect to Laurent's claims that he had no knowledge of the case and had been unable properly to assist in his defense. The attorneys all denied the suggestion that they had failed to keep Laurent informed or failed to provide him with any of the documents that had been produced by the Government. They also made a record of the specific steps that they had taken throughout the case and the trial to keep Laurent informed about the case. Id. at *6-9. One of the lawyers also stated that:

“I just want the record to reflect that to the extent that his remarks could have been construed as a criticism of counsel, we are entitled to answer honestly to defend ourselves against such. That's all.” Id. at *8.

On Monday, March 9, 2015, the lawyers reported to the court that Laurent had informed them that he did not wish to testify at trial. The trial concluded and the jury convicted Laurent on all of the charges asserted against him. The court stated that the defendants (including Laurent) would have 60 days to file any post-trial motions. Id. at *10.

However, four days after the jury had returned its verdicts, all three of Laurent's attorneys moved the court to be relieved as counsel and to have new counsel appointed for Laurent. Laurent did not move to have his present counsel removed and to have new counsel substituted. As the court explained, the lawyers had argued that they had been placed into a situation of conflict with Laurent:

“[I]n light of his assertion on March 6, 2015 – that he had no knowledge of the case and had not been able to properly consult with his attorneys – new counsel ‘could assert as a basis for a new trial that trial counsel was ineffective for failing to keep Mr. Laurent informed during (or before) the trial and/or for acquiescing to the trial proceeding in his absence.’ ... Consequently, they claim withdrawal is proper, in order to ensure that ‘all claims that could be asserted to protect Mr. Laurent's rights are asserted on his behalf.’” Id. at *10-11.

The court began its opinion by noting that, because it was counsel who was moving to withdraw, as opposed to Laurent moving for substitution of counsel, the court had significant discretion, under Second Circuit precedent, in determining whether to grant the motion to withdraw. But it also observed that the court would abuse its discretion if it denied such a motion in

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

circumstances in which requiring counsel to continue representation would cause the attorney to violate ethics rules or possibly subject the attorney to sanctions. Id. at *12-13.

Laurent's lawyers argued that if they continued to represent Laurent, they might violate Rule 1.7 and/or Rule 3.7. The court summarized their arguments as follows:

“Laurent's attorneys appear to make the following argument. In light of Laurent's suggestion that his lawyers did not sufficiently communicate and consult with him regarding his trial, a reasonable lawyer would conclude that they have ‘differing interests’ with respect to whether a claim for ineffective assistance of counsel should be included in Laurent's post-trial motion pursuant to Federal Rule of Criminal Procedure 33.... In addition, if Laurent were to pursue an ineffective assistance claim on this basis, his attorneys would become potential fact witnesses whose testimony would be offered ostensibly for the purpose of contradicting Laurent's claim, in violation of Rule 1.7.... Since their representation of Laurent would result in a violation of either Rule 1.7 or Rule 3.7, or both, counsel is thus required to withdraw from the representation under Rule 1.16(b).” Id. at *16-17 (citations omitted).

The court ruled that none of these arguments justified granting the lawyers leave to withdraw and that granting leave to withdraw would cause undue delay and disruption in the progress of this already long-pending prosecution. The court first noted that Laurent would have to meet the difficult standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), in order to establish ineffective assistance of counsel. The court also observed that ineffective assistance claims are usually asserted in collateral proceedings attacking a conviction, rather than in the midst of post-verdict motions. However, under Second Circuit case law, an ineffective assistance of counsel claim can be raised during post-verdict motion practice. Id. at *17-20.

The court then held that the motions to withdraw must be denied because the potential ineffective assistance claims which, according to Laurent's attorneys, could cause them to violate the Rules of Professional Conduct if they were not relieved by the court were “facially implausible.” Although the court would be required to grant Laurent's lawyers leave to withdraw in order to properly adjudicate the merits of a potentially plausible ineffective assistance claim, in the present case:

“[T]he court would decline to conduct a hearing or even consider any such claim if it were raised in [Laurent's] anticipated Rule 33 motion. Accordingly, counsel's continued representation of Laurent will not

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

cause them to violate the Rules of Professional Conduct, nor will it expose them to the possibility of sanctions. The prosecution of this suit would, however, be disrupted by counsel's withdrawal." Id. at *24.

With respect to the possible claim that counsel had failed to keep Laurent informed about the case and the trial, the court stated that any such claim would be "'so inconsistent with the facts of record in this case' as to make any such claim 'patently meritless' and evidentiary proceedings involving his lawyers' testimony 'clearly unnecessary.'" Id. at *25. The court based this conclusion on a finding that Laurent's suggestions that counsel failed to keep him informed were "flatly contradicted" by counsel's representations on the record and because Laurent's credibility with the court "has been significantly diminished" because of his improper behavior throughout the case. Id.

In Curshen v. United States, 2015 U.S. App. LEXIS 173 (2d Cir. Jan. 7, 2015), the Second Circuit, in an unpublished opinion, vacated a district court decision which summarily denied the defendant's *pro se* petition for relief under 28 U.S.C. § 2255. The defendant had asserted that he had been denied effective assistance of counsel because his lawyer was allegedly laboring under a conflict of interest because he had concurrently represented another person who was implicated in the same securities fraud matter as was the defendant. That other person supposedly cooperated with the prosecution and was even listed as a prosecution witness in another case brought against the defendant in the Southern District of Florida. 2015 U.S. App. LEXIS 173, at *2-5.

The Second Circuit held that the district court had erred by failing to conduct a hearing or otherwise obtain evidence before rejecting the defendant's conflict-based ineffective assistance claim. The Second Circuit observed that, "'[e]xcept in highly unusual circumstances,' a district court should not resolve an off-the-record claim of ineffective assistance of counsel without 'testimony, affidavits, or briefs' from the allegedly ineffective attorney." Id. at *2 (citations omitted). The Second Circuit stated that, in the present case, it had been alleged that defense counsel could not effectively represent the defendant because of the supposed dual representation and "the available court record from the prior district court proceedings did not contradict these allegations." Id. at *5.

The district court had justified its refusal to hold a hearing or to otherwise obtain additional evidence because, in its view, "proceeding to trial would have been an implausible defense strategy given the overwhelming evidence of [the defendant's] guilt." The Second Circuit held, however, that the district court had committed reversible error by requiring a showing of prejudice because "as we have made clear, an alternative defense strategy is plausible even if unreasonable." If there was a plausible defense strategy which was not followed and which the district court fails to fully consider, a remand for the development of a fuller record is required. Id.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

In its Formal Ethics Opinion No. 1048 (2015), the NYSBA Committee on Professional Ethics expressed the view that there is no *per se* ethical prohibition to a defense lawyer advising a defendant as to a proposed plea bargain agreement that includes a waiver of the right to challenge convictions on ineffective assistance of counsel grounds. Rather, a defense lawyer can, consistent with the New York Rules of Professional Conduct, provide such advice to a defendant **unless** a reasonable lawyer would find a personal interest conflict of interest, i.e., a significant risk that the lawyer’s professional judgment on behalf of the defendant would be adversely affected by the lawyer’s own interest in avoiding an allegation of ineffective assistance of counsel. If such a conflict exists, the lawyer could continue to represent the defendant **if** the conflict is waivable and the defendant provides a valid waiver. If the conflict is not waivable or if the defendant refuses to provide a waiver, the lawyer must move the court for leave to withdraw from the representation.

Opinion 1048 began by noting that this issue “has been the subject of much attention.” Advisory ethics opinions in at least twelve non-New York jurisdictions have taken the position that it is *per se* impermissible for a defense lawyer to participate in a plea bargaining process which would include considering whether the defendant will waive the right to raise an ineffective assistance of counsel argument in any attempt to overturn or vacate the conviction. Opinions in two other jurisdictions, in contrast, had expressed the view that there was no *per se* prohibition. It is important to note that in New York, as opposed to some other states, bar association ethics opinions do *not* carry the force of law.

The Opinion then considered the question of whether, under substantive New York law, a waiver of the right to challenge a conviction on grounds of ineffective assistance of counsel could be valid. Opinion 1048 observed that the Committee does not have jurisdiction to determine questions of law, but then noted that conducting a brief survey of New York case law was appropriate in the present circumstances. According to the Opinion, if it was clear that plea bargain waivers of the right to challenge a conviction on ineffective assistance grounds were impermissible, the question of whether advising a defendant about a plea bargain providing for such a waiver would be rendered academic. The Opinion, however, concluded that it was not at all clear that New York law precludes the inclusion of a waiver of ineffective assistance challenges from plea bargain agreements.

Accordingly, Opinion 1048 then turned to the substantive ethics issues. It first considered whether a lawyer would be confronted with a “personal interest conflict” under Rule 1.7(a)(2) if s/he were asked to participate in negotiating a plea bargain agreement that included a waiver of the right to make ineffective assistance challenges. Opinion 1048 observed that successful ineffective assistance challenges are meant to produce a favorable outcome for the defendant (e.g., vacating a conviction) and that the direct benefit to the client will “typically” not be directly contrary to the defense lawyer’s personal interests. Nonetheless, it continued, a successful ineffective assistance claim can yield “indirect” negative consequences for the defense lawyer and that means that a

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

criminal defense lawyer would have an interest in avoiding challenges to the effectiveness and propriety of her/his representation of the defendant:

“Even a challenge that is neither meritorious nor successful could require the lawyer to spend time responding, and could cause the lawyer reputational damage. Stronger challenges could lead to more concrete harms like malpractice awards or professional discipline. The degree of the lawyer’s personal interest will be a factor in determining whether that interest gives rise to a Rule 1.7 conflict and, if so, in determining whether the conflict is waivable.”

Opinion 1048 expressed the view that it could not “give a blanket answer to the fact-specific question of whether, in a particular case, a reasonable lawyer would find a significant risk that the prospect of an [ineffective assistance] waiver would adversely affect a defense lawyer’s professional judgment on behalf of the defendant.” This is because there are numerous factors which bear on the degree of personal interest implicated in any one case. “In a given case, a reasonable lawyer could perceive low risk or high risk that the defense lawyer’s professional judgment on behalf of the defendant would be adversely affected by the prospect of an [ineffective assistance] challenge.” Opinion 1048 then expressed the view that whether a personal interest conflict relating to waiver of ineffective assistance challenges could be validly waived pursuant to Rule 1.7(b) is a similarly fact-specific inquiry and that the question cannot be answered with a flat yes or a flat no.

Opinion 1048 then considered whether a plea bargain agreement that contains a waiver of the right to challenge a conviction on ineffective assistance grounds could be deemed to be “an agreement prospectively limiting the lawyer’s liability to a client for malpractice,” which is flatly prohibited by Rule 1.8(h)(1). The Opinion noted that advisory ethics opinions issued by bar ethics committees in other states had adopted that position. Opinion 1048, however, rejected this argument. It first expressed the view that a plea agreement which contains a waiver of the right to challenge a conviction on ineffective assistance grounds does not literally limit a lawyer’s potential malpractice liability. Even if a defendant has waived the right to challenge a conviction on ineffective assistance grounds, it does not prevent the defendant from bringing a civil malpractice suit against the lawyer.

The Opinion also brushed aside the argument, adopted by bar ethics committee opinions in other states, that a plea bargain agreement that contains a waiver of the right to bring an ineffective assistance challenge to a conviction somehow violates the “spirit” of Rule 1.8(h)(1). According to Opinion 1048, even if there was any support for the “spirit” argument, it was simply “too attenuated” to support an absolute bar on defense lawyer participation in negotiating plea agreements that contain a waiver of the right to challenge a conviction on ineffective assistance grounds.

**E. WITHDRAWAL OF DEFENSE COUNSEL WHEN THE ATTORNEY-CLIENT
RELATIONSHIP HAS BROKEN DOWN.**

In People v. Gibson, 126 A.D.3d 1300 (4th Dept. 2015), the court, by a 4-1 vote, reversed a conviction, ruling that the trial court had abused its discretion when it refused to appoint new counsel for the defendant and failed to grant the current defense counsel’s motion to withdraw. Both the defendant and the lawyer reported to the trial court that they were “unable to communicate effectively”; their most recent meeting had been “rather antagonistic”; and there had been an irreparable breakdown in the attorney-client relationship. The trial court justified its decision by stating that a lack of communication between a defendant and counsel does not constitute good cause for appointment of substitute counsel. The trial court added that this was so “[e]specially when there may be some indication that lack of communication was initiated or promoted by the defendant as opposed to defense counsel.” 126 A.D.3d at 1301.

The majority first observed that when a defendant makes specific factual allegations with respect to defense counsel, the trial court is obligated to undertake at least some minimal inquiry to determine whether the defendant’s allegations have merit. In this case, according to the majority, the trial court erred when it determined “that a breakdown in communication between attorney and client cannot constitute good cause for substitution of counsel.” In the case before the court, the defendant had produced more than mere conclusory allegations that the attorney-client relationship had broken down. Rather, both the defendant and defense counsel agreed before the court that they were unable to communicate. Id. at 1302.

The majority also held that the trial court had erred when it suggested that any breakdown in communication had been “initiated or promoted” by the defendant. The majority opinion noted that there was evidence in the record which suggested that the breakdown in communication resulted from legitimate concerns by the defendant as to defense counsel’s performance. Id. at 1302.

The dissenting justice expressed the view that the trial court had not abused its discretion by denying the motion for appointment of substitute counsel. It stated that, in its view, the motion for replacement counsel was based largely on complaints by the defendant that defense counsel had been in contact with him only infrequently. According to the dissent, this type of complaint was not sufficient to justify appointment of substitute counsel. Id. at 1303-04.

**F. ISSUES ARISING WHEN A RELATIVE OF A CLIENT PAYS THE CLIENT’S
FEES.**

In its Formal Ethics Opinion No. 1063 (2015), the NYSBA Committee on Professional Ethics expressed that view that when a lawyer accepts payment of a client’s legal fees from the relative of a client, the relative who pays the fees does not become a client of the lawyer merely because s/he has

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

paid the lawyer's fee. The relative paying the fees becomes a client of the lawyer only if the lawyer gives the payor reason to believe that s/he is, in fact, a client.

Opinion 1063 arose out of an inquiry by a lawyer who had agreed to represent an 18-year-old in a criminal matter. The client's divorced parents were both present at the lawyer's initial meeting with the son. Only the son signed the retainer agreement, but each parent paid one-half of the retainer payment. The lawyer continues to represent the son.

Subsequently, the lawyer agreed to represent the mother in two matters against the father. One was a custody dispute with respect to another child, while the other was a child support matter which involved the son, among other children. The father's lawyer claimed that the lawyer in question had a conflict because s/he had accepted money from the father. Opinion 1063 expressed the view that, in the circumstances presented, there was no conflict of interest.

The Opinion first observed that lawyers will sometimes accept payment of a client's legal fees from a third party, including relatives of the client. Opinion 1063 then noted that "[i]t is well-established that when a lawyer accepts payment from a third party to represent a client, the third-party payor is not a client merely by virtue of paying the lawyer's fee."⁷

The Opinion also observed that in situations in which a third-party payor is present at a lawyer's intake interview with a client, the lawyer might give the third party the impression that s/he is also a client. Opinion 1063, accordingly, suggested that lawyers should consider: telling the third-party payor that the lawyer does not represent him/her or owe him/her any duties; not providing any legal advice to the third-party payor; and not sharing confidential information with the third-party payor without receiving informed consent from the client.

Opinion 1063 then expressed the view that, unless the lawyer had given the father reason to believe that s/he represented him as well as the son, the father was not a client. That led to the conclusion that the lawyer would not have a current client conflict under Rule 1.7(a)(1) by representing the mother against the father because Rule 1.7(a)(1) is triggered only in situations where a lawyer is adverse to a current client. According to Opinion 1063, the lawyer's representation of the mother against the father could still create a so-called personal or financial interest conflict under Rule 1.7(a)(2) if a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fee payments from the father on behalf of the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. However, the Opinion also expressed the view that, even if a personal interest conflict did exist, the lawyer could still, pursuant

⁷Indeed, under Rule 1.8(f)(2), a lawyer cannot accept payment of fees by someone other than the client unless "there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship."

to Rule 1.7(b), represent the mother if the lawyer reasonably believes that s/he can still provide competent and diligent representation to the mother and if the lawyer obtains informed consent, confirmed in writing, from the mother.

G. ADEQUACY OF DEFENDANT’S WAIVER OF RIGHT TO APPEAL IN CONNECTION WITH ENTERING A GUILTY PLEA.

In People v. Brown, 122 A.D.3d 133 (2d Dept. 2014), the Appellate Division, Second Department, issued a lengthy opinion which set forth suggested procedures to be used by trial courts when a defendant waives his/her right to take an appeal in connection with entering a guilty plea. The Court (per Presiding Justice Skelos) observed that the procedures often followed by trial courts in handling this common scenario was frequently inadequate and led to appellate decisions that the defendant’s guilty plea was invalid:

“Due to ambiguous or incomplete oral colloquies between defendants and the courts or the People regarding [waivers of the right to appeal], it is frequently the case that instead of producing the intended benefit of finality, an appeal waiver merely injects into a criminal appeal an additional and difficult issue, i.e., the validity of the waiver. The purpose of appeal waivers would be better served if greater attention were given to the colloquies used in taking such waivers. Indeed, because ‘[g]iving up the right to appeal is not a perfunctory step’ the Court of Appeals has ‘underscore[d] the critical nature of a court’s colloquy with a defendant explaining the right relinquished by an appeal waiver.’ *The purpose of this opinion is to encourage deliberation by the trial courts in the taking of appeal waivers, with the hope that the laudable purpose of such waivers will be achieved, and that defendants will be benefitted through a better understanding of the significance of the fundamental right they are being asked to waive and the consequences of doing so.*” 122 A.D.3d at 134-35 (emphasis added; internal citations omitted).

The Court reviewed, in detail, the many opinions which the Court of Appeals had handed down in recent years addressing the validity of waivers of a defendant’s right to appeal. It noted, in particular, that, although the Court of Appeals had held, on many occasions, that it was “good practice” to obtain a written waiver of the right to appeal from the defendant, the presence of a written waiver of the right to appeal did not necessarily mean that the defendant’s waiver of the right to appeal was valid. Instead, the Court noted that:

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

“[O]verreliance by trial courts on such written waivers, as evinced by the present case, has led to problems in securing valid waivers of the right to appeal. Even where a written waiver is executed by the defendant, ‘a knowing and voluntary waiver cannot be inferred from a silent record.’ In other words, a written waiver is not a complete substitute for a proper colloquy supervised by the trial judge. While ‘[a] detailed written waiver can supplement a court’s on-the-record explanation of what a waiver of the right to appeal entails ... a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal as a condition of the plea agreement.’” *Id.* at 138-39 (internal citations omitted).

After observing that trial courts frequently (and improperly) rely upon “standard terse or abbreviated oral colloquies” before accepting a defendant’s purported waiver of the right to take an appeal, *Brown* set down the following guideposts for ensuring that a defendant’s waiver of the right to appeal in connection with the entry of a guilty plea is valid:

“[W]e suggest that it would be best practice to provide all defendants with a deliberate and thorough on-the-record explanation of the nature of the right to appeal and the consequences of waiving that right. A court should engage in this practice irrespective of whether the defendant has executed a written waiver of the right to appeal. In this manner, the overreliance on written waivers will be mitigated and the trial courts and the People are more likely to ensure that the appeal waivers defendants agree to as a condition of their plea agreements will be enforced by appellate courts. More significantly, this practice will provide defendants with the utmost protection of their valued right to appeal. On the other hand, perfunctory appeal waiver colloquies, which do not evince a free and informed decision by the defendant, serve only to defeat the intended purpose of appeal waivers as they are no more than a pathway to future litigation.

Generally, such a thorough explanation should include an advisement that, while a defendant ordinarily retains the right to appeal even after he or she pleads guilty, the defendant is being asked, as a condition of the plea agreement, to waive that right. Ideally, a defendant should then receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant’s

conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues. The defendant should also be told that appellate counsel will be appointed in the event that he or she were indigent. The trial courts should then explain the consequences of waiving the right to appeal, i.e., that the conviction and sentence will not receive any further review, and shall be final.” Id. at 144-45.

H. DEFINITION OF “KNOWLEDGE” THAT TRIGGERS DUTY TO REPORT FRAUDULENT TRIAL CONDUCT TO THE COURT.

In United States v. Parse, 789 F.3d 83 (2d Cir. 2015), the Second Circuit reversed a district court’s denial of a defendant’s motion for a new trial which had been based on serious juror misconduct. The decision, as discussed below, is important with respect to the issue of when does an attorney have “knowledge” sufficient to trigger a duty to report or address fraudulent conduct in a case.

The district court’s denial of the motion for a new trial was premised on findings that the defendant’s lawyers had waived this right because they either: 1) knew, no later than immediately before the start of jury deliberations, that one juror (“Conrad”) had lied about almost every aspect of her identity and background; or 2) failed to exercise reasonable diligence to pursue “mounting evidence” that Conrad had engaged in egregious lying in her response to voir dire questions. The Second Circuit held that: 1) the district court’s finding that the defendant’s lawyers “knew” that Conrad had lied during voir dire was clearly erroneous; and 2) the district court’s alternative holding that a finding that the defendant’s lawyers “knew” that Conrad had lied during voir dire was not necessary to find a waiver of the right to seek a new trial was legal error. 789 F.3d at 115, 119.

Parse arose out of a trial of five defendants in connection with the creation and marketing of fraudulent tax shelters. Following a lengthy trial, the jury acquitted one defendant, convicted three defendants (two of whom were partners at a major law firm) on all counts, and found Parse, a broker at the investment bank which executed transactions to implement the tax shelters, guilty on two counts but not guilty on four other counts. Id. at 85. However, roughly two months after the jury had returned its verdict, the four defendants who had been convicted on some or all of the charges against them moved for a new trial on the grounds that one juror, Conrad, had lied during voir dire, withheld material information during voir dire and was biased against the defendants. Id. at 85-86.

The new trial motions were made approximately two weeks after the prosecution had disclosed to the defendants and to the district court that it had received a letter from Conrad shortly after the verdict had been returned. Id. at 85-86. According to both the district court and the Second Circuit, Conrad’s

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

two-page letter praised the government’s prosecution of the case and indicated that she was severely prejudiced against the defendants and, in particular, against Parse. Id. at 90.

The district court held an evidentiary hearing on the new trial motions and concluded that Conrad was a “pathological liar and utterly untrustworthy,” whose lies during voir dire were “breathtaking.” Id. at 92. The Second Circuit noted that the district court found that Conrad lied during voir dire about, among other matters, her own background and that of her husband. Id. at 88. In particular, Conrad concealed the fact that she had graduated from law school in 1997 and had been admitted to practice in 2000, and also concealed the fact that she had been suspended from practice by the Appellate Division, First Department, in 2007 and had subsequently been suspended by the Southern and Eastern Districts of New York. As of the time of the evidentiary hearing, Conrad was seeking reinstatement by the First Department. However, according to the district court, her application “was riddled with falsehoods.” Id. at 88-89.

The district court concluded that Conrad had deliberately lied in order to be seated on the jury. Id. at 120. It also concluded that Conrad was “actually biased” against the defendants. Id. at 93. The district court stated that if it had been aware of Conrad’s real background and experiences at the time of voir dire, it would have inferred that she was biased and would have excluded her from the jury. Id. at 99-101. The district court ruled that the moving defendants other than Parse were entitled to a new trial on the grounds that they were denied their right to an impartial jury. The district court stated that there was no reason to believe that these defendants or their lawyers had knowledge or suspicions of Conrad’s misconduct prior to the end of the trial. Id. at 101.

The district court reached a different conclusion as to Parse. The district court found that Parse’s attorneys “knew that Conrad was a suspended attorney [which was critical to concluding that counsel knew that Conrad was guilty of misconduct] – or at least they would have known had they exercised due diligence” or that, in the alternative, even if Parse’s lawyers “did not have actual knowledge that Conrad was the suspended attorney, they would have known had they exercised due diligence.” Id. at 102-103. The district court stated:

“[A] defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence.

[Case law makes clear] litigants and their counsel must act with reasonable diligence based on information about juror misconduct in their possession, or they will be deemed to have waived their right to an impartial jury based on the challenged juror misconduct.” Id. at 102.

NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE

The Second Circuit rejected both prongs of the district court's analysis and concluded that Parse's motion for a new trial should have been granted. The court stated that "the record amply supports the findings of the district court that Conrad repeatedly lied during voir dire ... and that she did so in order to be chosen as a juror.... Further, the [district] court found that Conrad was in fact, impliedly, and inferably biased against the defendants, and that if the court had known the truth, it would have dismissed Conrad for cause." Id. at 111 (citations omitted). Accordingly, the jury empaneled in this case was not an impartial jury, which violated the Sixth Amendment. Id.

The Second Circuit disagreed with the district court's finding that Parse's lawyers *knew*, prior to the end of trial, that Conrad had lied during voir dire. The Second Circuit concluded that although Parse's lawyers *suspected* that Conrad "was not the person she represented herself to be during voir dire," the suspicion did not "leaven" into actual knowledge until they had received Conrad's post-verdict letter to the prosecution. According to the Second Circuit, it was information contained in that letter that transformed Parse's lawyers' suspicions that Conrad was lying into actual knowledge. Id. at 116.

The Second Circuit noted that the district court had concluded that one of the partners of the firm that represented Parse (who had coordinated and overseen juror research) had demonstrated that she had knowledge that Conrad had lied during voir dire. According to the district court, that was because that partner allegedly had demonstrated, in an email sent during jury deliberations, that she knew that Conrad was a suspended lawyer by stating: "Jesus, I do think that it is her." This was, according to the Second Circuit, the linchpin of the district court's conclusion that Parse's lawyers "knew" that Conrad had lied during voir dire. Id. at 98-99, 116.

The Second Circuit rejected the district court's conclusion that this "excited utterance" demonstrated that the partner knew that Conrad had lied during voir dire. Id. at 116-17. It noted, among other things:

- The excited utterance was immediately followed in the email by a request to a paralegal to "track down" further information relevant to the question of whether Conrad had lied about her identity. According to the Second Circuit, "[a]lthough a request for additional information does not necessarily belie knowledge," her conduct indicates that the "'I think' utterance exhibited something short of actual knowledge." Id.
- The partner did not state that she knew that Conrad had lied about her identity because "[b]elief, surmise, and opinion are not the same as knowledge," and the partner had only said that she *believed* that Conrad was a suspended lawyer. Id. at 117.

- Viewing the excited utterance as a statement that the partner “knew” that Conrad had lied during voir dire was undercut by the fact that the partner had never shared the documents that prompted the excited utterance with her partners. According to the Second Circuit, although Parse’s counsel could have exercised greater diligence in pursuing the open questions about Conrad’s truthfulness during voir dire, that was not equivalent to knowledge. Id.

The Second Circuit also rejected the district court’s holding that a finding of actual knowledge was not necessary to sustain a finding that a defendant had waived his/her right to object to the seating of and participation by a biased juror:

“[W]aivers must be knowing, intelligent acts, done with sufficient awareness of the relevant facts. A ruling that a litigant has ‘waive[d]’ a right because he failed ‘to acquire sufficient information to make an informed decision,’ is based on an erroneous view of the law.” Id. at 118.

Judge Straub wrote a brief concurring opinion, which agreed with the result reached in the principal opinion, but for a different reason. Initially, Judge Straub stated that he was “not persuaded” by the majority opinion’s conclusion that the district court clearly erred in ruling that Parse’s lawyers knew that Conrad had lied during voir dire. According to Judge Straub, the district court was in the best position to assess the credibility of the partner who had made the excited utterance, and the district court’s factual findings were not clearly erroneous. Id. at 124 & n.1. Judge Straub then expressed the view that, given the egregious and undisputed nature of Conrad’s misconduct, “Parse could not have waived his right to an impartial jury even if his attorneys knew of the juror misconduct.” According to Judge Straub, “[w]e have never upheld a verdict rendered under these circumstances, and to do so would be to make a farce of our system of justice.” Id. at 124-126.

I. PROSECUTORIAL CONDUCT AND MISCONDUCT.

1. FAILURE OF PROSECUTION TO PRODUCE *BRADY* MATERIAL.

In People v. Kull, 2014 N.Y. Misc. LEXIS 3442 (Dist. Ct. Nassau Co. Jul. 24, 2014), the court granted a defendant’s motion to withdraw a guilty plea because the prosecution had failed to timely inform the defendant of the existence of potentially exculpatory evidence, i.e., so-called Brady material. The defendant had entered a guilty plea to a Driving While Intoxicated charge on June 13, 2013. She had been given a breath test at the scene of the underlying incident using an Intoxilyzer device. Id. at ***1-2.

NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE

On December 5, 2013, approximately six months after the guilty plea had been entered, the prosecution informed counsel for the defendant for the first time of the existence of possible Brady material. The prosecution advised defense counsel that, during routine maintenance, it was discovered that a piece of the Intoxilyzer device used in the defendant's breath test had a contaminant on it. The prosecution added that it did not, at that time, have an answer as to whether this contamination could possibly have had an effect on the defendant's breath test. Id. at ***2-3. However, the prosecution later conceded that the police had submitted a service work order to the manufacturer of the device six weeks *before* the defendant entered her guilty plea and that contamination had been found and parts had been replaced by the manufacturer within three weeks of the service request, i.e., prior to the time the defendant entered her guilty plea. Id. at ***3-4.

The prosecution argued in opposition to the defendant's motion that it was "clear" that the contamination had "no effect" on the results of the defendant's blood alcohol level test. The court rejected this claim and concluded that the defendant's Brady rights had been violated, and that the motion to withdraw the guilty plea should be granted. The court found that:

"Clearly, the police department and District Attorney had knowledge of a contamination issue regarding the Intoxilyzer 5000 EN that was used to obtain a BAC of the defendant's breath prior to the defendant's guilty plea, and they failed to disclose this information to the defendant. This information, if it had not been improperly withheld from the defendant and her counsel, would have permitted defendant the opportunity to evaluate the strength of the evidence regarding the reliability of the Intoxilyzer used to obtain the defendant's BAC, prior to pleading guilty." Id. at ***5-6.

**2. FIFTH AMENDMENT RIGHTS AND THE ADEQUACY OF
MIRANDA WARNINGS.**

In People v. Dunbar, 24 N.Y.3d 304 (Oct. 28, 2014), the New York Court of Appeals ruled that the Queens County District Attorney's Offices's pre-arraignment interview program was improper. In particular, the Court held that the "preamble" delivered to suspects before they were given Miranda warnings, "undermined the subsequently-communicated *Miranda* warnings to the extent that [the suspects] were not adequately and effectively advised of the choice [the Fifth Amendment] guarantees against self-incrimination before they agreed to speak with law enforcement authorities." 24 N.Y.3d at 308 (internal quotation marks and citations omitted). The Court, accordingly, affirmed the Appellate Division, Second Department's decisions that the statements given by the defendants in the two individual cases that were before the Court of Appeals should have been suppressed and that the two convictions should be reversed. Id. at 311-13.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The Queens District Attorney's pre-arraignment interview program was instituted in 2007. As the Court of Appeals noted:

“[T]he program consisted of a structured, videotaped interview conducted by two members of the District Attorney's staff (an assistant district attorney and a detective investigator [DI]) with a suspect immediately prior to arraignment. During this interview, the DI delivered a scripted preface or ‘preamble’ to the *Miranda* warnings that, among other things, informed the suspect that ‘this is your opportunity to tell us your story,’ and ‘your only opportunity’ to do so before going before a judge.” Id. at 308.

Because the effect of the preamble on the subsequently delivered Miranda warnings was the crux of the issue before the Court of Appeals, the Court's decision set forth verbatim the text of the preamble (which was exactly the same in the two individual cases before the Court). Following introductory remarks by the Assistant District Attorney and the DI, the DI would state:

“If you have an alibi, give me as much information as you can, including the names of any people you were with.

If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.

If there is something you need us to investigate about this case you have to tell us now so we can look into it.

Even if you have already spoken to someone else you do not have to talk to us.

This will be your only opportunity to speak with us before you go to court on these charges.” Id. at 309.

The DI would then inform the suspect that the interview was being recorded and, after that, read the suspect the Miranda warnings and conclude by asking the suspect whether he would talk to the prosecutors. Id. at 310. In both of the cases before the Court of Appeals, the suspect agreed to talk and provided the prosecution with a statement. Each suspect was arraigned, indicted, tried and convicted. Both defendants made a motion to suppress the statement he had made or the interview he had given, but the motions were denied and the interviews were used against the defendants at trial. Id. at 310-13.

NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE

Each defendant appealed his conviction, arguing, among other things, that the preamble recited by the DI had the effect of neutralizing and/or undermining the Miranda warnings which they were subsequently given. In both cases, the Second Department reversed the conviction. The Second Department first determined that the “preamble” had effectively undermined the Miranda warnings, stating that the preamble “add[ed] information and suggestion ... which prevent[ed] the *Miranda* warnings] from effectively conveying to suspects their rights, creating a muddled and ambiguous message.” Id. at 311 (internal quotation marks and citations omitted) (alterations in original). The Second Department also rejected the prosecution’s argument that the effect of the preamble and, in particular, whether it had undermined the Miranda warnings, had to be determined on a case-by-case basis. According to the Second Department, such a case-by-case review was irrelevant to the question of whether Miranda warnings had been properly administered. Id. at 311.

The prosecution was granted leave to appeal to the Court of Appeals. The Court of Appeals affirmed the Second Department’s decisions. The Court first stated that giving an effective Miranda warning is an absolute prerequisite to conducting any questioning of a suspect. In addition, the rights guaranteed by the Fifth Amendment are so fundamental that courts will not even consider prosecution arguments that a particular suspect had, in fact, been aware of his rights, even though the authorities had failed to give the Miranda warnings. Id. at 313-14.

The prosecution had acknowledged to the Court of Appeals that a statement made in the absence of a Miranda warning must be suppressed. It argued, however, that the Miranda warnings were unquestionably given in the two cases before the Court. According to the prosecution, this meant that the preamble statements made before the Miranda rights were given bore only on the question of whether a particular waiver given in a particular case was voluntary; and, supposedly, there was no justification for a *per se* conclusion that the preamble fatally tainted any subsequent interview or statement. Id. at 315.

The Court rejected this argument. It stated that there was no claim that the Miranda warnings which were given to the two defendants failed to apprise the defendants of their rights. Instead, the issue was whether a standardized procedure, i.e., the preamble, effectively vitiated or neutralized the effect of the subsequently delivered Miranda warnings. The Court stated that it agreed with the Second Department’s conclusion that the preamble, “which is at best confusing and at worst misleading, rendered the subsequent *Miranda* warnings inadequate and ineffective...” Id. at 315-16.

The Court of Appeals stated that “for all intents and purposes,” the defendants had been warned “that remaining silent or invoking the right to counsel would come at a price – they would be giving up a valuable opportunity to speak with an assistant district attorney, to have their cases investigated or to assert alibi defenses.” Id. at 316. In fact, “by advising [the defendants] that speaking would facilitate an investigation, the interrogators implied that these defendants’ words would be used to help them, thus undoing the heart of the warning that anything they said could and

would be used against them.” *Id.* The Court concluded that, because of the preamble, the defendants had never been “clearly informed” of their Miranda rights and that this would be true for any case in which the preamble had preceded the reading of Miranda warnings. *Id.*

**3. PREEMPTION OF APPLICATION OF STATE ATTORNEY
ETHICS RULES TO FEDERAL PROSECUTORS.**

In United States v. Supreme Court of New Mexico, Case No. 1:13-cv-00407-WJ-SWV, Memorandum Opinion & Order, Dkt. No. 47 (D.N.M. Feb. 3, 2014), a federal district court ruled that a state ethics rule restricting the ability of prosecutors to subpoena lawyers to testify to present evidence about a past or present client could not be applied to federal prosecutors with respect to grand jury proceedings. The district court concluded that the state ethics rule could not be applied in the federal grand jury context because it was preempted by federal law protecting grand jury secrecy and conflicted with other important federal grand jury policies. Opinion & Order at 12-20. However, the district court rejected the United States’ challenge to the application of the state ethics rule to the conduct of federal prosecutors with respect to criminal trials because the United States Court of Appeals for the Tenth Circuit had previously rejected a similar challenge to an identical Colorado ethics rule as applied to criminal trials, and the Tenth Circuit’s ruling was binding on the district court. The district court’s opinion, however, expressed “sympathy” for the United States’ position and suggested that the United States appeal to the Tenth Circuit and to petition to have the issue considered en banc. *Id.* at 6 & n.5.⁸

The United States had brought an action challenging the constitutionality of applying New Mexico Rule of Professional Conduct 16-308(E) to federal prosecutors. The New Mexico Rule, which is identical to ABA Model Rule 3.8(e), provides that a prosecutor in a criminal case shall:

“not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege⁹]

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

⁸As a matter of federal appellate procedure, the legal holding of a prior circuit court can, in general, only be overruled by an opinion of the circuit court sitting en banc.

⁹The United States did not challenge the validity of applying subparagraph (i) to federal prosecutors.

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

(iii) there is no other feasible alternative to obtain the information.”¹⁰

The district court initially noted that the New Mexico Rule did not provide defense lawyers with a ground for moving to quash a subpoena and did not create a private right of action for any person allegedly aggrieved by the issuance of a subpoena to a criminal defense lawyer. The only remedy for an alleged violation of the Rule would be to file a disciplinary complaint with the appropriate New Mexico authorities. Slip Op. at 3-4.

The district court then turned to the merits of the United States’ preemption arguments. The court noted that its preemption analysis was governed by a Circuit Court opinion, United States v. Colorado Supreme Court, 189 F.3d 1282 (10th Cir. 1999), and by a statute, the McDade Act, which was enacted during the pendency of the Colorado Supreme Court litigation. The McDade Act provides, in relevant part, that:

“(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”

The district court then noted that, under the Tenth Circuit’s Colorado Supreme Court opinion and the McDade Act, whether a state rule is preempted by federal law and rules depends on whether it is a state rule of professional ethics, which federal prosecutors must follow under the McDade Act, or whether it is a substantive or procedural rule, which can be preempted by federal law if the state rule is inconsistent with federal law. It concluded that the Tenth Circuit had determined that, in non-grand jury contexts, the New Mexico Rule was an “ethics rule” and, accordingly was not preempted by federal law. Supreme Court of New Mexico, Slip Op. at 5-8.

The district court then noted that the Tenth Circuit’s Colorado Supreme Court opinion had explicitly left open the question of whether a rule identical to the New Mexico Rule could, consistent with the Supremacy Clause of the United States Constitution, be applied to federal prosecutors in the grand jury context. In particular, the Tenth Circuit had not addressed whether the ethics rule at issue in Colorado Supreme Court actually conflicted with federal law, as applied to grand jury proceedings. Supreme Court of New Mexico, Slip Op. at 5-8.

¹⁰It should be noted that the New York Rules of Professional Conduct do not contain any rule that is equivalent to Model Rule 3.8(e).

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

The district court concluded that the New Mexico Rule could not be applied to federal prosecutors in the grand jury context because it conflicted with federal rules and policies, such as Federal Rule of Criminal Procedure 6(e), which provided strong protection to grand jury secrecy. According to the district court, a prosecutor would have to disclose confidential grand jury information in fighting a disciplinary proceeding alleging that s/he had violated the New Mexico Rule and this would contravene the strong federal interest and rules with respect to grand jury secrecy. The court further concluded that application of the New Mexico Rule to federal prosecutors in connection with grand jury investigations conflicted with federal law and policies in an additional respect. According to the district court, application of the New Mexico Rule in the context of a grand jury investigation would be inconsistent with the broad scope afforded to grand jury investigations and the narrow scope of permissible disclosures relating to grand jury proceedings under federal law and rules. And it could significantly sidetrack and delay federal grand jury proceedings, which is plainly inimical to important federal grand jury policies and practices. Slip Op. at 10-12, 13-20.

J. JUDICIAL RECUSAL.

In People v. Friedman, 67104/87, NYLJ 1202728354710, at *1 (Sup. Ct. Nassau Co. Jun. 2, 2015), a State Supreme Court Justice recused herself from presiding over an actual innocence hearing in a case seeking to overturn the defendant's conviction (on a guilty plea) in a highly publicized sexual abuse prosecution. The judge rejected the defendant's arguments that recusal was required because she had allegedly had conversations with the persons conducting an integrity review of the underlying conviction and because the integrity review process undertaken by the Nassau County District Attorney's Office was allegedly a "vital part" of the actual innocence hearing. Id. at *1-3. Nonetheless, the court concluded that recusal was appropriate because:

- The actual innocence hearing had been repeatedly delayed and could possibly be subject to further delay in a case where the defendant "is proclaiming that he is actually innocent of the charges to which he pled guilty." Id. at *3.
- Even under the court's concept of how the actual innocence hearing should be conducted, it was possible that one of the original prosecutors in this case would testify (and as the court had previously disclosed) that the Justice had been the prosecutor's supervisor when she (the Justice) was working in the Nassau County District Attorney's office. Id.
- The current lead prosecutor in the case had, one month previously, become a judge and the court "can foresee an argument that this Court may feel a need to support the position previously espoused by a member of the District Attorney's Office at a time when this Court was a member of the District

*NEW UNIFORM DISCIPLINARY PROCEDURES
AND 2016 ETHICS UPDATE*

Attorney's Office, who is now a fellow member of the Judiciary only two short years after this Court was elected to the bench." Id.

- Although the court believed that it could be impartial in assessing the credibility of her former colleague and in ruling on the merits, "[t]here is now a potential appearance that the Court's impartiality could be questioned." Id.

Michael S. Ross

MICHAEL S. ROSS, ESQ.
One Grand Central Place
60 East 42nd Street
Forty-Seventh Floor
New York, New York 10165
Telephone (212) 505-4060
Facsimile (212) 505-4054
michaelross@rosslaw.org

Michael S. Ross is the principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics and criminal law. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York and also served as an Assistant District Attorney in Kings County. Mr. Ross has been an Adjunct Professor at Benjamin N. Cardozo Law School, where he teaches Fall and Spring Semester courses in Litigation Ethics, and an Adjunct Associate Professor at Brooklyn Law School, where he teaches Fall, Spring and Summer courses in Professional Responsibility. In addition, in his three and a half decades of teaching at Cardozo Law School, he has taught a variety of ethics, trial practice and judicial administration courses.

Mr. Ross is a frequent lecturer and author on topics involving ethics, trial practice and criminal law for such organizations as the Practicing Law Institute, the Appellate Division, First Department, the Association of the Bar of the City of New York, the New York State Judicial Institute, the National Institute of Trial Advocacy, the New York State Bar Association, the New York County Lawyer's Association, the New York State Association of Trial Lawyers and the New York State Academy of Trial Lawyers.

Mr. Ross has served as a member of the New York State Bar Association's Committee on Professional Discipline; the New York State Bar Association's Task Force On Lawyer Advertising; the New York County Lawyers' Association Committee on Professional Discipline; the New York State Bar Association's Special Committee on the Unlawful Practice of Law; the New York State Bar Association Special Committee on Procedures for Judicial Discipline; and the New York State Bar Association's Committee on Mass Disasters. He previously served for a number of terms on the Association of the Bar of the City Of New York's Committee on Professional Discipline.

Mr. Ross completed a five-year tenure as an appointed member of the New York State Continuing Legal Education Board, which, among other things, formulates CLE guidelines in the State. Mr. Ross has chaired the American Bar Association Grand Jury Committee and the City Bar Association's Committee on Criminal Advocacy. He previously served as the ABA Criminal Justice Section's liaison to the ABA Standing Committee on Ethics and Professional Responsibility and was an appointed member of the ABA's Special "Criminal Justice In Crisis Committee."

Among his writings, Mr. Ross has co-authored a chapter on "Client and Witness Perjury," for the American Bar Association's Section of Litigation ethics training course book entitled Litigation Ethics: Course Materials For Continuing Legal Education. The course book was developed for use nationally by law firms, bar associations and other groups which provide ethics training.

**Part 1240 – Rules For Attorney Disciplinary
Matters**

Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS

(effective July 1, 2016)

TABLE OF CONTENTS

§ 1240.

1. Application.....	1
2. Definitions.....	1
3. Discipline Under These Rules Not Preclusive.....	2
4. Appointment of Committees.....	2
5. Committee Counsel and Staff	2
6. Conflicts; Disqualification from Representation	2
7. Proceedings Before Committees	3
8. Proceedings in the Appellate Division.....	6
9. Interim Suspension While Investigation or Proceeding is Pending.....	9
10. Resignation While Investigation or Proceeding is Pending.....	9
11. Diversion to a Monitoring Program.....	10
12. Attorneys Convicted of a Crime	11
13. Discipline for Misconduct in a Foreign Jurisdiction.....	12
14. Attorney Incapacity.....	13
15. Conduct of Disbarred, Suspended or Resigned Attorneys.....	14
16. Reinstatement of Disbarred or Suspended Attorneys	15
17. Reinstatement of Incapacitated Attorneys	16
18. Confidentiality	17
19. Medical and Psychological Evidence	18
20. Abatement; Effect of Pending Civil or Criminal Matters, Restitution	18
21. Appointment of Attorney to Protect the Interests of Clients	18
22. Resignation for Non-disciplinary Reasons; Reinstatement	19
23. Volunteers/Indemnification	19

Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS

(effective July 1, 2016)

§ 1240.1 Application

These Rules shall apply to (a) all attorneys who are admitted to practice in the State of New York; (b) all in-house counsel registered in the State of New York; (c) all legal consultants licensed in the State of New York; (d) all attorneys who have an office in, practice in, or seek to practice in the State of New York, including those who are engaged in temporary practice pursuant to Part 523 of this Title, who are admitted pro hac vice, or who otherwise engage in conduct subject to the New York Rules of Professional Conduct; and (e) the law firms that have as a member, retain, or otherwise employ any person covered by these Rules.

§ 1240.2 Definitions

- (a) Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct, as set forth in Part 1200 of this Title, including the violation of any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law §90(2).
- (b) Admonition: discipline issued at the direction of a Committee or the Court pursuant to these Rules, where the respondent has engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, and shall be in writing, and may be delivered to a recipient by personal appearance before the Committee or its Chairperson.
- (c) Censure: censure pursuant to Judiciary Law §90(2).
- (d) Committee: an attorney grievance committee established pursuant to these Rules.
- (e) Complainant: a person or entity that submits a complaint to a Committee.
- (f) Court: the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these Rules.
- (g) Disbar; Disbarment: to remove, or the removal, from office pursuant to Judiciary Law §90(2). Such terms shall also apply to any removal based upon a resignation for disciplinary reasons, a felony conviction, or the striking of an attorney's name from the roll of attorneys for any disciplinary reason, as stated in these Rules.

- (h) Foreign jurisdiction: a legal jurisdiction of a state (other than New York State), territory, or district of the United States, and all federal courts of the United States, including those within the State of New York.
- (i) Letter of Advisement: letter issued at the direction of a Committee pursuant to section 1240.7(d)(2)(iv) of these Rules, upon a finding that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. A Letter of Advisement shall be confidential and shall not constitute discipline, but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.
- (j) Respondent: a law firm, an attorney or other person that is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these Rules.
- (k) Suspension: the imposition of suspension from practice pursuant to Judiciary Law §90(2).

§ 1240.3 Discipline Under These Rules Not Preclusive

Discipline pursuant to these Rules shall not bar or preclude further or other action by any court, bar association, or other entity with disciplinary authority.

§ 1240.4 Appointment of Committees

Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or Committees (hereinafter referred to as “Committee”) within its jurisdiction as it may deem appropriate. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as Chairperson. All members of the Committee shall reside or maintain an office within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business; all Committee action shall require the affirmative vote of at least a majority of the members present.

§ 1240.5 Committee Counsel and Staff

Each Department of the Appellate Division shall appoint to a Committee or Committees such chief attorneys and other staff as it deems appropriate.

§ 1240.6 Conflicts; Disqualifications from Representation

- (a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with a current member of a Committee, (3) current member of a Committee’s professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent or complainant in a matter investigated or prosecuted before that Committee.

- (b) No referee appointed to hear and report on the issues raised in a proceeding under these Rules may, in the Department in which he or she was appointed, represent a respondent or complainant until the expiration of two years from the date of the submission of that referee's final report.
- (c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.
- (d) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in any matter in which the Committee member or staff member participated personally while in the Committee's service.

§ 1240.7 Proceedings Before Committees

(a) Complaint

- (1) Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by a Committee acting sua sponte.
- (2) The complaint shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration. If that address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Committee or the Court may transfer a complaint or proceeding to another Department or Committee as justice may require.

(b) Investigation; Disclosure. The Chief Attorney is authorized to:

- (1) interview witnesses and obtain any records and other materials and information necessary to determine the validity of a complaint;
- (2) direct the respondent to provide a written response to the complaint, and to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;
- (3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a respondent or witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a

complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and

(4) take any other action deemed necessary for the proper disposition of a complaint.

(c) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections 1240.7(d)(2)(iv), (v) or (vi) of these Rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent.

(d) Disposition.

(1) Disposition by the Chief Attorney.

(i) The Chief Attorney may, after initial screening, decline to investigate a complaint for reasons including but not limited to the following: (A) the matter involves a person or conduct not covered by these Rules; (B) the allegations, if true, would not constitute professional misconduct; (C) the complaint seeks a legal remedy more appropriately obtained in another forum; or (D) the allegations are intertwined with another pending legal action or proceeding.

(ii) The Chief Attorney may, when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant.

(iii) The complainant and the respondent or respondent's counsel shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.

(2) Disposition by the Committee. After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:

(i) dismiss the complaint by letter to the complainant and to the respondent;

(ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;

(iii) make an application for diversion pursuant to section 1240.11 of these Rules;

- (iv) when the Committee finds that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant imposition of discipline, issue a Letter of Advisement to the respondent;
- (v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, but that public discipline is not required to protect the public, maintain the integrity and honor of the profession, or deter the commission of similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, on such terms as the Committee deems just, to seek reconsideration of the proposed Admonition.
- (vi) when the Committee finds that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, maintain the integrity and honor of the profession, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section 1240.8 of these Rules.

(3) As may be permitted by law, the complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Committee.

(e) Review.

(1) Letter of Advisement.

- (i) Within 30 days of the issuance of a Letter of Advisement, the respondent may file a written request for reconsideration with the chair of the Committee, with a copy to the Chief Attorney. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.
- (ii) Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right.

- (2) Admonition. Within 30 days of the issuance of an Admonition, the respondent may make an application to the Court, on notice to the Committee, to vacate the Admonition. Upon such application and the Committee's response, if any, the Court may consider the entire record and take whatever action it deems appropriate.
- (3) Review of Dismissal or Declination to Investigate. Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.
- (4) As may be permitted by law, the respondent and the complainant shall be provided with a brief description of the basis of disposition of any review sought or objection submitted pursuant to this section.

§ 1240.8 Proceedings in the Appellate Division

(a) Procedure for formal disciplinary proceedings in the Appellate Division.

- (1) Formal disciplinary proceedings shall be deemed special proceedings within the meaning of CPLR Article 4, and shall be conducted in a manner consistent with the rules of the Court, the rules and procedures set forth in this Part, and the requirements of Judiciary Law §90. There shall be (i) a notice of petition and petition, which the Committee shall serve upon the respondent in a manner consistent with Judiciary Law §90(6), and which shall be returnable on no less than 20 days' notice; (ii) an answer; and (iii) a reply if appropriate. Except upon consent of the parties or by leave of the Court, no other pleadings or amendment or supplement of pleadings shall be permitted. All pleadings shall be filed with the Court. The Court shall permit or require such appearances as it deems necessary in each case.
- (2) Statement of Disputed Facts. Within 20 days after service of the answer or, if applicable, a reply, the Committee shall file with the Court a statement of facts that identifies those allegations that the Committee contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. Within 20 days following submission by the Committee, the respondent shall respond to the Committee's statement and, if appropriate, set forth respondent's statement of facts identifying those allegations that the respondent contends are undisputed and those allegations that the respondent contends are disputed and for which a hearing is necessary. In the alternative, within 30 days after service of the answer or, if applicable, a reply, the parties may (i) file a joint statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or (ii) file a joint stipulation of disputed and undisputed facts.

- (3) Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, a party must, no later than 14 days after filing a statement of facts with the Court as required by section 1240.8(a)(2) of these Rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:
- (i) the name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and
 - (ii) a copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such documents.
- (4) Subpoenas. Upon application by the Committee or the respondent, the Clerk of the Court may issue subpoenas for the attendance of witnesses and the production of books and papers before Court or the referee designated by the Court to conduct a hearing on the issues raised in the proceeding, at a time and place therein specified.
- (5) Discipline by Consent.
- (i) At any time after the filing of the petition with proof of service, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion shall include:
 - (A) a stipulation of facts;
 - (B) the respondent's conditional admission of the acts of professional misconduct and the specific rules or standards of conduct violated;
 - (C) any relevant aggravating and mitigating factors, including the respondent's prior disciplinary record; and
 - (D) the agreed upon discipline to be imposed, which may include monetary restitution authorized by Judiciary Law §90(6-a).
 - (ii) The joint motion shall be accompanied by an affidavit of the respondent acknowledging that the respondent:
 - (A) conditionally admits the facts set forth in the stipulation of facts;

- (B) consents to the agreed upon discipline;
- (C) gives the consent freely and voluntarily without coercion or duress; and
- (D) is fully aware of the consequences of consenting to such discipline.

(iii) Notice of the joint motion, without its supporting papers, shall be served upon the referee, if one has been appointed, and all proceedings shall be stayed pending the Court's determination of the motion. If the motion is granted, the Court shall issue a decision imposing discipline upon the respondent based on the stipulated facts and as agreed upon in the joint motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and shall not be used against the respondent, Committee or any other party in the pending proceeding or any other proceedings.

(b) Disposition by Appellate Division.

- (1) Hearing. Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. Formal disciplinary charges may be sustained when the referee finds, by a fair preponderance of the evidence, each essential element of the charge. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court.
- (2) Discipline. In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions, and applicable case law and precedent. Upon a finding that any person covered by these Rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, and deter others from committing similar misconduct.

(c) Applications and Motions to the Appellate Division

Unless otherwise specified by these Rules, applications and motions shall be made in accordance with the rules of the Court in which the proceeding is pending.

§ 1240.9 Interim Suspension While Investigation or Proceeding is Pending

- (a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these Rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation or proceeding under these Rules; (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment, or other clear and convincing evidence; or (5) other uncontroverted evidence of professional misconduct.
- (b) An application for suspension pursuant to this rule may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.
- (c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing.
- (d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).

§ 1240.10 Resignation While Investigation or Proceeding is Pending

- (a) A respondent may apply to resign by submitting to a Court an application in the form prescribed by the Court, with proof of service on the Committee, setting forth the specific nature of the charges or the allegations under investigation and attesting that:
 - (1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent; and
 - (2) the respondent cannot successfully defend against the charges or allegations of misconduct.
- (b) When the investigation or proceeding includes allegations that the respondent has willfully misappropriated or misapplied money or property in the practice of law, the respondent in the application shall:

- (1) identify the person or persons whose money or property was willfully misappropriated or misapplied;
 - (2) specify the value of such money or property; and
 - (3) consent to the entry of an order requiring the respondent to make monetary restitution pursuant to Judiciary Law §90(6-a).
- (c) Upon receipt of an application for resignation, and after affording the Committee an opportunity to respond, the Court may accept the resignation and remove the respondent from office pursuant to Judiciary Law §90(2).

§ 1240.11 Diversion to a Monitoring Program

- (a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:
- (1) the nature of the alleged misconduct;
 - (2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and
 - (3) whether diverting the respondent to a monitoring program is in the public interest.
- (b) Upon submission of written proof of successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion and direct resumption of the disciplinary charges or investigation.
- (c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law §§90(10) and 499.
- (d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

§ 1240.12 Attorneys Convicted of a Crime

- (a) An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section 1240.7(a)(2) of these Rules of the fact of such finding. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation. The obligations imposed by this rule shall neither negate nor supersede the obligations set forth in Judiciary Law §90(4)(c).

- (b) Upon receipt of proof that an attorney has been found guilty of any crime described in subdivision (a) of this section, the Committee shall investigate the matter and proceed as follows:
 - (1) If the Committee concludes that the crime in question is not a felony or serious crime, it may take any action it deems appropriate pursuant to section 1240.7 of these Rules.

 - (2) If the Committee concludes that the crime in question is a felony or serious crime as those terms are defined in Judiciary Law §90(4), it shall promptly apply to the Court for an order (i) striking the respondent's name from the roll of attorneys; or (ii) suspending the respondent pending further proceedings pursuant to these Rules and issuance of a final order of disposition.

- (c) Upon application by the Committee, and after the respondent has been afforded an opportunity to be heard on the application, including any appearances that the Court may direct, the Court shall proceed as follows:
 - (1) Upon the Court's determination that the respondent has committed a felony within the meaning of Judiciary Law §90(4)(e), the Court shall strike the respondent's name from the roll of attorneys.

 - (2) Upon the Court's determination that the respondent has committed a serious crime within the meaning of Judiciary Law §90(4)(d),
 - (i) the Court may direct that the respondent show cause why a final order of suspension, censure or disbarment should not be made; and

 - (ii) the Court may suspend the respondent pending final disposition unless such a suspension would be inconsistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice; and

- (iii) the Court, upon the request of the respondent, shall refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and
 - (iv) the Court, upon the request of the Committee or upon its own motion, may refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and
 - (v) after the respondent has been afforded an opportunity to be heard, including any appearances that the Court may direct, the Court shall impose such discipline as it deems proper under the circumstances.
- (3) Upon the Court's determination that the respondent has committed a crime not constituting a felony or serious crime, it may remit the matter to the Committee to take any action it deems appropriate pursuant to section 1240.7 of these Rules, or direct the commencement of a formal proceeding pursuant to section 1240.8 of these Rules.
- (d) A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent based on the conviction.
- (e) Applications for reinstatement or to modify or vacate any order issued pursuant to this section shall be made pursuant to section 1240.16 of these Rules.

§ 1240.13 Discipline for Misconduct in a Foreign Jurisdiction

- (a) Upon application by a Committee containing proof that a person covered by these Rules has been disciplined by a foreign jurisdiction, the Court shall direct that person to demonstrate, on terms it deems just, why discipline should not be imposed in New York for the underlying misconduct.
- (b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Any or all of the following defenses may be raised:
- (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
 - (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or
 - (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.

- (c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.
- (d) Any attorney to whom these Rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 1240.7(a)(2) of these Rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The respondent shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

§ 1240.14 Attorney Incapacity

- (a) Upon application by a Committee that includes proof of a judicial determination that a respondent is in need of involuntary care or treatment in a facility for the mentally disabled, or is the subject of an order of incapacity, retention, commitment or treatment pursuant to the Mental Hygiene Law, the Court may enter an order immediately suspending the respondent from the practice of law. The Committee shall serve a copy of the order upon the respondent, a guardian appointed on behalf of the respondent or upon the director of the appropriate facility, as directed by the Court.
- (b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these Rules, the Committee, or the respondent, may apply to the Court for a determination that the respondent is incapacitated from practicing law by reason of mental disability or condition, alcohol or substance abuse, or any other condition that renders the respondent incapacitated from practicing law. Applications by respondents shall include medical proof demonstrating incapacity. The Court may appoint a medical expert to examine the respondent and render a report. When the Court finds that a respondent is incapacitated from practicing law, the Court shall enter an order immediately suspending the respondent from the practice of law and may stay the pending proceeding or investigation.

§ 1240.15 Conduct of Disbarred, Suspended or Resigned Attorneys

- (a) Prohibition Against Practicing Law. Attorneys disbarred or suspended shall comply with Judiciary Law §§478, 479, 484 and 486.
- (b) Notification of Clients. Within 10 days of the effective date of an order of disbarment or suspension, the respondent shall notify, by certified mail and, where practical, electronic mail, each client of the respondent, the attorney for each party in any pending matter, the court in any pending matter, and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment or suspension. A notice to a respondent's client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Where counsel has been appointed by a court, notice shall also be provided to the appointing court.
- (c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all respondent's clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.
- (d) Duty to Withdraw From Pending Action or Proceeding. If a respondent's client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment or suspension, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.
- (e) Discontinuation of Attorney Advertising. Within 30 days after being served with the order of suspension or disbarment, the respondent shall discontinue all public and private notices through advertising, office stationery and signage, email signatures, voicemail messages, social media, and other methods, that assert that the respondent may engage in the practice of law.
- (f) Forfeiture of Secure Pass. A respondent who has been disbarred or suspended from the practice of law shall immediately surrender to the Office of Court Administration any Attorney Secure Pass issued to him or her.
- (g) Affidavit of Compliance. A respondent who has been disbarred or suspended from the practice of law shall file with the Court, together with proof of service upon the Committee, no later than 45 days after being served with the order of disbarment or suspension, an affidavit showing a current mailing address for the respondent and that the respondent has complied with the order and these Rules.
- (h) Compensation. A respondent who has been disbarred or suspended from the practice of law may not share in any fee for legal services rendered by another attorney during

the period of disbarment or suspension but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment or suspension. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

- (i) Required Records. A respondent who has been disbarred or suspended from the practice of law shall keep and maintain records of the respondent's compliance with this rule so that, upon any subsequent proceeding instituted by or against the respondent, proof of compliance with this rule and with the disbarment or suspension order or with the order accepting resignation will be available.

§ 1240.16 Reinstatement of Disbarred or Suspended Attorneys

- (a) Upon motion by a respondent who has been disbarred or suspended, with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other notice and proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by clear and convincing evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll of attorneys; the respondent has complied with the rules of the court; the respondent has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the respondent to the practice of law.
- (b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, and any related decision; a completed questionnaire in the form included in Appendix A to these Rules; and proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title. After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in section 520.8 of this Title, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.
- (c) Time of application
 - (1) A respondent disbarred by order of the Court for misconduct may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment.

- (2) A suspended respondent may apply for reinstatement after the expiration of the period of suspension or as otherwise directed by the Court.
- (d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension upon an order of the Court. No more than thirty days prior to the expiration of the term of suspension the respondent must file with the Court and serve upon the Committee an application for reinstatement together with an affidavit stating that the respondent has fully complied with the requirements of the suspension order and has paid any required fees and costs. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in opposition.
- (e) The Court may establish an alternative expedited procedure for reinstatement of attorneys suspended for violation of the registration requirements set forth in Judiciary Law §468-a.

§ 1240.17 Reinstatement of Incapacitated Attorneys

- (a) Time of application. A respondent suspended on incapacity grounds pursuant to section 1240.14 of these Rules may apply for reinstatement at such time as the respondent is no longer incapacitated from practicing law.
- (b) Necessary papers. Papers on an application for reinstatement following suspension on incapacity grounds shall include a copy of the order of suspension, and any related decision; proof, in evidentiary form, of a declaration of competency or of the respondent's capacity to practice law; a completed questionnaire in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.
- (c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the respondent's disability or incapacity has been removed and the respondent is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the respondent's disability or incapacity has been removed, including a direction of an examination of the respondent by such qualified experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent. In a proceeding under this section, the burden of proof shall rest with the suspended respondent.
- (d) Where a respondent has been suspended by an order in accordance with the provisions of section 1240.14 of these Rules and thereafter, in proceedings duly taken, the respondent has been judicially declared to be competent, the Court may dispense with further evidence that the respondent's disability or incapacity has been

removed and may direct the respondent's reinstatement upon such terms as are deemed proper and advisable.

- (e) Waiver of Doctor-Patient Privilege Upon Application for Reinstatement. The filing of an application for reinstatement by a respondent suspended for incapacity shall be deemed to constitute a waiver of any doctor-patient privilege existing between the respondent and any psychiatrist, psychologist, physician, hospital or facility who or which has examined or treated the respondent during the period of disability. The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician, hospital or facility by whom or at which the respondent has been examined or treated since the respondent's suspension, and the respondent shall furnish to the Court written consent to each to divulge such information and records as may be requested by court-appointed experts or by the Clerk of the Court.
- (f) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with Judiciary Law §90(6).

§ 1240.18 Confidentiality

- (a) All disciplinary investigations and proceedings shall be kept confidential by Court personnel, Committee members, staff, and their agents.
- (b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe the free interchange of information among the Committees.
- (c) All proceedings before a Committee or the Court shall be closed to the public absent a written order of the Court opening the proceedings in whole or in part.
- (d) Application to Unseal Confidential Records or for Access to Closed Proceedings. Unless provided for elsewhere in these Rules, an application pursuant to Judiciary Law §90(10) to unseal confidential documents or records, or for access to proceedings that are closed under these Rules, shall be made to the Court and served upon such other persons or entities as the Presiding Justice may direct, if any, and shall specify:
 - (1) the nature and scope of the inquiry or investigation for which disclosure is sought;
 - (2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and
 - (3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.

- (e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any respondent who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.

§ 1240.19 Medical and Psychological Evidence

Whenever a respondent intends to offer evidence of a medical or psychological condition in mitigation of allegations or charges, he or she shall give written notice to the Committee of the intention to do so no later than 20 days before the scheduled date of any appearance, argument, examination, proceeding, or hearing during which the respondent intends to offer such evidence to the Court, referee, Committee, subcommittee thereof, or counsel to a Committee. Said notice shall be accompanied by (a) the name, business address, and curriculum vitae of any health care professional whom the respondent proposes to call as a witness, or whose written report the respondent intends to submit; and (b) a duly executed and acknowledged written authorization permitting the Committee to obtain and make copies of the records of any such health care professional regarding the respondent's medical or psychological condition at issue.

§ 1240.20 Abatement; Effect of Pending Civil or Criminal Matters; Restitution

- (a) Any person's refusal to participate in the investigation of a complaint or related proceeding shall not require abatement, deferral or termination of such investigation or proceeding.
- (b) The acquittal of a respondent on criminal charges, or a verdict, judgment, settlement or compromise in a civil litigation involving material allegations substantially similar to those at issue in the disciplinary matter, shall not require termination of a disciplinary investigation.
- (c) The restitution of funds that were converted or misapplied by a person covered by these Rules shall not bar the commencement or continuation of a disciplinary investigation or proceeding.

§ 1240.21 Appointment of Attorney to Protect Interests of Clients or Attorney

- (a) When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these Rules, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.

- (b) Compensation. The Court may determine and award compensation and costs to an attorney appointed pursuant to this rule, and may direct that compensation of the appointee and any other expenses be paid by the attorney whose conduct or inaction gave rise to those expenses.
- (c) Confidentiality. An attorney appointed pursuant to this rule shall not disclose any information contained in any client files without the client's consent, except as is necessary to carry out the order appointing the attorney or to protect the client's interests.

§ 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement

- (a) Resignation of attorney for non-disciplinary reasons.
 - (1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affidavit or affirmation in the form included in Appendix B to these Rules. A copy of the application shall be served upon the Committee and the Lawyers' Fund for Client Protection, and such other persons as the Court may direct.
 - (2) When the Court determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.
- (b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit in a form approved by the Court. The Court may grant the application and restore the attorney's name to the roll of attorneys; or deny the application with leave to renew upon proof that the applicant has successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title, or the New York State Bar Examination described in section 520.8 of this Title; or take such other action as it deems appropriate.

§ 1240.23 Volunteers/Indemnification

Members of the Committee, as well as referees, bar mediators, bar grievance committee members when assisting the Court of the Committee, and pro bono special counsel acting pursuant to duties or assignments under these Rules, are volunteers and are expressly authorized to participate in a State-sponsored volunteer program, pursuant to Public Officers Law §17(1).

**“Meaning of new Uniform Rules on attorney
discipline,”
State Bar News, March/April 2016**

Meaning of new Uniform Rules on attorney discipline

By Christina Couto

In an attempt to interpret New York's revised attorney discipline rules, which take effect July 1, some of New York's most highly esteemed judges, attorneys and law professors convened during Annual Meeting to discuss the upcoming changes.

"The new statewide rules do not come with an instruction manual," said Michael S. Ross of New York City (Law Offices of Michael S. Ross). "Which is why it is important to talk with opinion leaders and thought leaders." He moderated the program, "New Era in Attorney Ethics and Discipline: Ethics and Procedure of Attorney Discipline Under the New Uniform Rules," on January 26.

New Uniform Rules

The new rules aim to streamline the way complaints are handled and include provisions for notifying the accused lawyer earlier during an investigation, creating opportunities for attorneys to participate in treatment programs after substance abuse-related complaints and offering new ways for lawyers to obtain information about their cases.

"I think what the new rules are trying to do is, procedurally, give us a framework and ultimately, a more equitable statewide system," said panelist A. Gail Prudenti (School of Law at Hofstra University), former chief administrative judge of the State of New York and chair of the Commission on Statewide Attorney Discipline.

The new rules are a "step in the direction for not only procedural unity, but more consistent sanctions in the future," she added.

Immediate Past President Glenn Lau-Kee of New York City (Kee & Lau-Kee) said the new rules represent a significant improvement to attorney discipline and "the expectation is that this will move things along and help the efficiency of the system."

Calling the new disciplinary rules "an amazing achievement," Presiding Justice Karen K. Peters of the Third Department said the changes in the approach to discipline are an "important response to a community need."

"Antiquated system"

Under the current system, each of the four Appellate Division departments use different procedural rules to hear and investigate complaints against lawyers and decide sanctions.

Admitting the system was not "broken," but "antiquated," then-Chief Judge Jonathan Lippman created the Commission on Statewide Attorney Discipline in March 2015 to review New



An all-star cast—Prominent New York judges, attorneys and law professors dissected the updated Rules of Professional Discipline, which take effect July 1. Panelists included, from left, Immediate Past President Glenn Lau-Kee, Judge A. Gail Prudenti, Sean M. Morton, Judge Karen Peters, Judge Richard T. Andrias and Gregory J. Huether. [Photo by Brad Hamilton]

York's attorney disciplinary system and offer recommendations on ways to enhance the efficiency and effectiveness of the attorney discipline process.

In its report, the commission noted that "New York has a uniquely decentralized system for handling attorney grievances, with four different sets of procedures administered by eight regional grievance offices."

Three public hearings were held around the state to obtain input from legal consumers, lawyers, bar groups,

advocates and others. President David P. Miranda testified at a July 2015 hearing, saying "affording due process to anyone accused of wrongdoing is certainly a fundamental requirement of our legal system."

Ultimately, the commission recommended 11 reforms, 10 of which were adopted in December 2015 by the Administrative Board of the Courts, which included Lippman and the presiding justices of the four appellate divisions.

The 11th reform, which was a pro-

posal to establish a statewide coordinator of attorney discipline, was rejected by the State Bar's House of Delegates in November 2015.

In addition to Prudenti, Lau-Kee and Peters, other panelists included Judge Richard T. Andrias (First Department), Gregory J. Huether, chief attorney (Fourth Department, Grievance Committee) and Sean M. Morton, deputy clerk of the Appellate Division, Third Department. ♦

Couto is NYSBA's senior media writer.