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CRIMINAL DEFENSE LAWYERS

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ETHICS MONOGRAPH
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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, that 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.

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Michael S. Ross
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I. **INTRODUCTION.**

To be an ethical criminal defense attorney, a lawyer must have a keen understanding of ethical rules as they impact on criminal cases. Six ethics issues, in particular, are important in the everyday lives of criminal defense attorneys. They are: 1) the ethics of legal fees in criminal cases; 2) the ethics of withdrawing from a case; 3) the important privilege issue relating to the self-defense doctrine; 4) the no-contact rule (Rule 4.2 of the New York Rules of Professional Conduct [the “Rules”]); 5) conflicts of interests and conflict waivers as they relate to criminal cases; and 6) the attorney’s role in making tactical decisions as it relates to the issue of ineffective assistance of counsel. The discussion of these topics below should provide criminal defense attorneys with a resource to consider and address these issues in their everyday practice.

II. **KEY FEE ISSUES FOR CRIMINAL DEFENSE ATTORNEYS.**

A. **THE NEED FOR A RETAINER AGREEMENT.**

1. New York’s written engagement letter rule for non-matrimonial and non-contingency fee cases (and for cases not governed by other special court rules) is captured within 22 N.Y.C.R.R. Sections 1215.1 and 1215.2, which provide that:
“§ 1215.1 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term ‘client’ shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) Explanation of the scope of the legal services to be provided;

(2) Explanation of attorney’s fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions

This section shall not apply to: (1) representation of a client where the fee to be charged is expected to be less than $3000, (2) representation where the attorney’s services are of the same general kind as previously rendered to and paid for by
the client, or (3) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), (4) or representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.”

2. Although New York’s written engagement letter rule was not intended to create a hard and fast disciplinary-like rule which would otherwise require an attorney to be disciplined for failing to issue a retainer agreement in a single case, the Departmental Disciplinary Committee for the First Judicial Department has (in this author’s experience) been issuing Admonitions (i.e., private discipline pursuant to 22 N.Y.C.R.R. Section 605.2[a][1]) based upon isolated failures to provide retainer agreements by lawyers. This seems at odds with the view of the Appellate Division, Second Judicial Department, in Rubenstein, P.C. v. Ganea, 41 A.D.3d 54, 60-61 (2d Dept. 2007). In Rubenstein, the Court clearly expressed the view that:

“The language of 22 NYCRR 1215.1 contains no express penalty for noncompliance (see 22 NYCRR 1215.1; Beech v. Gerald B. Lefcourt, P.C., supra; Matter of Feroleto, 6 Misc.3d 680, 682, 791 N.Y.S.2d 809). Indeed, the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients. This intent was described by Chief Administrative Judge Jonathan Lippman upon the rule’s adoption, that ‘this [rule] is not about attorney discipline in any way, shape or form, and we certainly do not expect in any significant degree there to be a large number of disciplinary matters coming out of this rule’ (Caher, Rule Requires Clients Receive Written Letters of Engagement, NYLJ, Jan. 22, 2002, at 1, col. 1, and quoted in Matter of Feroleto, supra at 683). The purpose of the rule therefore is to aid the administration of justice by prodding attorneys to memorialize the terms of their retainer agreements containing basic information regarding fees, billing, and dispute resolution which, in turn, minimizes potential conflicts and misunderstandings between the bar and clientele.” (Emphasis added.)

3. In any event, where an attorney does not have a retainer agreement, the lawyer is still permitted to be paid in quantum meruit for services rendered
where the attorney is not discharged for cause. See, e.g., Nabi v. Sells, 70 A.D.3d 252 (1st Dept. 2009); Miller v. Nadler, 60 A.D.3d 499 (1st Dept. 2009) (citing Rubenstein, P.C. v. Ganea, supra); Brooks v. Cohen, Jayson & Foster, 2010 U.S. Dist. LEXIS 8959, at *8 (S.D.N.Y. Aug. 26, 2010). In Felix v. Law Office of Thomas F. Liotti, N.Y.L.J., 25 Misc.3d 1239(A) (Sup. Ct. Nassau Co. 2009), the court granted judgment in favor of a former client in the amount of two-thirds of the flat fee which had been paid for work in a criminal case which had never fully been performed and in connection with which the attorney was discharged for cause. The court suggested that it might well have required the attorney to return all of the fees given the discharge for cause, but the former client had only asked for the return of “unearned fees.” Here, because the attorney performed some work before the discharge for cause, the court considered the former client’s request as not seeking a refund of all fees.

4. A client who is sent a retainer agreement and who benefits from the retainer agreement, but who fails to sign the retainer agreement, may not be able to escape the terms of that agreement. In Kushner v. Eliopulos, 27 Misc.3d 1218(A) (Civ. Ct. Kings Co. 2010), the court granted summary judgment to a criminal attorney against a husband and wife, both of whom had asked the attorney to represent the wife in a pending criminal case. The attorney sent the couple a retainer agreement, but the agreement was never signed. Nonetheless, the court granted summary judgment in favor of the attorney on quantum meruit grounds (analyzing the nature of the services provided as reflected in documentary evidence and applying the factors of Rule 1.5). The court dismissed the counterclaims for malpractice, breach of contract, intentional infliction of emotional distress and breach of professional responsibility.

B. NON-REFUNDABLE AND MINIMUM FEES.

1. Non-refundable fees have now been clearly prohibited in New York by Rule 1.5(d), which provides that “[a] lawyer shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated.”

2. However, it is not entirely clear what the Appellate Divisions consider to be an acceptable “minimum fee.” See Matter of Cooperman, 83 N.Y.2d 465, 475 (1994) (“Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to
professional discipline.”). Some courts in other states have permitted minimum fee agreements. By way of example, the Michigan Supreme Court, in Grievance Administrator v. Cooper, 757 N.W.2d 867 (Sup. Ct. Mich. 2008), found no violation of disciplinary rules based on an attorney’s use of a retainer agreement that required the client to pay a minimum fee written as follows:

“1. Client agrees to pay Attorney a MINIMUM FEE OF $4,000.00 which shall be payable as follows:

Retainer $4,000.00

Balance $-0-

..."

This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.

2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.

3. Hourly rate: Attorney $195.00

Assistant $______

4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above. ....

11. ... The Client is entitled to terminate this agreement subject to its contractual liability to the law firm for services rendered.”

In his concurring opinion to the Order which dismissed the ethics charges against the attorney, Michigan Supreme Court Justice Marilyn J. Kelly stated:

“However, counsel might be aided in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were
substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.”

It remains to be seen whether New York courts will eventually adopt the reasoning in Cooper. C.f. Matter of O’Farrell, 942 N.E.2d 799, 807 (Ind. 2011) (noting that Cooper lacks sufficient facts and is difficult to understand). In any event, the retainer language in the Cooper case could well be improved if: (1) the task (i.e., the scope of the work) to be performed by the attorney as part of the minimum fee were clearly defined; and (2) the agreement more clearly explained that the minimum fee is the least the attorney will charge for completing the task. See Professor Roy Simon, “Interesting Provisions in the New Rules – Part I Rule 1.0 through Rule 1.6,” The New York Professional Responsibility Report, p. 4 (April 2009).

C. THE RIGHT TO KEEP FEES UPON EARLY DISCHARGE.

1. Most criminal law practitioners now understand that written retainer agreements are required in every case, but many still fail to understand the mechanics of keeping their fees in the event they are discharged before the case is completed.

2. New York State Bar Association (“NYSBA”) Committee on Professional Ethics Opinion No. 570 (1985) (and various other opinions and authorities) allow a lawyer to deposit advance fees in their operating account (and not their escrow account).¹ Thus, a dispute with a client will typically not “freeze” the right of the attorney to “keep” fees already paid, because the fees would typically not be considered “disputed” escrow funds which are otherwise subject to Rule 1.15(b)(4).²

3. Where an attorney is discharged “without cause” prior to the completion of a case, the attorney is entitled to be paid quantum meruit for services

¹Advisory ethics opinions are not binding on the courts, but can be helpful in understanding an ethics issue.

²Criminal law practitioners should recall that imbedded within the escrow rules is Rule 1.1(d)(2), which requires that attorneys make accurate entries in their ledger books or similar records “and in any other books of account kept by them in the regular course of their practice....” This provision would otherwise require that where an attorney receives cash, he or she must make a proper contemporaneous entry of that receipt in the attorney’s regular books and records.

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rendered. See generally United States v. Brumer, 420 F.Supp. 206 (S.D.N.Y. 2005). The factors to be considered are much the same as in Rule 1.5(a)(1)\(^3\), which governs what is or is not an “excessive” fee in New York:

“The factors a court considers in making a quantum meruit determination of the reasonableness of attorneys’ fees include: (1) the difficulty of the questions involved; (2) the skill required to handle the problem; (3) the time and labor required; (4) the lawyer’s experience, ability and reputation; and (5) the customary fee charged by the Bar for similar

\(^3\)Rules 1.5(a) and (b) provide, in pertinent part:

“(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services....

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.”

4. Of course, where many criminal law practitioners find difficulty is in proving what work was performed – a key component of the quantum meruit analysis.

a. The burden of keeping adequate and complete records to support a criminal lawyer’s entitlement to fees upon discharge rests upon the attorney. See Wong v. Kennedy, 853 F.Supp. 7 (E.D.N.Y. 1994).

b. Although billing records are the best manner for proving work performed, courts may allow (to a greater or lesser extent) “reconstruction” of work performed. In certain areas of law, particularly where fees are contingent (such as contingent fee personal injury or commercial work) or are fixed in nature (such as criminal law), attorneys sometimes do not maintain contemporaneous records of time spent on the matter. In such instances, if the attorney is discharged without cause, the attorney will be paid on quantum meruit basis based upon the attorney’s “reconstruction” of time from available diaries and other papers in the client file. See, e.g., Brumer, 420 F.Supp.2d at 211 n.4; D’Jamoos v. Griffith, 2008 U.S. Dist. LEXIS 11197 (E.D.N.Y. Feb. 29, 2008) (court considered reconstruction of time by commercial attorney who was discharged without cause over a period of thirteen years, and where the reconstruction seemed reasonable, credited the attorney for the full amount sought [id. at *11-13]; and where the attorney’s records and recollection were not strong, applied a percentage discount); Lake v. Schoharie County Commissioner of Social Services, 2006 U.S. Dist. LEXIS 4916, at *23 (N.D.N.Y. May 16, 2006) (court accepted attorney’s reconstruction of time records, including grouped “block” time entries which combined multiple tasks into a single time entry); Mendoza v. Blum, 602 F. Supp. 200, 203 (S.D.N.Y. 1985) (court accepted attorney’s reconstruction of time from diaries, document and case files as reasonable). Nonetheless, an attorney’s best chance for being awarded the full amount of quantum meruit fees requested is by proving work performed through contemporaneous time records.

5. Imbedded within principles governing early discharge of a lawyer are the related principles of return of funds and real property of the client (including client files). Rule 1.16(e) provides: “Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall ... deliver[] to the client all papers and property to which the client is entitled,
promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.” Among other things, the attorney must return client files. However, Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson, 91 N.Y.2d 30 (1997), stands for the proposition that a client is not entitled to a copy of his or her file if the client still owes the attorney money, and the client is responsible for any assemblage and delivery charges in terms of producing the files to the client. And, to be clear, upon discharge, the client is entitled to an “accounting” of fees kept by the attorney.

D. **NEW YORK’S REFERRAL/SHARED FEE RULE.**

1. Rule 1.5(g) permits a division of fees among lawyers, subject to the following conditions:

   “A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

   (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

   (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client’s agreement is confirmed in writing; and

   (3) the total fee is not excessive.”

2. Although Rule 1.5(g) does not require anything more than the assumption of joint responsibility, as opposed to actual work on the case, in order to justify sharing in a fee, some courts are still of the view that the original attorney is required to have performed “some work” on the case before giving that case to the second attorney. Cf. Jontow v. Jontow, 33 A.D.2d 744 (1st Dept. 1970) (interpreting prior, but somewhat similar, Rule).

3. On occasion, the lawyer who has been referred a case will try to defeat his or her obligation to pay the agreed upon referral fee, based upon an argument that, for example, the client did not agree to the referral fee, or that there was some other ethical violation on the part of the referring lawyer. Such a claim might be rejected by a court. For example, in Estate of Carter, 120 Misc.2d
1009 (Sup. Ct. N.Y. Co. 1983), a law firm tried to avoid its obligation to pay the estate of a referring attorney the fifty percent agreed upon upon referral fee. The court recognized that the client may not have known precisely that a division of fees would be made, as required by Disciplinary Rule (“D.R.”) 2-107 (the former fee sharing Rule) of the former New York Lawyer’s Code of Professional Responsibility. However, the Carter court found that the client had to have known that the referring lawyer had been involved in the case to some extent; the client was not disadvantaged; and “[a]ny further elaboration or specificity regarding the exact arrangement between the collaborating attorneys is not ethically mandated by this code provision.” 120 Misc. at 1018. The Carter court further rejected the tactic of refusing to pay a referral fee based upon some minor ethical lapse by the referring attorney:

“In any event, it does not appear that there has been any intentional subterfuge on the part of either firm regarding their fee arrangement. This method of dealing admittedly may not strictly comport with the guidelines of [former] DR 2-107 [the fee sharing Rule]. Whatever minor transgressions one might perceive, this court cannot condone this defendant’s use of the code’s provisions as a shield to avoid its legal, ethical and moral obligations. It would be a mockery of justice if this court were to allow the defendant to raise ethical rules, which it may have equally violated, to shield itself from a legitimate claim and thereby unjustly enrich itself.” Id.

4. If an attorney affirmatively abandons any continued relationship with the referred case and the lawyer to whom the case was referred, the referral fee may be lost. See, e.g., Matter of Abreu, 168 Misc. 2d 229 (Surr. Ct. Bronx Co. 1996) (referring lawyer who “refused to contribute more substantially” jeopardizes referral fee). Stated another way, improper withdrawal or discharge for cause may wipe out the lawyer’s right to be compensated even on a quantum meruit basis.

5. A lawyer will not be entitled to share in a fee if the sharing is based upon joint responsibility for work performed and the joint responsibility would violate the prohibition against conflicts of interest. See, e.g., Pessoni v. Rabkin, 220 A.D.2d 732 (2d Dept. 1995) (court denied attorney legal fees where representing parent drivers of car and passenger children created conflict of interest); N.Y. State Bar Op. 349 (“if it reasonably appears ... that the husband is likely to be brought in as a defendant in a third party claim that his negligence caused all or part of the wife’s injuries, the lawyer should not
in the absence of special circumstances represent both husband and wife in an action....”); Matter of Kelly, 23 N.Y.2d 368, 376, 378 (1968) (simultaneous representation of multiple clients in the same case is fraught with potential conflicts, which full disclosure may not cure); cf. Matter of Sokoloff v. Sokoloff, 82 Misc.2d 797 (N.Y.Co. Fam.Ct. 1975) (lawyer who withdrew from case because of obvious conflict in his representation of husband and wife was constructively discharged for cause and, therefore, he was not entitled to be paid for any work performed prior to his withdrawal); Wishnevesky v. Knutson, Index No. 2670-01 (S.Ct. Suffolk Co. Sept. 29, 2003) (unpublished opinion) (court granted referral fees to an attorney who represented both a driver and passenger in a car accident, where the court found that the passenger had waived her right to sue the driver after being advised of the conflict and after the passenger had confirmed that he had no intention of filing an action against the driver).


“In our view, where a lawyer is unable to assume sole responsibility for a matter due to a conflict of interest, that lawyer is also disqualified from assuming joint responsibility and, therefore, the referring lawyer may not accept a referral fee from the receiving lawyer.”

Citing, Nassau County Bar Op. 98-07 (1998) (an attorney who is barred from handling a matter due to a conflict of interest may not share in the fee for that matter after the attorney refers the matter to another lawyer); accord, ABA Informal Op. 1088 (1968) (other internal citations omitted).

7. The sharing of fees in criminal cases raises particularly sensitive issues.

a. Sharing fees in criminal cases is a particularly risky matter because the somewhat simple principles of Rule 1.5(g) must be considered in light of the wealth of case law concerning whether a conflict is waivable. And, to be clear, the waiver must now be in writing pursuant to Rule 1.7(b)(4).

b. If a lawyer claimed that he or she has assumed “joint responsibility” with co-counsel in a criminal case, a court or grievance committee may well ask how that joint responsibility was assumed and how it was acted upon. For example, has the attorney reviewed the pleadings, monitored the case, etc.?
c. Another variant of fee sharing may be deemed to have occurred in a criminal case when “lead counsel” takes funds from the lead or monied defendant to recommend and pay attorneys for codefendants. The situation permits lead counsel to constructively or actually take referral fees from the referred attorneys and, at the same time, lead counsel’s control of the funds places lead counsel in a position to control the other co-defendant’s counsel in such a way as to create a serious conflict of interest. If such a situation occurs, a court may conduct a full hearing to determine whether the codefendants’ right to counsel was violated. See United States v. Aiello, 814 F.2d 109 (2d Cir. 1987). The Second Circuit noted in Aiello:

“The affidavits submitted, including those submitted by counsel, if true, raise disquieting questions about trial counsels’ sensitivity to issues of professional responsibility. In addition to the alleged basic conflict of interest, there are questions involving referral fees and fee splitting and withholding. Appellants also cite other unrelated conflicts of interest, such as neglecting to discuss potential conflicts of interest with clients, contacting a defendant without the knowledge or approval of that individual’s attorney, and failing to preserve the confidences of a client. The record before us is far too incomplete to reach any conclusions on these allegations, but we note them because they are troublesome ones that may not properly be ignored.” 814 F.2d at 113 n.2 (emphasis added).

On remand in the Aiello case, District Court Judge Weinstein seemingly side-stepped making potentially critical findings of counsel, but did say that “[f]ee splitting and use of referral fees without the explicit consent of the client is always improper.” 681 F.Supp. 1019, 1026 (E.D.N.Y. 1988).

d. Issues relating to the waiver of conflicts in criminal cases are discussed infra at pp. 23-28.

III. The Ethics Of Withdrawing From A Case.

A. The Rule governing a lawyer’s withdrawal from a case is Rule 1.16. For criminal law practitioners, Rule 1.16 is often invoked when the attorney believes that he or she
is being asked to pursue frivolous defenses or theories; when the attorney believes that the client is using the attorney’s services to perpetrate a fraud or crime; when the client insists on taking actions with which the attorney has a fundamental disagreement; when the client fails to cooperate or otherwise renders the representation unreasonably difficult; and when the client “deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.” In New York, Rule 1.16 requires that the client have money, but not be willing to pay, in order to move to withdraw based upon fees that are due.

B. Although chapters could be written about the practical issues for criminal lawyers arising out of Rule 1.16, there are several important points to keep in mind:

1. A lawyer may move to withdraw when the client is mistreating him or her. For example, in Meyler v. City University (http://vertumnus.courts.state.ny.us/claims/search/display.html?terms=&url=/claims/html/2012-038-505.html) (Ct. Claims Jan. 17, 2012), the Court of Claims granted two lawyers’ motions to withdraw on the basis of their client’s hostile and insulting response to the withdrawal motions. The lawyers stated that they were retained to pursue the claim after it had been commenced by another lawyer, but that upon reviewing the file in the matter, the lawyers determined that they did not wish to pursue the claim. The claimant refused to consent to the proposed withdrawal, but the claimant’s opposition did not articulate the grounds for his opposition. However, in asserting that he had been “denied justice,” the claimant made “substantial disparaging remarks” about the lawyers. The court ruled that the claimant’s attacks on the lawyers required that the lawyers be relieved as counsel for the claimant. The court stated that the claimant had made “bald attacks upon counsel’s integrity and professionalism – to the extent of alleging that [the lawyers] have broken the law,” which demonstrated that the attorney-client relationship had irretrievably broken down, and that, under such circumstances, relieving counsel was appropriate. See also Casper v. Lew Lieberman & Co., Inc., 1999 U.S. Dist. LEXIS 777 (S.D.N.Y. May 26, 1999) (granting an attorney’s motion to be relieved as counsel where there was a “fundamental breakdown of the trust required to maintain a working attorney-client relationship”; the court found that “irreconcilable differences” had arisen between the attorney and client because of, among other things, the client’s lying, accusations of unprofessional behavior, lack of cooperation and failure to communicate).

2. Somewhat conversely, not every accusation made by a client against a lawyer will create a “conflict” sufficient to require the attorney to move to withdraw. There is a body of literature in the field of criminal law, where conflict issues are treated very seriously, which explains that mere criticism of a defense
attorney by his or her client does not require that the lawyer withdraw. For example, it is well established in the Second Circuit that a criminal defendant’s “commonplace complaints” and allegations of inadequate representation against counsel are insufficient to establish that counsel had a conflict of interest, or to create a conflict of interest, and, accordingly, are insufficient to make out a claim of ineffective assistance of counsel. The Second Circuit explained the rationale behind this rule at length in United States v. Moree, 220 F.3d 65, 71-72 (2d Cir. 2000):

“We made clear [in United States v. White, 174 F.3d 290 (2d Cir. 1999)] that ‘an actual conflict of interest’ does not necessarily arise every time that an attorney responds to allegations of incompetent representation or contradicts his client in open court. Recognizing that a trial court has the obligation to enquire into the basis of substantial complaints regarding counsel’s performance, we declined to adopt a broad rule that would give a defendant the unilateral power to establish a ‘conflict of interest’ simply by ‘expressing dissatisfaction with his attorney's performance.’

... 

Defendants for whom attorneys have been appointed under the Criminal Justice Act very commonly complain to the court in the early stages of the representation in an effort to have a new attorney appointed. It is commonplace for such a defendant to allege that the attorney is not paying sufficient attention to his case, has not come to see him in prison, has not undertaken sufficient investigation, is not making necessary motions, is not calling witnesses, or is trying to induce the defendant to plead guilty. If the mere making of such an accusation, regardless of lack of justification, ipso facto resulted in a conflict of interest because the attorney cannot defend himself without contradicting his client, district courts would lose control of the criminal cases before them. Defendants represented by appointed attorneys would effectively be able to change attorneys at will. Judges could be prevented from starting trials, and trials conducted by an attorney who had been previously accused of such dereliction would be subject to subsequent invalidation on the theory that the defendant was represented at trial by an attorney who had an actual conflict of interest.” (Citations omitted.)
3. The Second Circuit has, on numerous occasions, reiterated the rule that a mere, unsupported allegation of attorney misconduct does not automatically lead to a conclusion that the attorney must withdraw or be disqualified. See, e.g., Bussey v. Greiner, 320 Fed. Appx. 54 (2d Cir. Apr. 7, 2009) ("Bussey has identified a commonplace disagreement about trial tactics, which we have held is insufficient to give rise to an actual conflict"); United States v. Johnson, 265 Fed. Appx. 8 (2d Cir. Feb. 19, 2008) ("Mere expressions of dissatisfaction with an attorney’s performance do not establish the existence of an actual conflict"); United States v. John Doe #1, 272 F.3d 116, 123 (2d Cir. 2001) ("... [T]his Court has held that ‘where a defendant voices a ‘seemingly substantial complaint about counsel,’ the court should inquire into the reasons for dissatisfaction.’ However, if the reasons proffered are insubstantial and the defendant receives competent representation from counsel, a court’s failure to inquire sufficiently or to inquire at all constitutes harmless error.") (citations omitted).

4. Once a lawyer has decided that it is necessary or appropriate to move to withdraw, the lawyer must do so in an ethical manner. Specifically, the lawyer should move to withdraw *in camera* and *ex parte*. See, e.g., N.Y. State Bar Assoc. Op. 645; Casper v. Lew Lieberman & Co., 1999 U.S. Dist. LEXIS 777, *4 (S.D.N.Y. May 26, 1999) (law firm’s “version of the conflict [on which the motion to withdraw was based] has been submitted to the Court *in camera* and supports their position on the need for withdrawal”); Matter of Manfredi, N.Y.L.J., Feb. 13, 1996, p. 35, col. 2 (Sur. Ct. Westchester Co. 1996) (in support of attorney’s successful motion to withdraw as counsel, the attorney made *in camera* showing of facts relevant to the withdrawal motion). In moving to withdraw, the lawyer *cannot* disclose client confidences without client consent. See N.Y. State Bar Op. 681 (1996) (without client consent, attorney is not permitted to disclose client confidences or secrets in support of motion to withdraw, but attorney may disclose client secrets if ordered by the court to do so); see also Fried v. Village of Patchogue, 11 Misc.3d 1068(A) (Sup. Ct. Suffolk Co. Mar. 13, 2006) (where attorney withdraws fraudulent papers previously submitted to the court and seeks to withdraw as counsel, lawyer cannot explain the basis for withdrawal); Bar Assoc. of Nassau Co. Op. 2003-1 (2003) (motion to withdraw does not permit attorney to reveal client confidences without client consent); Professor Roy Simon, Simon’s New York Rules of Professional Conduct Annotated (2012 Edition), “Commentary” to Rule 1.16(c), pp. 640-41 (“[M]oving to withdraw does not relieve an attorney of the duty of confidentiality. Therefore, in moving to withdraw, a lawyer should not initially tell the court the reasons for moving to withdraw unless the client has consented to the disclosures.... If the client does not consent to let the
attorney disclose the reasons for seeking to withdraw, the court may nevertheless order the attorney to disclose the reasons. At that point, the attorney may reveal non-privileged confidential information in support of the motion to withdraw ‘to comply with other law or court order.’ However, a court has no authority to order an attorney to disclose information protected by the attorney-client privilege, absent a waiver, so the attorney may not reveal confidential information that is protected by the attorney-client privilege.”).

IV. **The Important Privilege Issue Relating To The Self-Defense Doctrine.**

A. New York Rule 1.6(b)(5)(i) provides in relevant part that “a lawyer may reveal or use confidential information[4] to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct.” A.B.A. Model Rule 1.6(b)(5) is different from the New York Rule, and provides, in pertinent part, that a “lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”

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

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4Rule 1.6(a) defines “Confidential information” as consisting “of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”
Also, because certain such claims are dismissed before an attorney is required to testify, the need for the attorney’s testimony can only be determined by a court.

C. In its Opinion 1859 (Jun. 6, 2012), the Virginia State Bar Standing Committee on Legal Ethics referred to and followed A.B.A. Formal Opinion 10-456. Virginia Opinion 1859 expressed the view that a criminal defense lawyer should not disclose information relating to a former client’s case in response to an informal request by a prosecutor who is preparing an answer to the former client’s claim, in a post-trial relief proceeding, that he had received ineffective assistance of counsel at trial. The Opinion stated that defense lawyers must bear in mind that the information being sought by the prosecutor is confidential information protected by Virginia Rule 1.6, and that the self-defense exception permits disclosures of Rule 1.6 material only to the extent “reasonably necessary” to defend the lawyer against the claims made against her/him. The Virginia Opinion expressed the view that the prudent course of action for a lawyer faced with this situation is to resist the prosecutor’s request and only to provide the prosecutor with information pursuant to a court order and under court supervision. This will protect the lawyer from inadvertently violating Rule 1.6 by producing information that a court or disciplinary authority later determines went beyond the permissible scope of disclosure under the self-defense exception.

D. Whether the views expressed by A.B.A. Formal Opinion 10-456 and Virginia Bar Opinion 1859 would be adopted by a New York court is far from clear; and, indeed, in two separate 2011 decisions, the United States District Court for the Southern District of New York has taken seemingly opposing views on this issue.

1. In Melo v. United States, 825 F. Supp. 2d 457, 463 n.2 (S.D.N.Y. 2011) – a case concerning a claim of ineffective assistance in the context of a petition for habeas corpus – the court held that “an ABA ethics opinion is not binding on this Court,” and further noted that even if A.B.A. Formal Opinion 10-456 “were controlling, the Opinion does not purport to prohibit an attorney from providing an affidavit to the Government when confronted with an ineffectiveness of counsel claim in a habeas petition.”

2. On the other hand, in Azzara v. United States, 2011 U.S. Dist. LEXIS 10971, 5-6 (S.D.N.Y. 2011) – another case concerning a claim of ineffective assistance in the context of a petition for habeas corpus – the court adhered to the reasoning of A.B.A. Formal Opinion 10-456, and held that, even despite a waiver of the attorney-client privilege, the attorney could not provide the court with an affidavit concerning his services unless the client executed a consent form. In particular, the court held as follows:
“Cognizant of ABA Comm. on Eth. And Prof’l Responsibility, Formal Opinion 10-456 [sic] (July 14, 2010), the Court is sending a document labeled ‘Informed Consent’ to [the petitioner] (a copy of which is attached to this order). [The petitioner] must execute this document within 60 days from today’s date and return it to the court. If the document is not received by the court within 60 days from today’s date, the court will deny the § 2255 motion, on the ground that the movant failed to authorize the disclosure of information needed to permit the Government to respond to the motion.”

V. **THE NO-CONTACT RULE (RULE 4.2).**

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

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

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

B. This new Rule takes the place of former D.R. 7-104(A), which provided that “[d]uring the course of the representation of a client a lawyer shall not ... communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” (Emphasis added.) Thus, the relevant language of the new Rule continues to utilize the word “party” and not “person.” The New York State Bar Association’s Committee on Standards of Attorney Conduct had proposed that the term “party” be replaced with the term “person” to give broader reach to the no-contact rule, but the Appellate Divisions declined to change the Rule; and, indeed, in 1999, the Appellate Divisions’ amendment to the Rule specifically used the term “party” and not “person.”
C. Significantly, New York’s D.R. 7-104(A) – the predecessor to Rule 4.2 – had been interpreted not to apply to attorneys in criminal cases based upon the language of D.R. 7-104(A) which contains the language of “party” not “person.” See, e.g., Grievance Committee for Southern District v. Simels, 48 F.3d 640 (2d Cir. 1995); People v. Kabir, 13 Misc.3d 920 (Sup. Ct. Bronx Co. 2006). Ethics opinions assert that in civil cases, the former Rule would be applied broadly to “persons.” New York State Bar Assoc. Op. 735 (2001); New York State Bar Assoc. Op. 656 (1993) (“we have [previously] described DR 7-104’s scope as applicable to represented ‘persons,’ not merely technical parties”).

D. A number of court decisions and ethics opinions have applied Rule 4.2 in different contexts.

1. In Matter of Madris (Oliviera), 97 A.D.3d 823 (2d Dept. 2012), which involved two related child custody proceedings, the mother moved to disqualify the father’s attorney and law firm from appearing in the action based on an alleged violation of Rule 4.2, arising out of the supposedly improper ex parte communications with the child and with the Department of Social Services. The father and subject child experienced difficulties contacting the Social Services caseworker assigned to the case. As a result, the father’s attorney wrote to the caseworker’s supervisor alerting her of the problem and to “ask that she interview the parties to ensure that a complete and accurate report was produced for the court.” 97 A.D.3d at 824. Counsel for the father also sent copies of the letter to attorneys for the mother and child. The Family Court granted the motion to disqualify. Reversing, the Appellate Division held that “[c]ontrary to the mother’s conclusory assertions, there was no evidence that the father or his attorney improperly questioned the subject child regarding his interactions with the caseworker....” Id. at 825. The Appellate Division also concluded that the lower court incorrectly placed the burden of proof on the non-moving party (i.e., on the opponent of disqualification, rather than the movant), and that it had failed to consider the evidence in a light most favorable to the non-movant. Moreover, the court explained that the Family Court “misapprehended the role of the [Department of Social Services] where it has merely been assigned as the agency to complete a court-ordered investigation.” Id. Thus, the Department of Social Services was not a represented party within the meaning of Rule 4.2.

2. In its Opinion No. 959 (2013), the NYSBA Committee on Professional Ethics expressed the view that a lawyer who knew that counsel for an adverse party had withdrawn from representing the adverse party could, consistent with
Rule 4.2, directly contact the adverse party in order to determine whether the adverse party had retained new counsel. Opinion 959 noted that Rule 4.2 prohibits a lawyer from having direct contact with a represented party if the lawyer “knows” that the person in question is represented. However, if a lawyer knows that counsel for an adverse party has withdrawn, then the lawyer has reason to believe that the adverse party is not represented and is, accordingly, permitted by Rule 4.3 (which governs communications with unrepresented persons) to contact the adverse party to determine whether that party has obtained new counsel. The lawyer, however, must observe the limitations established by Rule 4.3 in communicating with the adverse party. In particular, the lawyer must “take care” not to give legal advice to the opposing party, even if it is the party, and not the lawyer, who initiates that portion of the communication.

3. In its Opinion No. 904 (2012), the NYSBA Committee on Professional Ethics expressed the view that a lawyer who represents the victim of a financial crime with respect to a potential claim for restitution against the person responsible for the financial crime cannot, consistent with Rule 4.2(a), directly contact the alleged perpetrator if the lawyer for the victim knows that the alleged perpetrator is represented by counsel in a criminal investigation of the same conduct. The Opinion stated that Rule 4.2 applies in these circumstances because: 1) the lawyer for the victim “knows” that the perpetrator is represented by counsel in the ongoing criminal investigation; 2) the potential restitution action against the perpetrator and the criminal investigation are closely related and potential negotiations concerning the restitution claim can have a direct impact on the criminal case; and 3) under the circumstances, the lawyer for the victim has reasonable grounds to believe that the lawyer for the perpetrator in the criminal investigation also represents the perpetrator with respect to the potential restitution claim.

Opinion 904 expressed the view that the proper course for the victim’s lawyer would be to contact the lawyer for the perpetrator in the criminal case and ask him or her whether he or she represents the alleged perpetrator with respect to the potential restitution claim. If the lawyer for the perpetrator states that he or she does not represent the perpetrator with respect to the restitution claim, the no-contact rule does not apply and the victim’s lawyer can directly contact the alleged perpetrator with respect to the restitution claim. But if the lawyer states that he or she does represent the perpetrator with respect to the potential restitution claim as well as in the criminal investigation, the no-contact rule applies and the victim’s lawyer cannot communicate with the alleged perpetrator without the consent of the perpetrator’s lawyer.
4. In 2008, the Supreme Court, Kings County, issued a highly controversial opinion, Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520 (Sup. Ct. Kings Co. 2008), aff’d, 899 N.Y.S.2d 859 (2d Dept. 2010), related to the application of the no-contact rule (then, D.R. 7-104[A]) to former employees of a corporate party to litigation and to offers by the corporation’s law firm to represent the former employees in connection with the litigation against the corporation. In Rivera, the Supreme Court granted a motion by plaintiff to disqualify the defendant corporation’s law firm from representing the corporation and also from representing former employees on the ground that the law firm had improperly “solicited” the former employees (in violation of the predecessor to current Rule 7.3) by directly contacting the former employees and offering to represent them (in addition to representing the corporation) at the corporation’s expense. 866 N.Y.S.2d at 526. In addition to ruling that the law firm had committed unethical solicitation, Supreme Court chastised the law firm for its attempted “end run” around the Court of Appeals’ holding in Niesig v. Team I, 76 N.Y.2d 363, 369 (1990), that the no-contact rule did not apply to former employees of a corporate party and that, accordingly, counsel for an adverse party was free to interview the former employee without the consent of, and outside the presence of, the corporation’s law firm. See Rivera, supra, 866 N.Y.S.2d at 524.

The Second Department summarily affirmed Supreme Court’s Rivera decision in 2010. Rivera v. Lutheran Med. Ctr., 899 N.Y.S.2d 859 (2d Dept. 2010). Although the Second Department’s treatment of the case was almost cursory, it specifically held that, “[c]ontrary to the contention of the [law firm], the record supports the Supreme Court’s determination that it engaged in acts of solicitation of professional employment, in violation of [the predecessor to current Rule 7.3].” 899 N.Y.S.2d at 859.

5. In Young v. Quatela and Morganstern & Quatela, 2011 N.Y. Misc. LEXIS 3858 (Sup. Ct. Nassau Co. Jul. 18, 2011), the court denied a motion to disqualify a law firm based upon an alleged violation of the no-contact rule. The plaintiff had sued his former matrimonial law firm for malpractice, and that firm’s defense counsel contacted the plaintiff’s father in an effort to have him testify in the present case; and did not seek to communicate with him concerning another case in connection with which he had counsel. The court made it clear that New York’s no-contact rule utilized the term “represented party” and not “represented person” and thus rejected the disqualification motion. The court also addressed those cases which had seemingly broadly included within the scope of the rule people who were represented by counsel, but who were not actively involved in a lawsuit. The court distinguished the case before it, finding that the communication under...
consideration was “not similar to the communication made to a party who retained counsel concerning terms of a contract, or questioning by the police in a criminal investigation outside the presence of retained counsel.” Id. at *10.

6. In In re Amgen, Inc., 2011 U.S. Dist. LEXIS 6304 (E.D.N.Y. Jun. 14, 2011), the court considered a request by a corporation to take steps to prevent what the corporation claimed were violations of Rule 4.2 by government prosecutors. The corporation was the subject of a grand jury investigation and a qui tam False Claim Act (“FCA”) lawsuit. The corporation claimed that the government had improperly sought to interview current and former corporate employees, and the corporation sought a protective order from the district court which would have required the government to coordinate with the corporation’s lawyers any contact with current and former corporate employees.

The court in Amgen first expressed the view that it did not have “free-standing authority” or supervisory authority to direct how the government conducts investigations merely because qui tam lawsuits are conducted under the “courts’ aegis pursuant to the FCA”; nor did the court have authority to control the executive branch of government merely because the prosecutor’s investigation was being conducted pursuant to the grand jury’s powers, and, in turn, district courts supervise grand juries. In particular, the court found that courts do not prescribe the modes of grand jury procedures.

As to the ethical issues surrounding the arguments made with respect to Rule 4.2, the court made a number of findings. First, and somewhat very surprisingly, the court declined to impose upon prosecutors the obligations of Rule 5.3(b)(1) to control the conduct of federal agents based upon the language in the Rule that states that a lawyer is responsible for the conduct of a non-lawyer, including an investigator, if he or she “orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it.” The court found that the record supported the view that prosecutors had ratified the conduct of the federal agents by allowing the agents to continue their practices even in the face of objections by the corporation. (The court also noted that in the adoption of the Rules of Professional Conduct, the definition of “party” had remained unchanged, and thus the New York Rule did not intentionally use the broader term of “person.” Id. at *18-21.) The court noted that in evaluating the ethical conduct of prosecutors, a court would have to consider New York ethical rules and, under the McDade Act, prosecutors would have to follow the “welter of ethical rules, not only the set
of rules adopted by the particular federal court in which she practices [i.e., the New York Rules].” Id. at *19. Thus, under these principles and the Second Circuit’s narrow view of the term “party” as expressed in Grievance Committee v. Simels, 48 F.3d 640 (2d Cir. 1995), federal prosecutors were not a “party” to the qui tam actions and because the corporation was not a party to the grand jury investigation, the court declined to apply Rule 4.2. (The court, however, rejected an argument by the government, that it was “authorized by law” to ignore Rule 4.2 based upon general language in a number of other criminal statutes.)

Finally, the Amgen court found that while prosecutors were ethically bound to follow New York ethical rules, that did not mean that courts had the authority to issue protective orders against the government.

**VI. CONFLICTS OF INTERESTS AND CONFLICT WAIVERS AS THEY RELATE TO CRIMINAL CASES.**

A. Defense attorneys often represent two or more individuals and/or entities in criminal investigations. A written waiver should be obtained where there is a conflict of interest, and it may be prudent to obtain a written waiver when there is a potential conflict which may develop into an actual conflict in the future. Written waivers of conflict of interest must be in writing pursuant to Rule 1.7(b)(4). At last, New York lawyers have been given a bright-line requirement that a waiver of a conflict of interest in connection with current clients can only occur when, in the words of Rule 1.7(b)(4), “each affected client gives informed consent, confirmed in writing.” (Emphasis added.)

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

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

C. “Informed consent” is a defined term in Rule 1.0(j). Now lawyers are told that informed consent has the element of risks and alternatives. Specifically, Rule 1.0(j) provides:
“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

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

D. New York ethics opinions which address the general notion of informed consent include the following guidance:

1. The adequacy of disclosure and consent will depend on the circumstances of each case. (City Bar Op. 2006-1, discussing Charles W. Wolfram, Modern Legal Ethics, Section 7.2.4, p. 343 [West Publishing Co. 1986].)

2. Clients should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts. (City Bar Op. 2006-1)

3. “Sophisticated clients need less disclosure of the ‘implications,’ ‘advantages,’ and ‘risks...’ before being able to provide informed consent.” (City Bar Op. 2006-1)

4. The full disclosure required for informed consent includes “information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict....” (City Bar Op. 2004-2)

5. In order to obtain informed consent, an attorney “must give careful, fact specific consideration to the risks and advantages to multiple representation and discuss those factors fully with each client.” (City Bar Op. 2004-2)

6. Informed consent requires that the “client whose engagement is being limited fully understands the implications of the limitation, including any restriction on communication with any separate counsel, and the impact, if any on the cost of handling the matter.” (City Bar Op. 2005-2)

E. Waivers by defendants to conflict-free representation must be meaningful, and they are often required to be given in court.
1. A waiver by a defendant to conflict-free representation at a “Curcio hearing” in federal court may later be determined to be inadequate because: (1) the conflict is so severe as to be unwaivable; or (2) the waiver was not knowing or intelligent. See United States v. Schwarz, 283 F.3d 76, 95 (2d Cir. 2002) (“An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney’s representation.”).

2. Before a defendant can knowingly and intelligently waive a conflict, the court must: (1) advise the defendant about potential conflicts; (2) determine whether the defendant understands the risks and conflicts; and (3) give the defendant time to digest and contemplate the risks, with the aid of independent counsel if desired. See, e.g., United States v. Kliti, 156 F.3d 150, 153 n.4 (2d Cir. 1998).

3. In the state courts, the conflict hearing is referred to as a “Gomberg hearing.” See, e.g., People v. Leary, 303 A.D.2d 256, 756 N.Y.S.2d 205 (1st Dept. 2003) (noting that failure to hold a Gomberg hearing was not a reversible error because the defendant failed to demonstrate that defense counsel’s relationship with a potential witness constituted a potential conflict of interest or that such conflict in fact affected the conduct of the defense.); People v. Alexander, 255 A.D.2d 708, 681 N.Y.S.2d 109 (3d Dept. 1998).

4. The New York Court of Appeals noted in People v. Harris, 99 N.Y.2d 202, 753 N.Y.S.2d 437 (2002), that: 1) a lawyer simultaneously representing two clients whose interests “actually conflict” cannot give either undivided loyalty for purposes of effective counsel issues; 2) in the context of joint representation of codefendants, once the presence of an actual conflict situation is established, prejudice is assumed but can be rebutted by a factual showing to the contrary; and 3) both the prosecution and the defense have a duty to recognize potential conflict situations.

5. Under the Supreme Court’s decision in Wheat v. United States, 486 U.S. 153 (1988), in order to avoid lurking potential conflicts and to preserve the public’s confidence in the integrity of the judicial system, a trial judge has the discretion – which is virtually unreviewable on appeal – to reject a defendant’s waiver of an actual or potential conflict. See also United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003). The Wheat decision has been cited with approval by New York State courts. See, e.g., People v. Scotti, 142 A.D.2d 616, 530 N.Y.S.2d 271 (2d Dept. 1988).
6. Recently, a federal district court in Dallas issued a thoughtful and detailed opinion that upheld the validity of an advance waiver in a case which, like another often-cited case, Celgene Corp. v. KV Pharmaceutical Co., 2008 U.S. Dist. LEXIS 58735 (D.N.J. Jul. 29, 2008), involved sophisticated, represented corporate litigants. The court in Galderma Labs., L.P. v. Actavis Mid Atl. LLC, 2013 U.S. Dist. LEXIS 24171 (N.D. Tex. Feb. 21, 2013), took a more expansive view of when advance waivers can be valid and explicitly took issue with Celgene’s analysis, which had demanded very specific disclosures in an advance waiver:

“[T]he Court disagrees with the Celgene Court that this type of language is always necessary to show informed consent. The examples given by the Celgene court are all examples of ways in which attorneys may identify a particular party, class of parties, or the nature of the potentially conflicting future matter. This type of language is not always necessary for a client to give informed consent, given the 2002 amendments to the Model Rules. ABA Formal Op. 05-436. If such language was always required, general and open-ended consent would never be valid. See id. To the contrary, the Committee recognized that under particular circumstances, general and open-ended consent is still likely to be valid.” 2013 U.S. Dist. LEXIS 24171, at *26-27.

7. Galderma does not necessarily mean that advance waivers will have clear sailing in courts in the future. Although Galderma provides a strong counterweight to Celgene and cases that have followed Celgene, and probably increases the “odds” that an advance waiver will be sustained in court, it is also likely that some courts will continue to adhere to the more

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5In Celgene, the court disqualified the Buchanan Ingersoll & Rooney P.C. firm from representing the defendant in a patent dispute, even though the plaintiffs, who were also clients of the Buchanan firm, had previously executed advance waivers of conflicts. The federal magistrate judge, who issued the ruling, found that the defendant had not given informed consent. Even with a sophisticated client, the Celgene court cautioned:

“The extent of the necessary disclosure is what is important.... [T]his is a question that must be conscientiously resolved by each attorney in the light of the particular facts and circumstances that a given case presents. It is utterly insufficient simply to advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation. This is no more than an empty form of words. A client cannot foresee and cannot be expected to foresee the great variety of potential areas of disagreement that may arise in a real estate transaction of this sort. The attorney is or should be familiar with at least the more common of these and they should be stated and laid before the client at some length and with considerable specificity. Of course all eventualities cannot be foreseen, but a great many can.” Id. at *12-13.
skeptical approach towards advance waivers. Thus, as a practical matter, although lawyers and clients will continue to draft and sign advance waivers, there is still no guarantee that they will be recognized by the courts in connection with disqualification motions.

8. In Macy’s Inc. v. J.C. Penny Corp., Inc., 2013 N.Y. App. Div. LEXIS 4798, at *2-3 (1st Dept. Jun. 27, 2013), the Appellate Division, First Department, upheld a lower court’s denial of a motion to disqualify plaintiff’s counsel (the Jones Day law firm), where the Jones Day had previously represented defendant J.C. Penny and had entered into an agreement which included an advance conflict waiver by J.C. Penny. The Jones Day law firm was representing Macy’s in litigation against J.C. Penny. Several years before this lawsuit was filed, J.C. Penny had retained Jones Day to represent it with respect to intellectual property and trademark matters in Asia. The retainer agreement between Jones Day and J.C. Penny contained a broad and general advance waiver. The First Department noted:

“That [conflict waiver] agreement expressly informed defendant about the possibility that Jones Day’s present or future clients ‘may be direct competitors of [defendant] or otherwise may have business interests that are contrary to [defendant]’s interests,’ and ‘may seek to engage [Jones Day] in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client’s interests are or potentially may become adverse to [defendant]’s interests.’ That agreement unambiguously explained that Jones Day could not represent defendant unless defendant confirmed this arrangement was amenable to defendant, thereby ‘waiv[ing] any conflict of interest that exists or might be asserted to exist and any other basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter.’” 2013 N.Y. App. Div. LEXIS 4798, at *2-3.

The First Department concluded that this waiver warranted the denial of J.C. Penny’s disqualification motion because, “Jones Day informed defendant about potential conflicts, and defendant waived its right to protest thereto.” Id. at *2. The Court did not, in upholding the advance waiver, mention the facts that J.C. Penny was, presumably, a sophisticated client and, presumably, a frequent user of sophisticated legal services. The Court did, however, cite the fact that Jones Day’s representation of J.C. Penny in Asian intellectual
property matters was unrelated to the subject matter of the Macy’s v. J.C. Penny litigation as an additional factor supporting the conclusion that the advance waiver was effective. (Presumably, the Court was expressing the view that there was no prior client conflict issue under Rule 1.9 because the two matters were not substantially related.) Id. at *3.

Macy’s v. J.C. Penny does not contain the longer and more elaborate analyses put forward by the courts in Celgene and in Galderma in determining whether a broad, general advance conflict waiver can be effective in defeating a disqualification motion. Indeed, the First Department did not cite either of those opinions in Macy’s v. J.C. Penny. It is, however, clear that Macy’s v. J.C. Penny comes down squarely on the side of Galderma in ruling that a broad advance conflict waiver was valid and enforceable.

VII. THE ATTORNEY’S ROLE IN MAKING TACTICAL DECISIONS AS IT RELATES TO THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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

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

Rule 1.2(a) provides: “Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” (For a classic application of Rule 1.2[a], see United States v. Velez, 2010 U.S. Dist. LEXIS 11817 [S.D.N.Y. 2010].)

B. In Graham v. Portuondo, 732 F. Supp. 2d 99 (E.D.N.Y. Aug. 12, 2010), vacated and remanded, 2011 U.S. App. LEXIS 22947 (2d Cir. Nov. 15, 2011), in the context of a defense based on mental illness, Judge Weinstein explored the contours of defense counsel’s duty to investigate possible defenses and noted that “the duty to investigate does not require counsel to conduct a searching investigation into every defense, ... or ‘to scour the globe on the off-chance that something will turn up.’ ... "Reasonably
diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”” (Internal citations omitted.)

C. In People v. Reid and Thomas, 918 N.Y.S.2d 863 (Sup. Ct. N.Y.Co. 2011), the court provided a helpful insight into when judges will consider a decision not to investigate as constituting inadequate assistance of counsel (and it explained the somewhat slippery approach of judges to the “everything to gain and nothing to lose” theory of investigation):

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

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

Counsel had a duty to search for evidence potentially favorable to the defense which could have been utilized at trial. At a minimum, he should have visited or sent an investigator to visit the ACS office, obtained a printout of defendant’s Metrocard and inquired about subway surveillance tapes. An adequate investigation would have provided defendant’s attorney with enough information to make an informed, deliberate decision about whether such evidence existed and whether to introduce it.

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

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

D. In People v. Diggins, 2013 N.Y. LEXIS 1337 (May 30, 2013), a divided New York Court of Appeals held that a defendant, who was being tried in absentia because he had absconded after an initial period of cooperating with his attorney, was deprived of effective assistance of counsel because his lawyer refused to participate in almost all aspects of the proceedings which took place after the defendant absconded, i.e., a pretrial Huntley hearing and the trial itself. The majority decided the case with a one-paragraph memorandum:

“It is well established that a defendant may not, by his absence alone, ‘waive his right to effective assistance of counsel.’ Although a defendant’s willful absence from trial surely hampers an attorney’s ability to represent the client adequately and must be taken into consideration, under the circumstances of this case, we conclude that counsel’s lack of participation during the jury trial amounted to the ineffective assistance of counsel. On this record, including defendant’s cooperation with his attorney in formulating a defense before absconding, there was a ‘reasonable basis for an active defense’.” Id. at *1 (internal citations omitted).

Two Judges dissented, concluding that “defendant’s trial counsel pursued a protest strategy,” which was, apparently, in their view, inconsistent with a determination that the lawyer had failed to provide effective assistance. Id. at *2. Although neither the majority nor the dissenters provided any factual discussion to place their brief legal conclusions in context, the opinions previously issued in this case by the New York County Supreme Court, in denying a CPL Section 440.10 motion to vacate (People v. Diggins, 2009 N.Y. Misc. LEXIS 2947 [Sup. Ct. N.Y. Co. Oct. 19, 2009]), and by the Appellate Division, affirming the Supreme Court’s denial of post-trial relief (People v. Diggins, 84 A.D.3d 667 [1st Dept. 2011]), provide a somewhat fuller description of the case’s factual background.

The defendant was charged with weapons and menacing offenses, arising out of his allegedly pointing a gun at his wife on a street, after she had found him in the
presence of his girlfriend. The defendant was arrested later that day at his girlfriend’s apartment, where the police lawfully recovered what appeared to be the weapon that the defendant supposedly pointed at his wife. The defendant apparently also made certain statements to the police outside of his girlfriend’s apartment and at the precinct (none of which was a confession). The defendant was represented by an experienced public defender who moved to suppress the statements defendant made to the police; and the court granted a Huntley hearing. 2009 N.Y. Misc. LEXIS 2947, at *2-3.

At this point, however, the defendant absconded, the Supreme Court issued a bench warrant for his arrest, and the case was sent out for hearing and trial. Defense counsel requested an adjournment, noting that since the case pivoted on the defendant’s interactions with his wife and girlfriend and their interactions with him, it was critical for the defendant to be present at any hearing or trial to assist the defense. The court denied this request and proceeded to conduct a “Parker” hearing (see People v. Parker, 57 N.Y.2d 136 [1982]) to determine whether it would be appropriate to conduct the Huntley hearing and to try the defendant in absentia. Defense counsel actively participated in the Parker hearing, at the close of which the court ruled that the defendant had willfully and voluntarily absented himself and would be tried in absentia.

Defense counsel then repeated his request that the case be adjourned to allow for the defendant’s presence to be secured, maintaining that he could not effectively represent the defendant if the defendant was not present for the proceedings. The court, however, proceeded to conduct the Huntley hearing. Defense counsel did not participate in the hearing, e.g., defense counsel conducted no cross-examination, making note of “my client’s inability to assist me.” Id. at *4. The court denied the Huntley motion and then indicated it was going to adjourn until the next day, when jury selection would begin. The court stated to defense counsel that, notwithstanding the defendant’s absence and counsel’s objections, counsel would “still have to do your best under these circumstances.” Id. at *4-5. Defense counsel responded that since the case depended on personal relationships, he could not conduct cross-examination effectively if his client were not present to advise him and provide insights into the personalities and emotions of his wife and of his girlfriend. Defense counsel asked to be relieved, but that request that was denied. Id. at *5-7.

Before trial commenced, counsel made it clear that he would not make an opening statement, not conduct any voir dire and generally not participate in the trial. The court then directed defense counsel “to defend your client to the best of your ability under the circumstances.” Id. at *7-8. Defense counsel replied that he believed that not participating in the trial was the best thing that he could do for his client, but ultimately promised the court that he would participate, e.g., object to questions “if
he thought doing so would be beneficial to his client.” Id. at *8-9. Defense counsel ultimately did not conduct any cross-examination, did not call any witnesses, did not make any objections, and did not sum up. He did, however, indicate that he was satisfied with the court’s proposed jury charge and subsequently indicated that he was satisfied with the court’s response to notes from the jury. Id. at *9-12.

The jury found defendant guilty on all counts. Defense counsel asked that the jury be polled. At the subsequent sentencing hearing, counsel made a number of arguments as to why defendant should be given the minimum sentence. Id. at *13. The court did not impose the minimum sentence. In fact, defendant was given an enhanced sentence because the court had determined, after the jury verdict and in absentia, that defendant was a predicate violent felony offender. Id. at *12.

More than one year later, defendant reappeared when he was arrested for attempted murder and other crimes. Defendant was convicted of these crimes and was sentenced to 25 years to life, based upon a finding that he was a persistent violent offender. The weapons conviction was one of the predicate violent crimes that led to his designation as a persistent violent offender. Several months later, the defendant made a motion in the Appellate Division for an extension of time to appeal his almost two-year-old weapons and menacing convictions. The Appellate Division denied that motion. Two more years went by, during which the defendant unsuccessfully appealed his designation as a persistent violent offender, arguing, among other things, that the weapons and menacing convictions should not have been considered for purposes of the persistent violent offender status, because the defendant was allegedly denied effective assistance of counsel in that case. Id. at *13. The defendant then commenced the CPL Section 440.10 proceeding.

The only witness at the CPL Section 440.10 hearing was the defendant’s trial counsel. Trial counsel first described the work he had performed to prepare for trial before the defendant absconded. This included preparing motions, meeting with defendant and hiring an investigator, who interviewed both the defendant’s wife and his girlfriend and who also visited the place where the alleged incident had occurred and the girlfriend’s apartment. The court specifically noted that, “[t]he investigation did not uncover any information favorable to the defendant.” Id. at *19.

The testimony of defendant’s trial counsel testimony focused on the reasons why he had chosen not to participate in the trial. The court summarized the position of defendant’s trial counsel as follows:

“[Defendant’s trial counsel] ... believed that without defendant present to provide insight into the witnesses testimony, biases, background, ability to see and perceive the events and other
information for cross-examination, it was virtually impossible for him to wage a vigorous defense. When defendant failed to appear for trial, [counsel] made repeated efforts to try and locate him but was unable to find him.

As with all his cases, [counsel] stated that his intent was to do his best for his client. However, faced with a powerful case and no client to assist him, [counsel] made a conscious and considered decision not to participate. The decision was made after consultation with his supervisors. [Counsel] also confirmed that [not participating] was something he decided to do based on the specific circumstances that confronted him at the time. He explained that he felt that, ‘the chances of getting an acquittal of an empty chair domestic violence trial were very, very low and that the less said the better actually.’” Id. at *21-22 (internal citations omitted).

The court concluded that the defendant had not been deprived of effective assistance. The core of the court’s analysis was that, under the circumstances presented, defense counsel’s very limited participation in the proceedings which took place after the defendant had absconded was the product of a “conscious, strategic decision not to participate in the Huntley hearing and the trial in absentia.” Id. at *37. This strategic decision was driven by the fact that the defendant’s absence from the hearings and trial had made the defendant’s case very difficult to litigate. The court concluded that, contrary to the defendant’s argument that counsel’s non-participation left him essentially unrepresented, counsel had knowingly adopted what he believed to be the best option for defendant in a very difficult case. Id. at *27-29, 33-35. The court concluded that this simply was not ineffective assistance of counsel.

The Appellate Division unanimously affirmed the denial of relief under CPL Section 440.10. People v. Diggins, 84 A.D.3d 667 (1st Dept. 2011). The Court concluded that, under the circumstances presented, defense counsel’s decision not to participate was an objectively reasonable strategic decision and was not ineffective assistance:

“The record demonstrates that defendant’s counsel, whose ability to conduct a defense was impaired by his client's absence, pursued a ‘protest strategy’ or ‘strategy of silence’ There is a presumption of prejudice where ‘counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.’ However, that presumption
is inapplicable to the facts of this case.”  Id. (internal citations omitted).

E. Consider these other informative cases:

1. In People v. McGillicuddy, 2013 N.Y. App. Div. LEXIS 824 (4th Dept. Feb. 8, 2013), the Appellate Division, Fourth Department, reversed a conviction on the grounds that the defendant had been denied his Sixth Amendment right to the effective assistance of counsel when the defendant’s attorney became aware, immediately before trial was to begin, that he faced serious potential conflicts of interest. As the court noted:

“A few days before trial, defense counsel became aware of a recorded conversation between defendant and defense counsel’s former client that the People sought to introduce in evidence to show defendant’s motive and intent for the burglary. Defense counsel’s former client was convicted of murder shortly before this trial began. Defense counsel was also aware that, when defendant was arrested for the instant crimes, he gave a statement to a police officer regarding defense counsel’s former client that the People also intended to introduce in evidence.” 2013 N.Y. App. Div. LEXIS 824, at *2.

Defense counsel brought the conflict of interest to the trial court’s attention, but the trial court failed to ascertain whether the defendant was aware of the risk posed by counsel’s potential conflict and knowingly had decided to proceed with his lawyer, the conflict notwithstanding. Id. The Fourth Department recognized that even if counsel had a potential conflict of

Author’s Note: The Court of Appeals majority’s brief explanation of its subsequent determination that defense counsel had failed to provide the defendant with effective assistance of counsel could be seen as puzzling, and the opinion seemingly raises more questions than it answers. The majority’s rationale – that the defendant was deprived of effective assistance because the record before the Court, “including defendant’s cooperation with his attorney in formulating a defense before absconding” – indicated that there was a “reasonable basis for an active defense.” But this does not appear to take into account trial counsel’s consistent and detailed explanation that the defendant’s case was rendered almost impossible to defend by the defendant’s absconding. The Court of Appeals memorandum opinion also did not acknowledge that, even if defendant had been present at trial, the case against him was a strong one and the chances for an acquittal were not good. It could be argued that, even if there was a reasonable possibility of an active defense if defendant had been present at trial, that possibility was not the situation with which trial counsel was, in fact, confronted. The argument would continue that, under the circumstances actually confronting trial counsel, his non-participation was, at a minimum, a reasonable strategy to pursue. The majority’s memorandum opinion, accordingly, could make it unclear whether the Court of Appeals will, in the future, consider a “protest strategy” or a “strategy of silence” to be effective assistance of counsel.
interest, a conviction could be reversed only if it was found that the conflict bore a substantial relationship to the conduct of the accused’s defense. Id. at *3-4. The Fourth Department concluded, however, that this standard was easily satisfied in this case because, among other things:

“Defense counsel indicated that he was unable to cross-examine the police officer with respect to defendant’s statement concerning his former client; he stipulated that his former client’s voice was on the recording and thus avoided having to confront his former client in that regard; and he did not call his former client to testify regarding the recorded conversations with defendant.” Id. at *3-4.

2. In State v. Cheatham, 292 P.3d 318 (2013), the Supreme Court of Kansas ruled that a capital defendant was deprived of his right to effective assistance of counsel because he was represented, under a flat fee arrangement, by an overworked lawyer who had never tried a capital case and had not tried a murder case in over 20 years. The lawyer was a solo practitioner with a high-volume rural practice. 292 P.3d at 322-23. The lawyer knew that because of the accused’s indigence, he could not pay for investigators, experts and consultants and other costly out-of-pocket expenses that are usually associated with a capital case. The defendant did agree to pay what counsel ultimately stated was a flat fee of $50,000. The Kansas Board of Indigents’ Defense Services contacted the lawyer and offered to help him find co-counsel, experts, consultants and investigators. The lawyer did not take the agency up on its offer. Id.

Defendant was convicted and sentenced to death. Following an appeal and a remand, the trial court reversed the death penalty, finding that the lawyer had mishandled the penalty phase of the case. The Kansas Supreme Court ruled, on a further appeal, that the lawyer had committed errors that also tainted the guilt portion of the case, and ordered a new trial.

The court’s opinion expressed harsh criticism of counsel’s performance, stating that the representation of the defendant “bore a greater resemblance to a personal hobby engaged in for diversion rather than an occupation that carried with it a responsibility for zealous advocacy.” It also ruled that the flat fee arrangement created an actual conflict of interest since it created a disincentive for the lawyer to devote to the case the time necessary to properly defend a capital case. In this regard, the court noted that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases strongly disapproves of the use of flat fees in death
penalty cases because it creates a conflict between the client’s interest in receiving a more-than-competent job and the lawyer’s interest in doing the minimum amount of work needed to earn his or her fee.  Id. at 343-47.

The flaws in the fee arrangement were exacerbated still further by the defendant’s indigence and the lawyer’s admission that he would not spend any of his own funds to hire investigators or to prepare the case and the fact that he told defendant that he would not cut back on his other cases or activities including a possible run for governor. In fact, the lawyer logged only 200 hours on the case and spent only 60 hours preparing for trial. Finally, it appeared that counsel was a potential alibi witness for the defendant, but that because he was counsel for defendant, he had, in effect, made himself unavailable to testify on defendant’s behalf.  Id. at 323-24.

3. In People v. Townsley, 20 N.Y.3d 294 (2012), a divided New York Court of Appeals rejected a criminal defendant’s contention that he had been denied effective assistance of counsel on his direct appeal from his conviction because his appellate counsel failed to argue that the conduct of the prosecutor at trial created ethical conflicts for defendant’s trial counsel, thereby depriving the defendant of the effective assistance of counsel. Townsley was part of protracted (eighteen-year) litigation that arose out of defendant’s conviction in 1995 for gang-related murder, attempted murder and other crimes. The defendant had been accused of shooting two members of a rival drug gang, killing one and severely wounding the other. It was undisputed that defendant was at the scene of the shooting. The defense theory was that the “real killer” was the leader of his gang, Simeon Nelson, a/k/a “Sims,” who was also present at the scene of the crime. Nelson did not testify at Townsley’s trial. 20 N.Y.3d at 296-97.

The ineffective assistance of counsel issue was produced by: 1) an effort by defendant’s trial counsel to interview Nelson before the trial; and 2) the prosecutor’s efforts to use the defense’s attempts to interview Nelson to the advantage of the prosecution. Id. at 297. During cross-examination of defendant, the prosecutor asked Townsley if he and his lawyers had met with Nelson (in prison) on the morning of the first day of the trial. Townsley conceded that he had seen his lawyers meeting with Nelson, but denied that he had attended the meeting.

Defense counsel sarcastically stated, during his summation, “[w]ell, I’m sorry that the lawyers for [defendant] wanted the real killer to come forward,” in an obvious reference to this line of cross-examination. Id. at 297. The prosecutor used this as an opening for a much longer discussion of the
defense lawyers’ meeting with Nelson, during his summation. The prosecutor’s summation including the following comments, which were quoted by the Court of Appeals:

“‘I went and found out about their little secret meeting on April 25th. The Defendant didn’t know that I knew, and he tried to backtrack and he tried to get flustered, and now the Defense lawyer told you it’s his duty and obligation to try to talk to the real killer.

‘Is there any testimony by anyone in this trial that they spoke to Sims and confronted him? No. No lawyer for Legal Aid got on the stand and testified. You have no evidence ... that they confronted Sims.

‘No, they had their little meeting with Sims to see if he would help them save their client, say it wasn’t him, say it was somebody else, give us some information that could get our boy and your friend off.’”  *Id.* at 297.

Defendant’s trial counsel did not object to the prosecutor’s questions about the jailhouse meeting, or to the prosecutor’s summation comments about the meeting. Nor did Townsley’s appellate counsel on the direct appeal of his conviction raise any issues about the questions about the meeting or about the prosecutor’s summation comments (although even the dissent acknowledged the appellate counsel had submitted a “thorough brief,” raising six grounds for reversal [*id.* at 308]). The conviction was affirmed.

Twelve years later, defendant made a motion pursuant to CPL Section 440.10 to set aside his conviction, arguing, among other things, that the prosecutor had accused defense counsel of trying to fabricate a defense, i.e., Nelson was the real killer, which resulted in defendant being deprived of his right to conflict-free counsel. The CPL 440 motion was dismissed because, among other reasons, defendant could have raised the conflict issue on direct appeal. Defendant then filed a *coram nobis* proceeding in the Appellate Division, based, in part, on the contention that appellate counsel was ineffective for failing to raise the conflict issue. The Appellate Division denied *coram nobis* relief, and defendant then obtained leave to appeal to the Court of Appeals. *Id.* at 297-98.

The majority opinion initially addressed what was the appropriate standard for effective assistance in cases presenting claims of ineffective assistance of
appellate counsel. This was a critical and perhaps decisive issue in the appeal to the Court of Appeals, because the majority adopted a relatively deferential standard for assessing ineffective appellate representation claims, whereas the dissent applied a more exacting and less forgiving standard. According to the majority:

“[W]e must remember that appellate counsel’s omission of claims from his appellate brief ‘should not be second-guessed with the clarity of hindsight.’ The constitutional requirement of effective assistance of counsel is met where ‘the attorney provided meaningful representation.’ Appellate lawyers ‘have latitude in deciding which points to advance’ and need not ‘brief or argue every issue that may have merit.’ In reviewing the performance of appellate counsel, ‘the minimum standard of performance required ... is a very tolerant one’ Viewing the case in that light, we conclude that appellate counsel was not ineffective.” Id. at 298 (citations omitted).

With respect to the merits, the majority focused on defendant’s argument that:

“[T]he prosecutor’s trial tactics created ethical problems for defendant’s trial counsel, who, according to defendant’s present argument, were put in a position where they should have called themselves as witnesses, and were also personally accused of wrongdoing. These problems, defendant argues, should have led the trial court to conduct an inquiry and, unless the conflicts were validly waived, to disqualify trial counsel. The court’s error in failing to proceed in this way, the argument continues, was so clear that appellate counsel’s failure to argue it on appeal amounted to ineffective assistance of counsel.” Id. at 298.

The majority observed that the prosecutor’s summation statements, which could arguably be viewed as suggesting that defense counsel had engaged in criminal conduct, i.e., subornation of perjury, were “entirely inappropriate” and “warranted a rebuke from the trial judge.” Id. at 300. However, the majority stated that defendant’s appellate counsel could reasonably have concluded that it would not be helpful to defendant to attempt to stop the trial to hold a hearing on whether defense counsel had a potential conflict because of the prosecutor’s comments about the meeting with Nelson:
“Trial counsel, and a reasonable appellate counsel reviewing the record, could well have taken [the prosecutor’s summation statements] as nothing more than an obnoxious, but essentially irrelevant, way of describing a defense lawyer’s legitimate activity. Now, in this coram nobis proceeding, defendant makes a perhaps plausible argument that the prosecutor’s remarks were more than that, but we do not find the argument ‘so compelling that a failure to make it amounted to ineffective assistance of counsel’.”  Id. at 301 (citation omitted).

The dissenting opinion of Judge Ciparik and Chief Judge Lippman maintained that the conduct of appellate lawyers who were accused of providing ineffective assistance should have been subject to a more searching review than that adopted by the majority. From that premise, the dissenters concluded that trial counsel’s failure to raise the potential conflict issue was clearly ineffective assistance and that appellate counsel’s failure to raise this issue in his appeals brief – no matter how thorough the brief was with respect to other issues in the case – also constituted ineffective assistance of counsel. And the dissenters argued that the conclusion that appellate counsel did not provide the constitutionally mandated quality of representation was significantly supported by the fact that the original appellate counsel had submitted a letter to the court below, in connection with the coram nobis proceedings, stating that his failure to make an ineffective assistance argument on appeal was not the product of a strategic analysis and decision. Rather, according to the dissenters, he had simply missed the issue.  Id. at 302-09.

4. In Taylor v. State, 51 A.3d 655 (2012), the Maryland Court of Appeals addressed the question of whether a defendant who alleges that he had been deprived of effective assistance of counsel because his defense attorney had sued him for failure to pay fees while the prosecution was ongoing, is entitled to a presumption that he was prejudiced by his representation by counsel who had a clear personal interest conflict. Taylor held that a defendant is entitled to such a presumption (instead of being required to prove prejudice), but only if he can first demonstrate that his counsel had an “actual conflict of interest” as that term is used in Sixth Amendment case law, i.e., a conflict of interest that had an adverse effect on defense counsel’s representation of the defendant. The Court ruled that, in the particular circumstances of the case, it was necessary to remand the case to the trial court for a hearing to determine whether defense counsel’s clear ethical conflict had an actual adverse effect on the representation of defendant.
The facts in *Taylor* were straightforward. Taylor was indicted for drug offenses and, shortly after his arrest, retained Christopher Robinson to represent him with respect to the drug indictment and with respect to another criminal case which was set to be tried a few days later (but which was ultimately dismissed without a trial). Because Taylor was unemployed and had no money, Robinson and Taylor signed a retainer agreement providing for payment of fees, pursuant to a strict schedule, by Taylor and by Anderson, Taylor’s then-girlfriend, who would be the actual source of payments to Robinson.

The trial of the drug case was originally scheduled for December 12, 2006, but was adjourned until early January 2007. Taylor and Anderson, however, had failed to make payments required by the retainer. Accordingly, several days after the adjourned trial date, but before the new trial date, Robinson brought a breach of contract case against Taylor and Anderson. That case remained pending when Taylor’s drug case was tried, resulting in a conviction. After the adverse verdict in the criminal case, but before Taylor’s sentencing, Robinson obtained a judgment against Taylor and Anderson in the fee litigation. Neither Robinson nor Taylor brought Robinson’s fee suit against Taylor, and the potential conflict of interest it caused, to the trial court’s attention prior to or during the trial.

The conflict issue was finally brought to the court’s attention by Taylor during his sentencing hearing. After the prosecutor and Robinson presented arguments about what an appropriate sentence would be, the court asked Taylor whether he would “like to say anything.” At that point, Taylor began an extended and emotional series of complaints about Robinson. At first, Taylor maintained that he had been unable to speak with Robinson for extended periods of time prior to and during the trial and that when he was able to speak with his lawyer, Robinson ignored his suggestions, questions, etc. Taylor then referred to the fact that Robinson had sued him over allegedly unpaid fees before his criminal case was tried and specifically asserted that Robinson had a conflict of interest. The trial judge ultimately told Taylor that the present hearing was “not the time” to make complaints against counsel.

The trial court did not ask Robinson for his reaction to Taylor’s statements about his representation of Taylor or the fee litigation; and Robinson did not offer any response to Taylor’s charges. Taylor received a sentence of 14 years imprisonment. Represented by new counsel, Taylor then filed a direct appeal of his conviction. That appeal did not raise and conflict of interest or ineffective assistance arguments. The appeals court affirmed Taylor’s
conviction. Taylor then (first pro se, and then represented by a public defender), brought a petition for post-conviction relief which raised, among other things, claims that he had been denied effective assistance of counsel because of Robinson’s conflict.

A post-conviction relief hearing was then held. Taylor testified that, before the January 2007 revised date of the trial, he learned (apparently not directly from Robinson) that Robinson had commenced fee litigation against him and Anderson, that he did not speak to Robinson again until the next court date, and that he did not feel comfortable with Robinson’s representation because Robinson had sued him. Taylor admitted that he did not inform the trial court that Robinson was suing him before or during the trial. Finally, Taylor testified that he had never consented to Robinson suing him.

Robinson testified at the hearing that he did not expect to get any money from Taylor through the lawsuit because Taylor was unemployed; rather, any recovery would come from Anderson, Taylor’s then-girlfriend. He added that he did not discuss the lawsuit with Taylor and that, because he did not anticipate obtaining any money from Taylor, he did not believe that the lawsuit impaired his ability to represent Taylor. Indeed, Robinson further testified that he would not have done anything differently in Taylor’s lawsuit if the fee suit had not been pending.

The trial judge hearing Taylor’s post-conviction motion ruled that Taylor had been deprived of effective assistance because his lawyer was simultaneously suing him to recover fees. The court stated that Robinson had a conflict of interest under Maryland’s version of Rule 1.7, because “there was a significant risk that the representation ... would be materially limited by a personal interest of trial counsel.” The Court then held that, under the United States Supreme Court’s opinion in Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980), Taylor was not required to prove that he had been prejudiced by Robinson’s representation of him because Robinson had an “actual conflict of interest.”

The State then appealed the trial court’s decision to the Maryland Court of Special Appeals, the intermediate appeals court in Maryland, which reversed the trial court’s determination. The Court of Special Appeals rejected that lower court’s conclusion that the more lenient standard of proof for ineffective assistance claims set forth in Cuyler v. Sullivan applied in this case. According to the Court of Special Appeals, the Cuyler standard was applicable in cases where counsel had an actual conflict caused by a joint representation of defendants. In all other cases, including cases where the
lawyer had an actual conflict because of a personal interest conflict, the test to be applied was the general test for ineffective assistance set forth in the United States Supreme Court’s decision in Strickland v. Washington, 466 U.S. 668 (1984). In ineffective assistance cases governed by Strickland, the convict must prove that he or she was prejudiced by counsel’s deficient performance; and the Court of Special Appeals determined that Taylor had not satisfied this burden.

The Maryland Court of Appeals unanimously reversed the decision of the Court of Special Appeals. It specifically rejected the conclusion that Cuyler v. Sullivan’s less demanding test for determining whether a defendant has been deprived of effective assistance of counsel is strictly limited to cases where counsel has a conflict caused by joint representation. Rather, according to the Maryland Court of Appeals:

“[T]he Sullivan analysis and presumption of prejudice applies when a defendant alleges ineffective assistance of counsel based on an attorney’s personal conflict of interest due to the attorney’s filing suit against the client before trial for unpaid legal fees arising from the very action where the attorney is representing the client, creating an adversarial relationship during the course of representation.” 51 A.3d at 669.

This conclusion, however, did not complete the Taylor Court’s analysis. The Court noted that “in order to meet the burden of proving ineffective assistance of counsel, [Taylor] must demonstrate that there was an actual conflict of interest in order for prejudice to the defense to be presumed. An ‘actual conflict of interest,’ for purposes of this analysis, is a conflict that adversely affects counsel’s representation of the defendant.” Id. And, according to the Court, although it was clear that Robinson had violated Maryland’s version of Rule 1.7 by representing Taylor while he was simultaneously personally suing Taylor, the fact that Robinson had violated Rule 1.7 did not, standing by itself, mean that he had an “actual conflict of interest” as that term was used by the Supreme Court in Cuyler, Strickland and other cases. Under those cases, “[o]nly if Robinson’s conflict was an ‘actual conflict of interest,’ due to its adverse effect on his representation of [Taylor], would [Taylor] then be entitled to a presumption of prejudice to the outcome of his trial.” Id. at 670.
The Taylor Court concluded that, because the trial court had incorrectly assumed that Robinson must have had an “actual” conflict for Sixth Amendment purposes because he plainly had an actual conflict of interest under Rule 1.7, a remand was necessary to determine whether Robinson’s personal interest conflict adversely affected his representation of Taylor:

“On remand, the court must consider the case-specific facts to determine whether, and explicate how, the potential conflict of interest based on Robinson’s presumed [Rule 1.7] violation adversely affected (if at all) his representation of Petitioner. Specifically, Petitioner has alleged that his lack of confidence in Robinson’s representation caused him to withhold information in aid of his defense. The trial court must determine whether Petitioner was reticent and, if so, how that had an adverse effect on Robinson’s representation of Petitioner.” Id. at 672.

4. In Lafler v. Cooper, 132 S. Ct. 1376 (2012), and Missouri v. Frye, 132 S. Ct. 1399 (2012), the United States Supreme Court, in sharply divided 5-4 decisions, held, for the first time, that a criminal defendant’s right under the Sixth Amendment to effective assistance of counsel applies to the plea bargaining process. Frye specifically held that the right to effective assistance applies to the consideration of plea bargains which lapse or are rejected, and that a defendant is denied effective assistance of counsel if counsel neglects to inform the defendant of a potentially favorable plea bargain offer, and the offer then lapses. Lafler held that a defendant may be deprived of his or her right to effective assistance if a favorable plea bargain offer is rejected on account of counsel’s “ineffective” advice and the defendant ultimately receives a longer term of imprisonment than he or she would have received under the plea bargain. The premise for both Lafler and Frye was that the constitutional right to effective assistance of counsel extends to “all critical stages of the criminal proceedings”; and the majority concluded that “plea bargains have become so central to today’s criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process.” Justice Scalia delivered very forceful dissenting opinions in these cases (which he read from the bench, to emphasize the importance, in his view, of the issues before the Court). At the end of his dissent in Lafler, Justice Scalia stated the following regarding his view of the effect of the Court’s opinion:
“[T]oday’s decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence (‘plea-bargaining law’) without even specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked exactly as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan’s elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today’s opinion affords constitutional status.”

The Lafler and Frye opinions received immediate and extensive coverage in both the general and legal press (e.g., the decisions were the lead story in both the print and internet versions of The New York Times on the day after the decisions were handed down) and extensive analysis and discussion of the cases have appeared on numerous blogs. As to what the real world impact of these decisions will be, Justice Alito’s dissent noted: “Time will tell how this works out.” In addition, Justice Alito suggested that it is unclear how these opinions will be applied by the lower courts because “[t]he Court, for its part, finds it unnecessary to define ‘the boundaries of proper discretion’ in today’s opinion[s].”

5. In People v. Yagudayev, 2012 N.Y. App. Div. LEXIS 531 (2d Dept. Jan. 24, 2012), the Appellate Division, Second Department, reversed a defendant’s grand larceny conviction on the grounds that he had been deprived of his constitutional right to effective assistance of counsel. The defendant had been charged with grand larceny and certain lesser included offenses. The criminal charges arose out of an incident at a Home Depot store. The defendant had placed and packed hundreds of dollars in tools in a box for a vanity valued at $70.00, and then attempted (using an excuse that he had to rush outside to attend to a small child in an automobile) to have an innocent bystander pay for the “vanity” with cash provided by the defendant and then take the vanity box containing the tools out of the store and give the box to the defendant.

At trial, the defendant’s lawyer elicited testimony from the defendant that confirmed all but one element of the evidence presented by the prosecution; the defendant did not concede that he himself had removed the box with the
concealed tools out of the store. During the charge conference, it became clear that defense counsel’s strategy in presenting the defendant’s seemingly incriminatory testimony was to lay the basis for an argument that the defendant was only guilty of a lesser included offense. Defense counsel apparently believed that if the defendant himself had not removed the tools from the store, he could not be convicted of grand larceny and he could only be convicted for lesser included offenses. However, even a small amount of legal research would have demonstrated to the lawyer that his strategy was legally unsustainable. The Court of Appeals had previously and clearly held that it was not necessary for the prosecution to prove that a defendant had physically removed stolen property from a store in order to sustain a grand larceny charge. The defendant was convicted on all counts and then maintained on appeal that his trial counsel was ineffective.

The Second Department stated that it was important, in assessing an ineffective assistance claim, to take care to avoid confusing “mere losing tactics” with true ineffective assistance. The court, however, stated that, in the present case, defense counsel’s strategy of having the defendant admit facts which would establish that the defendant was guilty of lesser included offenses, but not admit facts which defense counsel believed the prosecution must prove in order to obtain a grand larceny conviction was “legally indefensible.” 2012 N.Y. App. Div. LEXIS 531, at *5. This was because the Court of Appeals (and subsequent lower court decisions) had plainly destroyed the premise of defense counsel’s theory by holding that the prosecution was not required to prove that a defendant physically removed stolen property from a store in order to sustain a charge of grand larceny. Thus, according to the Second Department, the testimony which defense counsel elicited from the defendant established not only the lesser included offense, but also the most serious charges. In view of the governing Court of Appeals opinion – of which defense counsel was apparently unaware – the Second Department concluded that defense counsel had adopted an “‘inexplicably prejudicial’ strategy” which “amounted to eliciting an admission of guilt on the stand,” and that counsel’s adoption of that strategy constituted ineffective assistance of counsel. Id. at *7.

6. In United States v. Cain, 2012 U.S. App. LEXIS 1772 (2d Cir. Jan. 31, 2012), the Second Circuit held that a defendant in a large racketeering prosecution was not deprived of his constitutional right to be represented by counsel of his choice when the district court disqualified his retained attorney on the grounds that the lawyer might be called as a grand jury witness in connection with a potential witness tampering charge against the defendant. During a pre-trial conference in this case, the prosecution informed a Magistrate Judge...
that it was investigating a charge that the defendant had been involved in influencing a witness against the defendant in a parallel state prosecution, to provide perjured affidavits recanting inculpatory statements against the defendant. The defendant’s lawyer also represented the defendant in the state proceeding and had introduced the affidavits in court; accordingly, the government stated that it would call defense counsel to establish that the affidavits had been in the defendant’s possession and that the defendant had intended for them to be filed in an official proceeding. The district court ultimately concluded that the possibility that defense counsel would testify against his client either in the same or in a parallel proceeding created a *per se*, non-waivable conflict and disqualified the defendant’s lawyer.

The defendant argued on appeal that the disqualification of his retained lawyer deprived him of his Sixth Amendment right to counsel of his choice. The Second Circuit rejected this argument. The court recognized that the class of cases in which a conflict in not waivable is “very narrow,” which might seem to militate against disqualification in cases where the defendant insists that he or she wants to be represented by a particular lawyer and is willing to waive any conflict. The Second Circuit also noted, however, that district courts have “broad latitude” in determining whether or not to disqualify a defendant’s counsel of choice; and the court observed that in the past 20 years, it had never reversed a conviction on the grounds that a district court had abused its discretion by disqualifying a conflicted attorney. The court then determined that it was unable to conclude that the district court in this case had abused its discretion by determining that the possibility that the defendant’s lawyer might be a witness against the defendant required disqualification of counsel.

7. In *Martinez v. United States*, 2012 U.S. Dist. LEXIS 9472 (E.D.N.Y. Jan. 26, 2012), the United States District Court for the Eastern District of New York (Judge Garauufis), held that a criminal defendant had been deprived of his constitutional right to effective assistance of counsel because his lawyer had withdrawn the prisoner’s *pro se* notice of appeal without his client’s authorization. The defendant had pleaded guilty to a serious drug offense, and the plea agreement contained a waiver of any right to appeal. Within days of the entry of the guilty plea, however, the prisoner filed a *pro se* notice of appeal. The prisoner called his lawyer several times before filing the notice of appeal, but the lawyer never answer or returned any of his calls. In addition, the prisoner’s sister also called the lawyer, between 7 and 10 times, because her brother had been unable to contact the lawyer. The lawyer finally responded to one of her calls and told her that he could not meet with her brother and urged her to pass messages between him and his client. When
the sister told the prisoner about her conversation with the lawyer, he became frustrated and told her to “forget about it.” The sister (and, ultimately, the lawyer) misinterpreted this to mean that the prisoner wanted to “forget about” the appeal, as opposed to telling the sister to “forget about” further efforts to contact the lawyer. The lawyer proceeded to file a motion to withdraw the appeal, which the Second Circuit granted. The prisoner then filed a Section 2255 petition which asserted, among other things, that the prisoner had been deprived of effective assistance of counsel because the lawyer had withdrawn the notice of appeal without his client’s authorization.

In ruling that the prisoner had received ineffective assistance of counsel and was entitled to have his appeal restored, Judge Garaufis made the following points: (1) a lawyer cannot withdraw an appeal on behalf of a criminal defendant client without the client’s authorization; (2) this rule applies even in cases where a defendant has filed a notice of appeal notwithstanding the fact that the plea agreement purports to waive any right the defendant may have to appeal; (3) the defendant never directly authorized the lawyer to withdraw his appeal – in fact the client consistently told the lawyer (before the lawyer ceased all communications with his client) that he wanted to appeal; and (4) a third party, such as the defendant’s sister cannot, as a matter of law, waive a defendant’s constitutional rights, such as the right to appeal, and a defendant cannot, as a matter of law, purport to assign such authority to a relative or another third party.

8. In People v. Clermont, 95 A.D.3d 1349 (2d Dept. May 30, 2012), the Appellate Division, Second Department, rejected, over a strong dissent by Justice Miller, a criminal defendant’s claim that he had been deprived of effective assistance of counsel at a suppression hearing. The underlying facts of Clermont are relatively simple. Clermont was convicted of criminal possession of a firearm. Two plainclothes policemen had been patrolling (in an unmarked car) an area of Jamaica, Queens, that was notorious for gang activity. While on patrol, the police noticed Clermont (who was walking with another man) adjusting his waistband. The police got out of their car and identified themselves as police officers. Clermont fled and, while doing so, removed a handgun from the right side of his waistband and threw it to the ground. He was apprehended and arrested.

Clermont’s lawyer made a pretrial motion to suppress the firearm; the motion was critical to the viability of the prosecution, because the gun was the central piece of evidence in the case. The trial judge ordered a suppression hearing and then denied the suppression motion. Clermont was convicted after trial, and he took an appeal, asserting that he had been deprived of
effective assistance of counsel at the suppression hearing. The Second Department affirmed by a 3-to-1 vote. The majority opinion described Clermont’s argument on appeal as follows:

“... [T]he defendant contends that his counsel was ineffective because he failed to make opening and closing arguments at the suppression hearing, suggesting that counsel did not believe there was a basis for suppression. Further, our dissenting colleague notes that the suppression court then erred in making a factual finding that the defendant dropped his weapon before the police chase rather than during the chase itself.” 95 A.D.3d at 1349.

The majority’s ensuing analysis, on its face, was straightforward. It noted that: (1) under New York law, the test for ineffective assistance of counsel is whether the defense lawyer provided “meaningful representation”; (2) “[w]hile a single error may qualify as ineffective assistance, it may only do so when the error is sufficiently egregious and prejudicial as to compromise a defendant’s right to a fair trial”; (3) “[s]tanding alone, the waiver of an opening and/or closing statement is not necessarily indicative of ineffective assistance of counsel”; and 4) “[i]solated errors in counsel’s representation generally will not rise to the level of ineffectiveness, unless the error is so serious that defendant did not receive a fair trial.” Id. at *3-4 (citations omitted).

Applying these principles to what it viewed as the relevant facts, the majority opinion stated:

“Notwithstanding the absence of an opening or closing statement and the suppression court’s mistaken factual finding as to when the defendant dropped the weapon, we find that the evidence, the law, and the particular circumstances of this case, viewed in totality, reveal that defense counsel provided meaningful representation. Defense counsel moved for, and obtained, a suppression hearing. A review of the hearing transcript demonstrates that defense counsel’s cross-examination of the detective was reasonably competent and thorough. In lieu of a closing argument, both the prosecutor and defense counsel relied upon the record.” Id. at *4-5 (citations omitted).
However, the dissent’s description of the suppression hearing and defense counsel’s performance is considerably different from what was described by the majority. To begin with, the dissent disclosed that an affirmation submitted by defense counsel in support of the suppression motion, “consisted of arguments addressed to a different case involving a separate set of facts and distinct legal issues.” Id. at *7 (emphasis added). Moreover, defense counsel also noted that he was “‘presently unaware of many of the relevant facts necessary to [his] preparation of the defense in this matter’ and requested the opportunity to submit a memorandum of law after the suppression hearing.” Id. at *7-8. Notwithstanding this request, defense counsel failed to submit any papers following the suppression hearing.

Moreover, the dissent revealed that, prior to the date of the suppression hearing, defense counsel moved to be relieved as counsel for defendant, stating that his associate had unexpectedly resigned, leaving him with an overwhelming amount of work which he had neither the time nor resources to cope with. On the day of the hearing, defense counsel reminded the court of his pending application to be relieved as counsel. The lower court, however, asked defense counsel if he could do the hearing that day in order to get the case into a trial posture. Defense counsel agreed to do so. As the majority noted, defense counsel declined to make an opening or closing statement and did not call any witnesses. The trial judge denied the motion to suppress, stated that it would issue a written order, and then granted defense counsel’s motion to withdraw.

Finally, the dissent noted, as had the majority, that the trial judge’s written order contained a factual error as to when defendant threw his gun away. The dissent, however, viewed the trial court’s mistake as a material deviation from the only testimony in the record about the incident, and then noted:

“The Supreme Court concluded that ‘[o]nce the detective observed the defendant throw the gun on the ground he was justified in chasing the defendant and subsequently arresting him and recovering the gun.’ The Supreme Court was never apprised of its apparent factual error and never asked to reconsider its decision in light of the actual testimony adduced at the suppression hearing.” Id. at *10.

The dissent then proceeded to apply the agreed-upon standard for assessing claims of ineffective assistance of counsel to “its” version of the facts. The dissent reached strikingly different conclusions than the majority:
“Under no standard of ‘meaningful representation’ was the defendant here provided with the assistance required by either the Federal or State Constitutions. Assigned counsel’s written motion was based on the wrong facts and he admitted that he was unable to adequately prepare. Although counsel acknowledged that the submission of post-hearing arguments was necessary, such submissions were never presented to the hearing court. This failure was all the more significant in light of the written decision of the hearing court, which was based on inexplicable factual findings unquestionably more prejudicial to the defendant than the actual hearing testimony. Although the hearing court’s decision was premised on an incorrect version of the underlying facts, this flawed premise was never questioned, and the defendant’s motion to suppress was never decided on the facts actually adduced at the hearing. Given the circumstances present here, I conclude that the defendant was not provided with ‘meaningful representation’ at the suppression hearing.”  Id. at *13-14.

9. In People v. Fisher, 18 N.Y.3d 964 (2012), the New York Court of Appeals reversed, by a 6-to-1 vote, the conviction of a defendant who had been charged with sexually abusing two of his nieces, on the grounds that the prosecutor had given an improperly inflammatory summation, and because the defendant had been deprived of effective assistance of counsel because his trial counsel had failed to object to the improper summation.

The defendant was convicted for various sex offenses arising out of alleged sexual abuse of two of his nieces. The nieces’ testimony was critical to the prosecution’s case. The defendant, however, argued both at trial and on appeal that the nieces’ testimony was suspect because the nieces allegedly were afraid of their mother, and the mother had a financial motive to have the defendant imprisoned whether or not he had, in fact, abused the nieces. In addition, the prosecution sought to confirm the nieces’ testimony through the testimony of one Raymond Burse, a convicted murderer who claimed that, while he was reincarcerated on account of an alleged parole violation, he had become privy to alleged statements by the defendant describing his sexual assaults on the nieces. The defendant, however, alleged that Burse had not heard defendant confess to the crimes and argued that the basis for Burse’s testimony was information contained in defendant’s legal papers, to which Burse has improperly obtained access while in prison. The defendant also maintained that Burse’s credibility was further undermined because the
prosecutor had promised to write a letter on his behalf to the Parole Board in “exchange” for his testimony.

The majority expressed the view that, although there was sufficient evidence to uphold the conviction, the evidence was “far from overwhelming” and that the verdict pivoted on the resolution of “fairly pronounced witness credibility issues.” 18 N.Y.3d at 966. According to the majority, “[t]hose issues should have been resolved by the jury dispassionately on the basis of the properly admitted evidence. The prosecutor’s summation, however, directed the jury’s attention elsewhere – a circumstance that competent defense counsel should have sought to prevent.” Id.

The majority noted that because the jury must decide a case only on the evidence, counsel’s summation “must stay within the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case,” and:

“Thus the District Attorney may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence. Above all he [or she] should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant.” Id. at 966 (citation omitted).

The majority then opined that the prosecutor’s summation departed from these principles in several respects: (1) the prosecutor strongly inferred that the nieces had made a number of prior statements which were consistent with their trial testimony – even though there was no evidence in the record to support such a claim; (2) the prosecutor engaged in “less than frank minimization of the consideration which Burse was to receive” in exchange for his testimony against defendant (id. at 967); and (3) the prosecutor closed her summation with an emotional plea to credit the nieces’ testimony, about which the majority stated that, “it was not permissible for the prosecutor, an officer of the court, to admonish the jury that their acceptance of the testimony of the child witnesses was essential to the administration of justice” (id.).

Finally, the majority held that, not only was the prosecutor’s summation prejudicial, the defendant had been denied the effective assistance of counsel because his lawyer had not objected to any of “the prosecutor’s egregiously improper departures during summation.” Id. at 967. And, in the majority’s
view, there was “no strategic basis for counsel’s failure to object to these highly prejudicial instances of prosecutorial abuse, in critical respects utterly attenuated from the evidence and the applicable principles of law.”  Id.

Judge Smith issued a vehement dissent, which was summarized in its opening paragraph:

“Defendant was convicted on compelling evidence, after a fair trial, of sexually abusing two young girls. The majority sets the conviction aside because it is displeased with the prosecutor’s summation, and thinks defense counsel should have objected to it. In fact, the summation, while not impeccable, was not outrageous. Defense counsel’s choice not to object may have been the right one. And if it was a mistake, it rises nowhere near to the level of ineffective assistance of counsel.”  Id. at 967.

10. In People v. Sanchez, 941 N.Y.S.2d 599 (1st Dept. 2012), a divided panel of the Appellate Division, First Department, rejected a defendant’s claim that he had been denied effective assistance of counsel. The basis for defendant’s claim was the fact that, at the beginning of trial, the defendant’s Legal Aid lawyer disclosed to the court that he had very recently been informed by the prosecutor of the existence of two other persons (Montero and DeJesus), who may have been connected to the crime with which the defendant was charged (armed robbery of a livery cab driver), and that one of these persons (DeJesus) had been represented by another Legal Aid lawyer. Defense counsel informed the court that he had discussed the potential conflict with his supervisors and that they had all agreed that there was no conflict. According to defense counsel, the defendant’s case would be based on the theory that Montero (who had not been represented by Legal Aid) was the real perpetrator and that the Legal Aid team did not “see a need to go into DeJesus [the other Legal Aid client], since there is no physical evidence connecting him to the crime.” 941 N.Y.S.2d at 603 (quoting defense counsel). That is, in fact, the case which Legal Aid presented on behalf of the defendant (together with a challenge to certain identification evidence and several alibi witnesses). The jury returned a guilty verdict.

The defendant subsequently moved, through new counsel, to set aside the guilty verdict on newly discovered evidence grounds. He claimed that, during a chance encounter at Rikers Island, DeJesus admitted responsibility for the crime for which the defendant had been convicted. At a hearing on the defendant’s motion to set aside the verdict, DeJesus testified and denied
that he had told the defendant that he, DeJesus, had committed the crime. The trial court denied the defendant’s motion, and the defendant appealed to the First Department, asserting that he had received ineffective assistance because Legal Aid had simultaneously represented both him and DeJesus, a person whom the defendant claimed was “believed by counsel to have participated in the robbery.”

The majority opinion rejected the defendant’s claim. The majority acknowledged that a conflict of interest on the part of defense counsel can be the basis for a finding of ineffective assistance, but that, “[t]o prevail on such a claim the defendant must ‘show that ‘the conduct of his [or her] defense was in fact affected by the operation of the conflict of interest,’” or that the conflict “operated on” the representation.” Defendant posits that a conflict of interest was created by Legal Aid’s dual representation of himself and DeJesus. We disagree.” Id. at 605 (citation omitted).

The majority noted that the target of the “third-party culpability defense was focused on Montero only, did not require counsel to implicate DeJesus or otherwise act in a way that was adverse to his interests. For this reason, counsel was correct in telling the court that there was no need to reference DeJesus by name during the trial” (id. at 605), and that, accordingly, there was no conflict of interest. The majority then stated that, even if there was, theoretically, a conflict, “it would not have affected the conduct of defendant’s defense or operated on counsel’s representation of defendant.” Id. It noted, in particular, that defense counsel had made “unimpeded use” of significant evidence in presenting defendant’s case and that defendant, accordingly, received the constitutionally mandated “meaningful representation.” Id.

Justice Freedman filed a dissenting opinion, taking the position that the fact that Legal Aid had represented DeJesus, as well as the defendant, had the inevitable effect of compromising Legal Aid’s representation of the defendant, because it could not pursue all of the possible avenues that a non-conflicted counsel could investigate. In particular, a non-conflicted defense lawyer would not have agreed simply “not to go into” DeJesus:

“Rather than proceeding to trial with the understanding that there would be no reference to this other suspect, a nonconflicted attorney would have, at least, sought a recess of the trial to further investigate this suspect for the purpose of building a third-party culpability defense.” Id. at 607.
11. In *People v. Henriquez*, 3 N.Y.3d 210 (2004), the New York Court of Appeals rejected the defendant’s claim of ineffective assistance of counsel based upon the defense attorney, in effect, abandoning all decision making ability and honoring his client’s instructions to put on no defense. During Henriquez’ murder trial, he specifically instructed his attorney not to cross-examine any witness; not to object to any line of cross-examination; not to call any witnesses; not to object to evidence; not to present a summation; etc. Following Henriquez’ conviction, he claimed that his constitutional right to a fair trial was violated because “the trial court and defense counsel respected his desire to refrain from presenting a defense.” N.Y.3d at 212, 214-15. The court rejected Henriquez’ claim of ineffective assistance of counsel and noted that because “the right to defend is given directly to the accused ... the Constitution does not force a lawyer upon a defendant”; and, therefore, the defense attorney could not be charged with failing to provide effective representation because Henriquez had knowingly, voluntarily and intelligently waived his right to effective assistance of counsel. Id. (internal citations omitted). Contrary to the somewhat unusual outcome of the Henriquez case, the general principles which should act as a guide to members of the defense bar as to the allocation of authority between defense lawyers and their clients are well-established. For example:

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

12. In *People v. Rodriguez*, 95 N.Y.2d 497 (2000), the New York Court of Appeals found that the trial court did not err by declining to consider *pro se* motions submitted by a *represented* defendant. Rodriguez’ defense attorney was aware of his client’s *pro se* motions, but declined to adopt the motions and present them to the court on the ground that the defense attorney believed that both motions were frivolous. Based upon these circumstances, the Court of Appeals found that the trial court had no further duty to entertain the defendant’s motions, noting that:
“By accepting counseled representation, a defendant assigns control of much of the case to the lawyer, who, by reason of training and experience, is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings.” 95 N.Y.2d at 501-02; see also id. (noting that many jurisdictions have refused to recognize a right of counseled defendants to act on their own defense).

13. In United States v. Diaz, 176 F.3d 52 (2d Cir. 1999), the Second Circuit found that despite the existence of at least one medical report suggesting that the defendant was incompetent to stand trial or to commit the offense alleged, an attorney’s failure to raise a diminished capacity defense was not ineffective assistance. In failing to raise the particular defense, the attorney relied on other medical reports, which suggested the defendant’s mental problems might be maligned. The attorney’s decision to rely on certain medical reports over others was found to fall within the “Strickland standard” of “reasonable professional assistance.”

14. There are, however, several general instances during the trial stage where courts have found attorneys’ failures to be ineffective assistance, as opposed to deferential strategical decisions. Specifically, attorneys have been found to have provided ineffective assistance when:

a. Strategy or recommendations are based on the wrong law, a misapprehension of the law, misapplication of the law, or a misunderstanding of the law. See, e.g., United States v. Hansel, 70 F.3d 6 (2d Cir. 1995) (An attorney’s failure to inform the defendant that two counts against him were time-barred and the attorney’s failure to object to those counts as untimely, resulting in a waiver of a statute of limitations affirmative defense when the defendant entered a guilty plea, were found to constitute ineffective assistance because the defendant would not have pled guilty but for the attorney’s recommendation based on his misunderstanding or ignorance of the law); Shiwlochan v. Portuondo, 345 F. Supp.2d 242 (E.D.N.Y. 2004) (An attorney’s failure to inform the defendant of the maximum possible sentence that he could receive, resulting in the rejection of a plea offer due to his misapprehension of how the judge would sentence the defendant if found guilty by the jury, was ineffective assistance. The defendant was found guilty at trial and received a maximum sentence of 41½ years to life, which was far lengthier than the 15 years to life that his attorney had suggested.).
b. Failing to prepare any defense at all. See, e.g., Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001) (An attorney’s failure to prepare a defense in an effort to reduce his amount of labor and to avoid preparing a defense that might prove unnecessary was ineffective assistance, despite the fact that the attorney believed the case would be dismissed, upon motion, after the prosecution presented its case in chief.).

c. Failing to call a fact witness when the factual testimony contradicts or would cast doubt upon the prosecution’s theory of guilt. See, e.g., Pavel, supra, 261 F.3d at 222 (An attorney’s failure to call a fact witness whose testimony would have cast doubt on the time frame proposed by the prosecution and would have offered a reasonable explanation for otherwise incriminating evidence, when that decision was neither based on “plausible strategic calculus or an adequate pre-trial investigation” nor based on an attempt to further his client’s interest, but was mainly to avoid work, was ineffective assistance. The factual testimony that was never heard by the jury would have corroborated the defendant’s testimony of an innocent explanation for the only physical evidence presented at trial and would have cast doubt on the victim’s testimony as to when the defendant had the opportunity to commit the crimes that he was accused of.).

d. Failing to consult and call an expert witness when critical testimony of another witness is called into question by a medical/psychological condition in expert’s field of expertise. See, e.g., Bell v. Miller, 500 F.3d 14 (2d Cir. 2007) (An attorney’s failure to consult a medical expert regarding the reliability of the prosecution’s witness’ identification of the defendant as his assailant, was ineffective assistance because the attorney knew that the witness had suffered memory loss due to excessive blood loss, which called into question the accuracy of the witness’ identification. If consulted and later questioned about the witness’ medical condition and its effect on his memory, the medical expert would have called into question the witness’ memory and ability to identify the defendant, which was the only evidence tying the defendant to the alleged crime); Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005) (An attorney’s failure to consult and call an expert medical witness in a sexual abuse case was ineffective assistance because beyond the purported medical abuse presented by the prosecution, the entirety of the case was dependent upon the defendant’s and the prosecution’s witnesses’ credibility. The attorney failed to consult or call a medical expert, who would
have testified that the prosecution’s evidence was not entirely indicative of sexual penetration, which would have simultaneously contradicted the only physical evidence presented by the prosecution and bolstered the credibility of the defendant).