

**THE KINGS COUNTY CRIMINAL
BAR ASSOCIATION**

PRESENTS:

**“PROFESSIONAL RESPONSIBILITY
UPDATE”**

A CONTINUING LEGAL EDUCATION COURSE

**JUNE 2, 2010
6:00 P.M. TO 8:00 P.M.**

**BROOKLYN BAR ASSOCIATION
123 REMSEN STREET
BROOKLYN, NEW YORK**

**OUTLINE
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I. Introduction.

- A. Effective April 1, 2009, New York finally joins 47 other State jurisdictions by moving to an ethical structure patterned after the American Bar Association structure of “Model Rules.” New York finally abandons the archaic system of Canon, Ethical Considerations and Disciplinary Rules. New York will now have “Rules” with “Commentary” authored by the New York State Bar Association’s “Committee on Standards of Attorney Conduct.”

The new Rules and Commentary are available at:

<http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments.pdf>

- B. Although New York has moved to the Model Rule format, the four Appellate Divisions which have promulgated and released the new rules on December 16, 2008 have created a “blend” of ethical principles drawn from former New York rules, A.B.A. rules as well as other sources. Lawyers will be able to draw upon, where applicable, interpretation of New York’s former rules and the A.B.A. Model Rules.

II. Significant Changes.

A. Overview.

It is still too early to predict even the immediate impact of the new Rules, but there are a number of new rules which New York attorneys should closely examine. They are addressed in Office of Court Administration announcements (http://www.courts.state.ny.us/press/pr2008_7.shtml); the ABA/BNA Lawyers Manual on Professional Responsibility, “New York Adopts Format of Model Rules ...” (Vol. 24, No. 26, Dec. 24, 2008); Roy Simon, The New York Professional Responsibility Report, “Comparing the NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility” – Parts I and II – Feb. 2009 and March 2009; Roy Simon, The New York Professional Responsibility Report, “Some Interesting Provisions In the New Rules” – Parts I through VIII – April 2009 and November 2009; and in other publications.

Although lawyers will need to familiarize themselves with all of the new provisions, set forth below are a number of provisions which stand out as being particularly important to this writer.

B. Scope Of Representation And Allocation Of Authority Between Client and Lawyer (Rule 1.2).

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

Rule 1.2(a) provides: “Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

C. Fee Agreements And Division Of Fees (Rule 1.5).

1. Retainer Agreements.

As a matter of ethics (and not necessarily court rules)

Rule 1.5(b) requires a lawyer to communicate fees and expenses to the client before or within a reasonable time after commencement of representation, and thereby extends the current letter of engagement rule (22 N.Y.C.R.R Section 1215), to all matters currently excepted under that rule (unless the client has been regularly represented by the lawyer). However, this Rule makes it clear that where

Rule 1.5(b) provides: “ 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.”

2. Fee Sharing.

The Appellate Divisions have now spoken clearly about the requirements of fee sharing among lawyers not in the sam firm. The client must be advised of the sharing and of the amount of the sharing. Rule 1.5(g) provides:

“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.”
(Emphasis added.)

The significant change in the Rule is that the client must be advised of *how* the lawyers will be sharing the fees (e.g., the percentage split).

3. Minimum Fees.

“Minimum Fees” (albeit *not* “non-refundable retainers”) are now permitted by Rule 1.5(d)(4) which provides 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....” (Non-refundable retainers, which were outlawed in Matter of Cooperman, 83 N.Y.2d 465 [1994], are now ethically and specifically prohibited by Rule 1.5[d].)

Recently, the Michigan Supreme Court found no violation of disciplinary rules based on an attorney's use of this 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.”¹

¹Grievance Administrator v. Cooper, 757 N.W.2d 867 (Sup. Ct. Mich. 2008). It remains to be seen whether New York courts will embrace the language in Cooper. 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 Roy Simon, “Interesting Provisions in the New Rules – Part I Rule 1.0 through Rule 1.6.” (continued..)

D. Confidentiality Of Information (Rule 1.6) And Conduct Before A Tribunal (Rule 3.3).

1. Rule 1.6 eliminates former D.R. 4-101's cumbersome use of the terms "secret" and "confidential" information with the all-encompassing term "confidential information" – which refers to all information gained during the representation, irrespective of the source.
2. Rule 1.6(a)(2) now makes it clear that disclosure of confidential client information impliedly authorized to advance the client's best interests when it is reasonable or customary.
3. Rule 1.6(b) has been *expanded* to permit a lawyer to reveal or use confidential client information necessary to "prevent reasonably certain death or substantial bodily harm."²
4. Rule 1.6(b)(3) – which is similar to former D.R. 4-105(C)(5) – allows lawyers "to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

1(...continued)

The New York Professional Responsibility Report, p. 4 (April 2009).

²Comment 6B to this Rule explains: "Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph."

5. Rule 1.6(b)(4) permits a lawyer to reveal confidential information in order to obtain ethics-related advice, i.e., the disclosure made be made to the extent necessary to secure legal advice about compliance with ethical rules or other laws.
6. Rule 3.3(a)(3) is a *radical departure* from the former rules. Rule 3.3(a)(3) requires a lawyer to correct a false statement of material fact or law previously made to the tribunal by the lawyer or the client and to take necessary remedial measures, including disclosure of confidential client information. That new Rule provides:

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

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

Of course, only time will tell how courts will apply this clear new rule to the conundrum of client perjury in criminal cases and whether the guidance lawyers have is “crystal clear.” Cf. People v. Berroa, 99 N.Y.2d 134 (2002); People v. DePallo, 96 N.Y.2d 437 (2001); People v. Darrett, 2 A.D.3d 16 (1st Dept. 2003).

7. Rule 3.3(b) provides that “[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
8. *The new Rules eliminate the former New York Disciplinary Rule (i.e., D.R. 7-102[B][1]) which requires disclosure of a crime or client fraud on a “person”, and substituted it with a new Rule 3.3 which is limited to disclosure of client fraud on a tribunal. Note that A.B.A. Model Rule 4.1(b) which requires disclosure of facts necessary to avoid assisting a client fraud or crime where the lawyer’s services have been used (and where the information is not protected by Rule 1.6’s confidentiality provision) is not part of the newly adopted New York Rules.*
9. Two Recent And Important Ethics Opinions.

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

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

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

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

...

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

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

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

Opinion 741 concludes that testimony at a deposition is governed by Rule 3.3 in part because false testimony at a deposition may constitute the crime of perjury, and the victim of the perjury is the adverse party, which may rely on the false testimony, as well as the justice system as a whole – even if the deposition is not submitted to a court, or not submitted to a court for months or even years after the testimony is reduced to transcript form.

Opinion 741 also addresses how an attorney should remediate the false testimony at a deposition. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony. Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See RPC 1.13 (organization as client). Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

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

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

Opinion 837 began by noting that New York's new Rule 3.3 – which was long ago adopted in most states – represents a “radical break” from former Disciplinary Rule 7-102(B) (1) because it provides that if a lawyer or the lawyer's client has offered

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

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

As to the vexing question concerning the duration of the duty to take remedial measures, Opinion 837 explains that the New York State Bar Association had recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that “[t]he duties stated in paragraphs (a) and (e) continue to the conclusion of the proceeding. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation.” See Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar’s proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel’s obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. The Opinion also expressed the view “that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3.”

E. Current Clients: Specific Conflict Of Interest Rules (Rule 1.8).

Rule 1.8(c) prohibits a lawyer from soliciting any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or from preparing on a client’s behalf an

instrument giving a gift to the lawyer or a person related to the lawyer, unless the lawyer or recipient of the gift is related to the client and a reasonable lawyer would find the transaction fair and reasonable.

In a business transaction between lawyer and client, Rule 1.8(a) requires the lawyer to advise the client in writing to seek the advice of independent counsel and to give the client a reasonable opportunity to do so; and the client must give informed written consent that addresses the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction.

F. Duties To Prospective Clients (Rule 1.18).

Rule 1.18 governs a lawyer's duties to a prospective client when that person and the lawyer ultimately do not form an attorney-client relationship. It applies the same duty of confidentiality owed to former clients. However, a lawyer or law firm may oppose a former prospective client if the lawyer's current client and former prospective client give informed written consent, or the law firm may do so if certain conditions are met, including timely screening of the disqualified lawyer and prompt written notice to the former prospective client. Rule 1.18's provisions do not extend to a person who communicates with a lawyer *in order to* disqualify the lawyer. The Rule provides:

“A person who:

- (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship; or
- (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of [the disqualification rule].”

G. Diligence And Proper Communication (Rules 1.3 and 1.4).

“Diligence” as an attorney is now clearly explained in Rule 1.3 which provides: “A lawyer shall act with reasonable diligence and promptness in representing a client. ... A lawyer shall not neglect a legal matter entrusted to the lawyer. ... A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.”

Proper “communication” with a client is finalized defined. Rule 1.4 codifies a lawyer’s duty to communicate effectively with the client, including keeping the client reasonably informed about the status of the matter promptly complying with a reasonable request for information. Rule 1.4 explains that:

“(a) A lawyer shall:

(1) promptly inform the client of:

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

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

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

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

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

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

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer

knows that the client expects assistance not permitted by these Rules or other law.

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

H. Written Waivers Of Conflict Of Interest Must Be In Writing (Rule 1.7[b][4]).

At last, New York lawyers have been give 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*.”

“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.”

In Opinion 829, issued April 29, 2009, the New York State Bar Association’s Committee On Professional Ethics expressed the view that where a lawyer prior to the adoption of New York’s new ethical rules obtained an oral waiver of a conflict of interest, the lawyer need *not* obtain a new consent to the conflict if the oral waiver was valid when given.

I. “Informed Consent” Is Now A Defined Term (Rule 1.0[j]).

The definitions section of the new Rules is robust and among the terms confined is “informed consent.” Now lawyers are told that informed consent has the element of risks and alternatives. 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.”³

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

³In *Celgene Corp. v. KV Pharmaceutical Co.*, 2008 WL 2937415 (D.N.J. July 29, 2008), 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 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 * 5 [citing to *In re Lanza*, 65 N.J. 347, 352-353 (1974)].)

The Court made it clear that more information had to be provided to the client, other than the request by the firm for open-ended authority to represent a potentially adverse party:

“ First, both agreements propose a future course of conduct that is very open-ended and vague. Both [waiver consent] provisions are so general that a reader has no clear idea what course of conduct Buchanan anticipated: what kinds of cases are substantially related? Did the parties anticipate that Buchanan would be adverse to Celgene in other patent cases? Second, there is nothing in the agreements to indicate that Buchanan communicated to Celgene adequate information or explanation about the risks of the proposed course of conduct, with regard to concurrent conflicts of interest: would Celgene be comfortable if Buchanan represented a generic pharmaceutical company in a patent case? Third, there is nothing in the agreements to indicate that Buchanan explained to Celgene reasonably available alternatives to the proposed course of conduct, such as Celgene asking Buchanan to specifically define ‘substantially related’ or requesting an even broader limitation-perhaps that Buchanan would not represent any generic drug companies. The record does not show that Celgene received anything in return for agreeing to these provisions. Indeed, the agreements only appear to benefit Buchanan-which further underscores the importance of Buchanan fully explaining the meaning and implications of the waiver. Neither agreement manifests informed consent within the meaning of [the ethics conflict rules and definition of informed consent].” (*Id.* at *8)

The *Celgene* case stands as a reminder to law firms to draft waivers which are specific, even when the waiving client is a sophisticated one. See generally, Michael J. DiLernia, “Advance Waivers of Conflicts of Interest in Large Law Firm Practice,” *Georgetown Journal of Legal Ethics*, Vol 22:97 (2009); Anthony E. Davis, “Another Look at Advance Waivers,” *New York Law Journal*, Sept. 8, 2008, p. 3, col. 1.

J. “Screening” For Conflicts Is Not Formally Recognized.

The new Rules *declined* the suggestion that the rules adopt a screening provision that would allow firms to avoid imputed disqualification by screening lawyers who were hired laterally from other firms. New York lawyers must be aware that New York does not have what is the equivalent of newly-adopted A.B.A. Model Rule 1.10 which permits lawyers with potentially disqualifying information to be screened, so long as written notice is given to the affected former client and other protocols are put into place to ensure compliance with the screening process. The New York view on the “imputation of disqualification” and the possibility of screening the attorney with the disqualifying information, is summarized in cases such as Papyrus Technology Corp. v New York Stock Exchange, 325 F.Supp.2d 270 (S.D.N.Y. 2004). There the court found that “[t]he touchstones of the imputation inquiry are the significance of the prohibited lawyer’s involvement in and knowledge of the former client’s confidences and secrets [internal citation omitted].” *Id.* at 279. Courts look at the degree of the lawyer’s involvement in the former client’s case; the recency of that involvement; the extent and timing of efforts to screen the lawyer from the rest of the firm and the size of the firm. *Id.* at 279-81.

K. Personal Interest Exception To The Conflict Rules Not Recognized.

The new Rules declined to adopt a personal interest exception for implied disqualification, similar to A.B.A. Model Rule 1.10(a) which provides that if an individual in a firm is disqualified due to a personal reason (such as bias), the entire firm is not disqualified on an imputed basis.⁴

L. Obligations To Unrepresented Party (Rule 4.3).

Rule 4.3 now makes clear the duties of lawyers towards unrepresented parties. The Rule provides:

“In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should

⁴A.B.A. Model Rule 1.10(a) provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

M. Receipt Of Inadvertently Sent Confidential Information (Rule 4.4[b]).

Finally, lawyers need no longer rely on a patchwork of court decisions and ethics opinions when confronted with the situation of inadvertently sent confidential information. Rule 4.4(b) provides:

"A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

N. Representing Clients With Diminished Capacity (Rule 1.14).

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

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized

under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.”

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

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

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

The new rules also reinforce the guidance given by the New York State Bar Association, the Juvenile Rights Division and many others that a lawyer should always attempt to resolve any differences of opinion with a client through traditional lawyering duties, such as intensive client counseling. Through normal counseling, lawyers will often be able to explain to a client why a particular option may serve the client's best interests, and may even be persuaded by a client that the position of the client is the most sensible.”

Andrew Schepard and Theo Liebman, “New Professional Responsibility Rules and Attorney for the Child,” New York Law Journal, March 11, 2009, p. 3, col. 1 (footnote omitted).

O. Advertising Rules Remain Unchanged From The Rules That Went Into Effect On February 1, 2007.

There have been no significant changes in the advertising Rules.

P. Multijurisdictional Practice Rules Of The A.B.A. Code Were Not Adopted.

In what was one of the biggest surprises and disappointments in the new Rules, the Appellate Divisions did not adopt a variant of A.B.A. Model Rule 5.5. There is no clear safe haven for lawyers who practice temporarily in New York; nor do in-house corporate lawyers have the umbrella of limited practice which that rule provides in other jurisdictions. Whether or when New York ever adopts a rule similar to Model Rule 5.5 is uncertain, but what is clear is that in-house corporate lawyers and other lawyers who practice in New York without being admitted to the Bar should expert ethics counsel in order to determine their responsibilities.

Q. Comments About Judges And Judicial Candidates (Rule 8.2).

Rule 8.2 expands the prohibition against false statements of fact regarding “qualifications or conduct of judges or judicial candidates to include false statements about “conduct or integrity.”

Rule 8.2(a) provides that “[a] lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.”

R. Obstructive And Delaying Conduct (Rule 3.2).

Rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding or cause needless expense. This Rule seems to engraft into the Rules the same principles incorporated into State and Federal sanctions provisions.

This Rule now clearly provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”

S. Communication With A Represented Person (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.”

This new Rule takes the place of former D.R. 7-104(A), which provided that “[d]uring the course of the representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate on the subject of the representation with a *party* the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” (Emphasis added.) Thus, the new Rule continues to utilize the word “party” and not “person.” The New York State Bar Association's Committee on Attorney Standards (“COSAC”) had proposed that the term “party” be replaced with the term “person” to give broader reach to the no-contact rule, but the Appellate Divisions declined to change the Rule; and, indeed, in 1999, the Appellate Divisions’ amendment to the Rule specifically used the term “party” and not “person.”

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

III. Recent Court Decisions Of Interest To Criminal Law Practitioners..

A. Introduction.

The new ethics rules in New York have not yet had generated a large number of court decisions which have turned on the “differences” between the old and new rules. Nonetheless, court decisions in general provide the criminal law practitioners with a wealth of guidance. Set forth below, by category, are court decisions and other legal commentaries of interest.

B. The “Acceptable Deception” Doctrine.

The “acceptable deception” doctrine has been the subject of considerable discussion in the last year. Lawyers should consider reading the interesting article of Barry R. Tempkin, “Deception in Undercover Investigations: Conduct-Based vs. Status Based Ethical Analysis,” 32 Seattle Univ. L. Rev. 123 (2008), which discusses whether and when civil and criminal law practitioners can and should be able to engage in deception as part of undercover operations, and discusses the ethical underpinning of opinions such as N.Y. Co. Lawyers’ Assn. Op. 737 (2007). That Opinion suggests that New York attorneys may supervise undercover operations which involve deceit and misrepresentation in situations involving a violation of civil rights or intellectual property rights, so long as the evidence sought is not reasonably available through other lawful means and the lawyer’s and the investigator’s conduct do not otherwise violate ethical rules.

In a somewhat recent interesting decision concerning when an attorney can engage in deception, the Wisconsin Supreme Court in Office of Lawyer Regulation v. Hurley, No. 2007 AP478-D (Feb. 11, 2009) found that a criminal defense attorney did not violate the anti-deceit rules by having an investigator use false pretenses to obtain potentially damaging evidence from a client’s victim. The case involved a claim of sexual assault and the supposed exhibition of pornography to a minor, and the defense wanted to show that the minor had a proclivity to view pornography. The defense attorney retained an investigator and sent the minor and his mother a letter supposedly from a company which was researching computer preferences. The minor and his mother were tricked into sending the minor’s computer to the defense attorney. At a hearing, the defense attorney introduced evidence that he had researched the law and surveyed attorneys inside and outside his firm and concluded that the ruse was lawful. The court pointed out that prosecutors have

traditionally been able to engage in ruses, and there was no way under that State's law to point to a reason why prosecutors could engage in conduct which defense attorneys could not. Another key point was that after the commission of the conduct in question, the State had passed an amendment to its ethical rules which permitted attorneys to advise and supervise others with respect to "lawful investigative activities."

In what is another chapter in the always fascinating, but often hard to predict saga of "acceptable deceit," the Supreme Court of Vermont in In re PRB, 989 A.2d 523 (Vt. 2009), upheld the imposition of only a private reprimand on two criminal defense attorneys who misled a potential witness about whether they were recording a telephone conversation. The court focused on the state's ethical rule 4.1 which forbids an attorney from making a false statement of material fact or law to a third person. (And New York attorneys should note that the New York Rule does not have the term "material" in it and thus forbids all mis-statements of fact and law.) The court, however, found that the attorney's conduct did not violate Vermont's Rule 8.4 (c), which has a New York counterpart, prohibiting conduct involving dishonesty, fraud, deceit and misrepresentation, because the falsehood concerning the tape recording did not call into question the attorney's fitness to practice law (i.e., conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law), which the Vermont court had previously found was a necessary, albeit implied, limitation to the rule. The decision also reiterates the majority view that the secret recording is not unethical, it is the lying about it which is.

C. Motions To Withdraw.

Joel Cohen, in his entertaining article, "Withdrawing Quietly From Representation," NYLJ, April 17, 2009, p. 3, col. 1, reminded attorneys that when attorneys withdraw or are discharged from a case – particularly a high-profile one in which there is media interest – they are not free to explain to the press why they either withdrew or were discharged. Such revelation of client information may only be made when, under Rule 1.6(b)(5), the attorney is accused of misconduct, and that the accusation of misconduct must be made in a pending proceeding where the attorney is called upon to defend himself or herself. Furthermore, even when the "self defense" exception may be invoked, the information revealed must be only that which is necessary to defend against the accusation of misconduct.

In Alter v. Oppenheimer & Co., Inc., 21 Misc.3d 1136A, 875 N.Y.S.2d 818 (N.Y. Co. Sup. Ct. 2008), the court refused to grant a motion to withdraw made by a prominent law firm just days before the scheduled trial was to begin. The firm claimed that it could not ethically continue to represent the defendant in a sexual harassment case because it had also represented another defendant which had settled the case. The court denied the motion in part because the firm and the defendants had all agreed before trial and before the settlement that there was no actual conflict between the defendants. In addition, the court did not find that the relationship between the defendant and counsel had broken down or had become unreasonably difficult merely because the firm claimed its loyalty had been questioned by the client. The court reviewed all of the applicable facts and rather than accept generalized conclusions by the law firm, it found that the attorney client relationship had not become unreasonably difficult for the firm, nor did mere distrust and criticism by the client justify allowing a law firm to withdraw on the eve of trial.

D. Failure To Investigate Claims.

In People v. Whiting, 21 Misc.3d 1131A (Kings Co. Sup. Ct. 2008), the court found that trial counsel's failure to investigate an alibi claim did not constitute ineffective assistance of counsel. The case raised the question of whether a defense attorney had a duty to promptly investigate a claim of alibi in the circumstances where – from a variety of other facts – the defense attorney reasonably did not believe that the alibi claim was true. Although the court did not find that the defense attorney's conduct constituted inadequate representation, the court's admonition on the subject of when to investigate claims bears repetition. Justice Goldberg noted: "However, despite her reservations about the shoe store alibi, it would not have taken much effort to send an investigator to the shoe store [to investigate the alibi]. ... [W]hile [defense counsel] may have been arguably deficient [in not promptly investigating the alibi] the defendant has not met his burden ... of establishing that but for [defense counsel's failure to investigate the alibi] there is a reasonable probability that the defendant would have been acquitted."

In United States v. Balis, 2009 WL 1117274 (S.D.N.Y. 2009), the court rejected a convicted lawyer's claim that his trial counsel had provided incompetent representation based, among other things, upon a supposed failure to interview and call certain witnesses at trial. The court explained in very clear terms that so long as a lawyer has considered the issue, the strategic decision not to call certain

witnesses is ordinarily not subject to claims of a lapse of professionalism even where the witness might have given exculpatory testimony. The court summarized the state of law as reflecting the principal that strategic decisions “are virtually unchallengeable.” The court was convinced that defense counsel had interviewed most of the supposed helpful witnesses and made a decision with full deliberation that such witnesses would have been unhelpful or counterproductive.

E. Negotiating The Dropping Of A Criminal Case.

In People v. Gagnon, 21 Misc.3d 594, 863 N.Y.S.2d 903 (Essex Co. Sup. Ct. 2008), the court addressed the question of whether a “release” agreement to “drop” criminal (and civil) charges in exchange for money was sufficient to establish the crime of bribery. (This case is significant to those criminal law practitioners who negotiate with victims of crimes and seek to settle potential civil cases.) The court dismissed the indictment and found that agreeing to drop a charge is different from agreeing to alter testimony or absent oneself from a proceeding. The court found that only the District Attorney had ability to determine to prosecute or how to prosecute a criminal case.

F. Duties As Between Co-Clients.

In People v. Ennis, 11 N.Y.3d 403, 872 N.Y.S.2d 364 (2008), the Court of Appeals refused to reverse a conviction where defense counsel failed to advise his client of information provided by the attorney of the defendant’s brother who was a co-defendant in the case. The information related to a proffer which had been made by the brother in which the brother admitted to committing the shooting in question. Defense counsel had been provided this information by the defendant’s brother’s attorney on a strictly confidential basis. The defendant claimed that if he had known of the proffer, he would have asked to be tried separately and would have called his brother as a witness at his trial. The defendant claimed that his lawyer was laboring under a serious conflict because of the promise made to the co-defendant’s brother not to reveal the information. The court disagreed but nonetheless noted that the duty to the client should have trumped the promise of confidentiality to a fellow attorney. The court also noted that the lawyer could have advised the trial judge on an ex parte basis, and without revealing the source, that he had reason to believe there had been a proffer which had not been formally disclosed to him by the prosecution.

G. Giving Advice To A Client To Plead Guilty.

In Berry v. Ercole, 2009 WL 1321906 (S.D.N.Y. 2009), the court rejected a convicted defendant's habeas corpus claim that his attorney had advised his client to plead guilty where the client adamantly claimed he was innocent. The court explained that defense counsel was required to advise the client of the strengths and weaknesses in the case and to advise the client fully on a plea agreements that might be offered, but the attorney is not obligated to "arm twist" the client into pleading guilty. The court will typically consider the level of counsel's efforts by the disparity in sentences between a plea and a conviction after trial and the likelihood of conviction.

H. The Pro Se Issue.

In People v. Hillary Best, NYLJ, March 10, 2008, p. 20, col. 3 (Queens Co. Crim. Ct. 2008), the court addressed the "extreme, last-resort" of requiring a defendant to represent himself pro se when the defendant attempts to sabotage numerous attorney-client relationships and engages in dilatory conduct. The court held that the defendant had forfeited his right to counsel and was required to proceed pro se at an upcoming hearing because: a) he had filed motions to relieve counsel against every attorney assigned to him by the court or had otherwise taken actions that resulted in attorneys moving to be relieved as counsel; b) he had filed or threatened to file law suits and/or grievances against attorneys; and c) he had consistently engaged in additional dilatory tactics.

I. The Brady Mandate.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454 on July 8, 2009. The Opinion indicates that as a matter of ethics – and not substantive criminal law – prosecutors must disclose evidence that tends to negate guilt or mitigates the offenses without regard to the anticipated impact of the evidence or information to a trial's outcome. The material must be disclosed as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. In other words, the rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use. The Opinion specifically warns prosecutors that the defendants cannot waive their right to such exculpatory materials even in return for leniency (which presumably refers to plea agreements where defendants waive their rights to receive Brady

material).

J. Representing “Impaired” Clients.

Rule 1.14 is a welcome new addition to the New York disciplinary landscape and, like its A.B.A. counterpart, provides much needed guidance for attorneys with impaired clients. Because the application of the Rule is often driven by complex fact patterns, it is helpful for attorneys to be able to turn to an ethics-oriented article which summarizes the application of the Rule in a variety of contexts. An excellent article on the subject is “Analysis & Perspective – Lawyer Client Relationship/Client With Diminished Capacity,” ABA/BNA Lawyers’ Manual on Professional Responsibility, Vol. 25, No. 24 (Nov. 25, 2010). The article provides helpful insight into the principles underlying the Rule, that is: 1) the lawyer must continue to treat the impaired client with attention and respect, attempt to communicate and discuss relevant matters and continue as far as reasonably possible to take action consistent with the client’s direction and decisions; 2) the lawyer should not substitute the lawyer’s own judgment for what is in the client’s best interest except for the circumstances specifically set out in the Rule. The article provides helpful guidance and examples of how to deal with a client who is competent but unable to assist (and in such instances may seek assistance of others in the client’s family); addresses the issue of how to assess a minor’s capacity (and noting that even young children have opinions that are entitled to weight in legal proceedings); considering the child’s wishes against the lawyer’s best interests analysis (and notes that a lawyer need not blindly advocate for a child’s stated position); notes the role of parents (noting that the interests of the child must prevail over parents’ stated interests); and notes that even if the child has a guardian, the lawyer may be able to communicate with the guardian against the client’s interests. Because Rule 1.14 is complex in its application, practitioners should read articles such as this before undertaking the representation of an impaired client.

K. Attorney’s Fees And Fee Disputes.

In Kushner v. Eliopoulos, 27 Misc.3d 1218(A) (N.Y. Co. Civ. Ct. 2010), the court granted summary judgment to a criminal lawyer against a husband and wife, both of whom had asked the lawyer to represent her 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 lawyer 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.

In Depetris & Bachrach v. Spour, 71 A.D.3d 460 (1st Dept. 2010), the Appellate Division, First Department, ruled that when a law firm refers a client to another firm and assures the other firm that it would pay the client's fees such a promise to pay fees is enforceable under the doctrine of implied warranty of authority. Although the court's ruling on the issue of consideration for the promise and the possible lack of a need for a writing formalizing the promise was somewhat murky, the court's holding is an important reminder to firms that they should not directly or indirectly promise that the clients they are referring will pay their bills.

L. Competency of Criminal Counsel.

In People v. Vasquez, NYLJ, Feb 19, 2010 (Sup. Ct. Bronx Co. 2010), the convicted criminal defendant took the position, among others, that his guilty verdict should be set aside because his client improperly conceded in summation that the jury should convict him of Robbery in the Second Degree, as opposed to Murder in the Second Degree connection with a robbery in which a victim died. The court noted that defense counsel discharged his duty to the client by explaining over time how counsel's defense theory was evolving and changing, including his approach to voir dire and the arguments which would be made during opening and closing statements. The court found that not only had the defendant consented to his counsel's strategy, but *that under governing law it was up to defense counsel to select a reasonable trial strategy* even if that strategy was unsuccessful and even if the client did not agree to such a strategy. The court pointed out that although the client alone decides whether to plead guilty or not, in the context of a trial, defense counsel may elect to concede guilt on certain charges if that is part of the overall trial strategy.

In People v. Diggins, 25 Misc.3d 1218(A) (Sup. Ct. N.Y.Co. 2009), the court rejected the defendant's claim that after he had voluntarily absented himself from trial, his lawyer's "strategy of silence" violated his constitutional right to effective assistance of counsel. There are many interesting issues raised in this decision, but suffice it to say that counsel should exercise extreme care, and understand fully the often-conflicting interests and policy considerations in undertaking such a strategy and when such a strategy can be defended as being

proper.

In Reich v. United States, 2010 WL 10373 (E.D.N.Y. Dec 31, 2009), the court denied a convicted lawyer-defendant's Section 2255 habeas claim that his attorney acted improperly and did not provide him effective assistance of counsel because that attorney "permitted" the defendant to attend a proffer session. The court explained that the attorney was entitled to believe that the defendant would tell the truth and possibly pave the way for a reduction of his sentence by way of acceptance of responsibility or substantial assistance. The court rejected the argument that a competent attorney would not have allowed such a proffer in the absence of non-prosecution agreement or, alternatively, the lawyer should simply have made a "lawyer proffer." Similarly, the court rejected the argument that counsel should have made unrealistic requests to the government for "compromises" in the government's position. The court also found that strategic decisions made by defense counsel are "virtually unchallengeable."

M. Money Laundering And Legal Fees.

In United States v. Velez, 586 F.3d 875 (11th Cir. 2009), the Circuit Court dismissed a money laundering indictment which had been brought against a lawyer who had been hired by another criminal law firm to review the sources of payment which were to be used to pay well known criminal defense counsel. The purpose of the review was to determine if the funds used for the defense of an indicted narcotics dealer were derived from criminal proceeds. Kuehne eventually issued "opinion letters" in which he concluded that several money transfers were not comprised of criminally derived property. After the funds were moved, Kuehne was indicted based upon the theory that the attorney knew that the funds were criminally derived and that he had intended to conceal their true source. The Court concluded that the language of the money laundering statute exempts criminally derived proceeds used to secure legal representation.