

**KINGS COUNTRY  
CRIMINAL BAR ASSOCIATION**

**PRESENTS:**

**“PROFESSIONAL RESPONSIBILITY UPDATE”**

**A CONTINUING LEGAL  
EDUCATION PROGRAM**

**NOVEMBER 27, 2007  
6:00 P.M. TO 8:00 P.M.  
BROOKLYN, NEW YORK**

**ETHICS MONOGRAPH  
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**I. INTRODUCTION.**

- A. In the new millennium, the criminal defense bar is required to confront and address a new generation of ethical issues, particularly in the context of litigation and trial related questions. The public, along with Federal and State prosecutors, is often dubious about zealous advocacy which may seem important to the client, but not may further the “public good.” Failing to identify these ethical issues as they arise, and failing to react “ethically,” may doom the criminal defense lawyer to disciplinary sanction and possible prosecution.**
- B. This brief outline addresses some of the new and modified disciplinary rules<sup>1</sup> and attempts to provide a template to understand how to deal with frequently raised ethical issues facing criminal law practitioners, including: zealous advocacy and its limits; the attorney-client privilege; recent developments in the crime fraud exception; and the allocation of authority between the client and the attorney.**

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<sup>1</sup>The New York Lawyer’ s Code of Professional Responsibility was patterned after the American Bar Association’ s Model Code (“ Model Code”). The A.B.A. Model Code, which also uses the term “ Disciplinary Rules,” has been superseded by the A.B.A. Model Rules (“ Model Rule”). For the purposes of this monograph, the reference to “ D.R.” will refer to the rules of the New York Lawyer’ s Code. Although the A.B.A. Model Rules do not govern in New York, in federal court cases (see Rule 1.5[b][5] of the Local Rules of the Eastern and Southern Districts of New York), they are informative, particularly as they relate to ethics opinions issued by the American Bar Association, which have been relied upon and cited on numerous occasions by both courts, disciplinary committees and ethics scholars.

## II. SOME NOT SO “NEW,” BUT OFTEN OVERLOOKED ETHICAL PRINCIPLES.

### A. Introduction.

1. Understanding the principles relating to, for example, the offering of questionable testimony and documents; lawyer deceit; the duty to correct false testimony; witness coaching; etc., requires an understanding of the sometimes murky application of the relevant provisions of the New York Lawyer’s Code Of Professional Responsibility Disciplinary Rules and the American Bar Association Model Code provisions.
2. This brief discussion will help to identify some of the “ethical pitfalls” associated with litigation, in a hope that by identifying the issues, an attorney can avoid making the wrong decisions.

### B. Zealous Advocacy And Its Limits.

1. The Significance Of The Crime-Fraud Exception To The Attorney-Client Privilege.
  - a. The attorney-client privilege, although the oldest privilege for confidential communications, is a limited one that must be proven to exist by the person asserting the privilege. See, e.g., United States v. Roe, 68 F.3d 38 (2d Cir. 1995).
  - b. As Roe explains (id. at 39-40), the privilege applies:
    - (1) Where legal advice of any kind is sought,
    - (2) from a professional legal adviser in his or her capacity as such,
    - (3) so that the communications relating to that purpose,
    - (4) made in confidence,

- (5) by the client,
  - (6) are at his or her instance permanently protected,
  - (7) from disclosure by himself or herself or the legal adviser,
  - (8) except that the protection can be waived.
- c. Communications are not considered to be within a legitimate attorney-client relationship if the attorney is wittingly or unwittingly being used to commit a crime or fraud. Thus, communications which would otherwise be protected by the attorney-client privilege or the attorney work-product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct. See, e.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich), 731 F.2d 1032, 1038 (2d Cir. 1994).
- d. The Fifth Circuit adopted the view of the Second Circuit and various other courts in In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005), when it held that the crime-fraud exception to the attorney-client and work-product privileges does not extend to other communications between the client and the attorney. It is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct.
- e. As Section 82 of the RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS (“Exception [To Privilege] For Client Crime Or Fraud”), explains: The attorney-client privilege does not apply to a communication occurring when a client:
- (1) Consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
  - (2) regardless of the client’s purpose at the time of the consultation, uses the lawyer’s advice or other service to

**engage in or assist a crime or fraud.**

- f. When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Over the years, some litigants have argued that there is a “public policy” exception to the attorney client privilege which allows the piercing of the privilege based upon a balancing test of the public good. In an excellent analysis of the issue, Southern District of New York Judge Sweet’s decision in G-I Holdings, Inc. v. Baron & Budd, 2005 WL 1653623 (S.D.N.Y. July 13, 2005), thoroughly addresses the issue. The Court found that the “public policy exception” to the attorney-client privilege has rarely been utilized and can rarely be justified. In a rare situation, the New York courts have applied the exception to allowing the court to require an attorney to disclose the client’s address where doing so was necessary for the safety and welfare of a young child. But other attempts to expand the public policy exception have been rejected.**
- g. The client need not specifically understand that the contemplated act is a crime or fraud. The client’s purpose in consulting the lawyer or using the lawyer’s services may be inferred from the circumstances. It is irrelevant that the legal service sought by the client (such as drafting an instrument) was itself lawful. RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS Section 132 (“Exception [To Privilege] For Client Crime Or Fraud”), “Comment c.”**

**2. Recent Developments In The Crime-Fraud Exception And The New York Lawyer’s Code Of Professional Responsibility.**

- a. D.R. 1-102(A)(4) – A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>2</sup>**

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<sup>2</sup>Needless to say, conduct may be deceitful even in the absence of affirmative acts by the lawyer. For example, in Matter of Forrest, 265 A.D.2d 12, 706 N.Y.S.2d 15 (1st Dept. 2000), the New York court imposed reciprocal discipline based, in part, upon a disciplinary finding in New Jersey that a lawyer had failed to inform both the arbitrator and opposing counsel that his client had died.

b. **D.R. 7-102(A)(4) – A lawyer shall not knowingly use perjured testimony or false evidence.<sup>3</sup>**

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<sup>3</sup>A.B.A. Model Rule 3.3(a)(4) similarly provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. Finally, it is important to emphasize that because of the nature of the adversary system, the prohibition against introducing false testimony does not prohibit a lawyer from attempting, through cross-examination, to discredit the truthful testimony of witnesses. See C. Selinger, The “Law” On Lawyer Efforts To Discredit Truthful Testimony, 46 OKLA. L. REV. 99 (Spring 1993). For an intelligent “give and take” discussion of the issues relating to presenting “false defenses” in criminal cases, see H. Subin, Is This Lie Necessary? Further Reflections On The Right To Present A False Defense, GEO. J. LEGAL ETHICS, Vol. 1, p. 689 (1988); J. Mitchell, Reasonable Doubts Are Where You Find Them: A Response To Professor Subin’s Position On the Criminal Lawyer’s “Different Mission”, GEO. J. LEGAL ETHICS, Vol. 1, p. 339 (1987); H. Subin, The Criminal Lawyer’s “Different Mission”: Reflections On The ‘Right’ To Present A False Case, GEO. J. LEGAL ETHICS, Vol. 1, p. 125 (1987); cf. D. Baker, “Shredding,” ABA J., (October 1999), p. 40 (discussing application of the ethical prohibition against asserting facts with no factual basis and prohibition against asserting frivolous position, in the context of attacking victim-witnesses’ credibility in the courtroom); H. Subin, The Criminal Lawyer’s “Different Mission”: Reflections On The ‘Right’ To Present A False Case, GEO. J. LEGAL ETHICS, Vol. 1, p. 125 (1987); Myers and Ohlbaum, “Discrediting The Truthful Witness: Demonstrating The Reality Of Adversary Advocacy,” 69 Ford. L.Rev. 1055(2000); Ellman, “Truth And Consequences,” 69 FORD. L.REV. 895 (2000); Thomas Moore, “Can Prosecutors Lie?” GEO. J. LEGAL ETHICS, Vol. 17, p. 961 (Spring 2004).

These views notwithstanding, one federal district court judge has ruled that he would not permit a defense lawyer to introduce evidence either on cross-examination or during direct-examination of the defense witnesses, which was inconsistent with evidence which had been suppressed in a pretrial hearing. United States v. Lauersen, 2000 WL 1693538 at \*9 (S.D.N.Y. Nov. 13, 2000)(WHP). In Lauersen, Judge Puailey had found that a pretrial “proffer” of the defendant could not be used by the government to impeach the defendant’s testimony, should she testify, because the defendant had not knowingly waived her rights. On the other hand, the court would not allow defense counsel to cross-examine witnesses or introduce affirmative evidence on the defense case in a manner which would be inconsistent with the proffer. The court took this position because it felt that it was “duty bound to protect the integrity of the proceeding and to ensure that matters presented to the jury are grounded in good faith. See, e.g., N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.33 [D.R. 7-102](2000).” Id. at \*9.

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

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

(continued...)

- c. **D.R. 7-102(A)(5) – In the representation of a client, a lawyer shall not knowingly make a false statement of fact or law.**
- d. **D.R. 7-102(A)(6) – In the representation of a client, a lawyer shall not knowingly participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.**
- e. **D.R. 7-102(A)(7) – In the representation of a client, a lawyer shall not counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.**
- f. **D.R. 7-102(B) – A lawyer who receives information clearly establishing that: 1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret; and 2) A person other than the client has perpetrated a fraud upon a tribunal, shall promptly reveal the fraud to the tribunal.**
- g. **Tempering these “protective” ethical mandates is the uncertainty of other seemingly non-mandatory rules:**
  - (1) **D.R. 4-101(C)(3) – A lawyer may reveal the intention of a client to commit a crime and the information necessary to prevent the crime.**
  - (2) **D.R. 4-101(C)(5) – A lawyer may reveal confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon**

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(...continued)

For a further discussion of the fascinating, and often impenetrable topic of the role which the “truth” plays in the adversary process, see Myers and Ohlbaum, “Discrediting The Truthful Witness: Demonstrating The Reality Of Adversary Advocacy,” 69 FORD. L.REV. 1055(2000); Ellman, “Truth And Consequences,” 69 FORD. L.REV. 895 (2000).

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.

- (3) Compare D.R. 4-101(C)(5) with A.B.A. Formal Opinion 92-366, which can be summarized as follows:

A lawyer who knows or with reason believes that his or her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation which are being, or will be, used in furtherance of the fraud, even though such a “noisy” withdrawal may have the collateral effect of inferentially revealing client confidences.

When a lawyer’s services have been used in the past by a client to perpetrate a fraud, but the fraud has ceased, the lawyer may, but is not required to, withdraw from further representation of the client; in these circumstances a “noisy” withdrawal is not permitted.<sup>4</sup>

- (4) It is important to remember that under notions of agency law, a “lawyer may ... be liable under civil or criminal law

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<sup>4</sup>Keep in mind that A.B.A. Opinions are not “binding” in New York State disciplinary proceedings. See L. Kellman, When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained A.B.A. Ethics Opinions, GEO. J. LEGAL ETHICS, Vol X., No. 2 317 (1996). Clearly, this is the case where A.B.A. Formal Opinion 95-396 interprets the term “party” expansively in the ex-parte communication rule to mean “person”; and yet, New York’s ex-parte communication provision in D.R. 7-104 literally and narrowly construes “party” to mean only a “party.” See Grievance Committee for Southern District v. Simels, 48 F.3d 640 (2d Cir. 1995). Some courts have even rejected the A.B.A. Model Code’s provisions for determining the propriety of attorney conduct, particularly in the context of nondisciplinary issues. See, e.g., Ryan v. Butera, 193 F.3d 210 (3d Cir. 1999)(in determining the propriety of the district court’s refusal to order the refund of a supposedly improper “non-refundable retainer,” and in applying the court’s inherent supervisory power over attorney-client fee arrangements, appellate court notes that it refused in the past to apply A.B.A. Model Rule 2-106(A)’s reasonable fee standard).

for aiding and abetting a client's misrepresentation.<sup>5</sup> A lawyer's transmission of information on behalf of a client, even on a matter seemingly as removed as transmitting a letter given to him or her by a client, can be viewed as making the attorney subject to the duty to correct. This reflects the engrafting of the law of "agency" on the duties of attorneys,<sup>6</sup> which, at the same time, must be tempered with an analysis of the relationship between the attorney and the client. As one group explained:

Undertaking to transmit information does not necessarily involve an undertaking to do anything more, and it is important to identify the characteristics that will signal both when a lawyer has become the alter ego of the client and how becoming an alter ego affects his professional responsibilities and his professional liabilities.<sup>7</sup>

- (5) In this regard, and as noted above, a lawyer who learns that he or she has transmitted information to an adversary, either in or outside the litigation context, has options as well as obligations. For example, appellate

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<sup>5</sup>RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS Section 98 ("Statement To Non-Client"), Reporter's Note to "Comment c"; see also Comments "d" and "e."

<sup>6</sup>*Id.* In that regard, in Rahman v. Smith, New York Law Jnl., Dec. 13, 2005 (Sup. Ct. Queens Co. 2005), Justice Garvin grappled with the timeless question concerning which statements made by an attorney during the course of litigation can be considered as a binding "admission" against the client. In moving to set aside the jury's verdict, plaintiff's counsel seized on a comment made by defense counsel in summation that "there was liability on both sides" and argued that this key admission precluded a defense verdict by the jury. The court rejected that argument, finding that statements made by counsel during a judicial proceedings are binding when they represent formal or informal admissions of fact. While statements of fact in an opening statement may be considered as binding admissions, the same is not true for arguments of counsel in summation. That is particularly appropriate given the standard jury instruction to the effect that counsel's statements in summation are not to be considered as evidence.

<sup>7</sup>Laboring in Different Vineyards? The Banking Regulators And The Legal Profession, Report by the American Bar Association Working Group on Lawyers' Representation of Regulated Client (Discussion Draft, Jan. 1993), p. 157.

courts in New York have amended the state's ethics code to include a new provision, D.R. 4-101(C)(5), which provides that a lawyer may reveal confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and 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. See also A.B.A. Formal Opinion 98-412 (1998)(attorney's duty to correct his or her misstatements embraces circumstance of an attorney who learns that the client has violated a court order, when the violation would cause the attorney's prior statements to be false).

- h. These disciplinary rules contain problematic definitions of a lawyer's mental state: i.e., "knows," "information clearly establishing" and "believed."
- (1) The Second Circuit has held that the language in D.R. 7-102 (B) of "information clearly establishing that" means "actual knowledge." Doe v. Federal Grievance Committee, 847 F.2d 57, 62 (2d Cir. 1988). It is important to emphasize the "knows" or "knowledge" does not mean "reasonably should know." See Matter of Lucarelli, 611 N.W.2d 754 (Sup. Ct. Wisconsin 2000)(In rejecting the claim that a prosecutor knowingly brought a case unsupported by probable cause, the court rejected the argument that "knowledge" can be satisfied by a finding of "reasonably should know.").
  - (2) Yet, the Supreme Court in Nix v. Whiteside, 475 U.S. 157 (1986), held that in applying D.R. 7-102's "knowledge" standard, a lawyer was permitted to advise the court of what he believed would be perjurious testimony by a client based solely upon the client indicating he would testify on his own behalf in a manner inconsistent with the version he had previously told the attorney. See also Frank S. Finnerty, Jr. [former Chief Counsel for the

Grievance Committee for the Tenth Judicial District in New York] and Robert P. Guido, Esq. [current Chief Counsel to that Committee], “Ethical Considerations In The Defense Of A Criminal Case, Criminal Trial Advocacy (8<sup>th</sup> Edition), p. 17 (arguing that, in their view and based on their analysis of the law including the Nix case, the standard for revealing the intention of a client to commit perjury is “what a reasonable attorney would believe under the circumstances.”

- (3) Nassau County Bar Association Opinion 93-41 suggests that where an attorney “clearly believes” that his co-counsel and client have committed fraud, he is obligated to report the misconduct, even though the reporting rule of D.R. 1-103 is triggered when the attorney possesses “knowledge” of misconduct. Addressing this same issue, New York State Bar Association Opinion 635 (9-92), opined that knowledge means more than mere suspicion and more than reasonable belief.<sup>8</sup>
- (4) The Florida Court of Appeals, Second District, held in Calley v. Woodruff, 751 So.2d 599 (Fla. Ct. App. 2d Dist. 1998), that an attorney forfeited his right to the earned share of a fee when he withdrew from his client’s case “in the absence of compelling evidence showing that his client’s conduct was criminal or fraudulent,” and where the disciplinary rule (i.e., D.R. 2-110[C][1][b]) permits

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<sup>8</sup>Moreover, “Terminology,” section 5 to the Model Rules, provides that such a level of knowledge “denotes actual knowledge of the fact in question.” RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS Section 120 (“False Testimony or Evidence”), Comment “c” (internal cross-references omitted) explains:

A lawyer’s knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document. A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client’s own statements indicate to the lawyer that the testimony or other evidence is false.

such withdrawal only when the lawyer reasonably believes that the client is engaging in a course of conduct that is fraudulent or criminal.

- (5) The “knowledge”/“belief” dichotomy – that is, the dichotomy between the attorney’s mandatory duties as opposed to discretionary duties – goes to the heart of decisions which lawyers must make every day, both in and out of the litigation context. Indeed, in Shade v. Great Lakes Dredge & Dock, 72 F. Supp.2d 518 (E.D. Pa. 1999), the federal district court was faced with whether a lawyer violated Rule 3.3’s proscription against intentionally presenting false testimony based upon the fact that the attorney called a witness to testify to a version of facts which was completely contrary to the version of facts which the witness had given under oath in another proceeding on both direct-examination and cross-examination. When accused of this misconduct, the attorney who was the subject of the accusation defended his conduct by explaining that the prior inconsistent testimony was merely peripheral evidence and that it had been offered in the prior proceeding to explain the witness’ own subjective beliefs.
- (6) The Shade court explained that even the outright inconsistency was not enough to support the conclusion that the attorney had knowingly presented false testimony:

“Even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the [adversarial system of justice] process.’ That is, the overall duty of truth ‘takes its shape from the larger object of preserving the integrity of the judicial system.’ However, it is important to emphasize that a mere suspicion of perjury is not enough to require disclosure to the court. As [Rule

3.3(a)(4) and (c)] indicates, an attorney's duty to inform the court does not arise unless the attorney knows that false testimony has been elicited; an attorney has the option of refusing to offer testimony she believes to be false."

Id. at 516-17 (emphasis added; internal citations omitted.)<sup>9</sup>

- (7) The First Department's Departmental Disciplinary Committee has argued that an attorney has a duty to correct false testimony by a client pursuant to D.R. 7-102(A)(6) merely when the falsity is "obvious." Matter of Janoff, 242 A.D.2d 27, 672 N.Y.S.2d 89 (1st Dept. 1998) (Post-Hearing Submissions By Staff).
- (8) For a comprehensive and illuminating discussion of the how state courts across the country have defined the level of information which constitutes "knowledge" under the ethical rules, see Erin Jaskot and Christopher Mulligan, "Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court," GEO. L.J., Vol. 17, p. 845 (Spring 2004). The authors note:

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<sup>9</sup>In fact, it is this elastic concept of "knowledge" versus "belief" which permits a prosecutor to use inconsistent factual theories of a crime in successive criminal trials. Cf. Michael English, A Prosecutor's Use Of Inconsistent Factual Theories Of A Crime In Successive Trials: Zealous Advocacy Or A Due Process Violation? 68 FORD. L. REV. 525, 541 (1999)(because a prosecutor is limited only by the proscription of not knowingly presenting false testimony, "ethical codes suggest that the prosecutor's personal opinion is irrelevant"); New York County Lawyers' Association Committee on Professional Ethics Opinion Number 698 (attorney not obliged to produce medical information which would be detrimental to the client's claims, so long as there is no specific request made for those documents); but see Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000)(the Due Process Clause forbids a State from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offense arising out of the same event). For an updated discussion concerning how various state courts have addressed the issue of whether, or under what circumstances prosecutors can lie, see Thomas Moore, "Can Prosecutors Lie?" GEO. J. LEGAL ETHICS, Vol. 17, p. 961 (Spring 2004).

Those courts adopting standards have articulated definitions of knowledge ranging from circumstantial evidence and a good faith belief to a more stringent definition of proof beyond a reasonable doubt. The majority of courts have required at the very least “some corroboration ... more than unsubstantiated rumor” before an attorney may invoke Model Rule 3.3 [the duty to correct witness perjury]. Other courts have defined the standard as “firm factual basis.” But these vague and varying standards have done little to clarify the issue for practicing attorneys, and leave scholars to question “[h]ow can a lawyer recognize when she has a firm factual basis rather than a reasonable doubt of a client’s intention to commit perjury while on the witness stand?” (Footnotes and citations omitted.)

The authors do not include New York as a jurisdiction which has clearly defined “knowledge” in this regard.

- (9) Finally, it must be emphasized that the “knowledge” does have teeth, and cannot be sidestepped by the willful ignorance of the facts. “[A] lawyer’s denial of knowledge is not conclusive on the question. And, as in criminal law, a lawyer’s conscious avoidance of knowledge of the falsity of evidence should not prevent a finding of actual knowledge.”<sup>10</sup> On the other hand, a lawyer, acts

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<sup>10</sup>Charles Wolfram, *Modern Legal Ethics (Hornbook Series-Student Edition)*, (1986), “What Lawyers Know,” section 12.5.2, p. 655 (citation omitted); see also RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS (“False Testimony or Evidence”), Reporter’s Note to “Comment c” (the concept of conscious avoidance, a concept applied generally in criminal law, also applies to the notion of when a lawyer knowingly uses false evidence); A.B.A. Formal Op. 353 n.9 (1987)(a lawyer who does not ask his or client questions about certain facts of the case

(continued...)

improperly when he or she seeks to withdraw from a case simply to avoid the “danger” inherent in a client’s possible perjury or involvement in presenting false evidence. This flows from the fact that such action harms the client, and therefore, a lawyer will be punished for acting without the necessary factual basis.<sup>11</sup> As one writer cautioned:

If the lawyer’s disquietude about a client’s intended testimony is the result of mere conjecture or an unsubstantiated opinion, however, the lawyer should present the testimony. Importantly, even if the lawyer’s suspicion permits formation of a reasonable belief that the evidence is false – and thus permits its non-introduction under D.R. 7-102 (A)(4) and Model Rule 3.3(c) – this does not entitle, or require, the lawyer to make disclosure or take other remedial action under Rule 3.3(a)(4) [mandating that a lawyer take remedial measures when the lawyer knows that he or she has previously offered evidence that the lawyer knows to be false].<sup>12</sup>

- (10) The “teeth” of the “knowledge” requirement is reflected in the manner in which courts have applied, de facto, the Doe case and in the way they have articulated an attorney’s obligation to question what a client claims to be true. For example, in Manhomhan v. Rome

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(...continued)

to avoid the ethical dilemma may be violating the duty to provide competent representation).

<sup>11</sup>See, e.g., Calley v. Woodruff, 751 So.2d 599 (Fla. Ct. App. 2d Dist. 1998).

<sup>12</sup>Wolfram, supra, p. 656; see also “Legal Background” to Model Rule 3.3, Annotated Model Rules of Professional Conduct (Fourth Ed.), p. 328 (1999)(a lawyer’s reasonable belief that a client intends to testify falsely must be based on independent investigation of the evidence or on distinct statements made by the client).

**Developmental Disabilities Services Office, 1999 WL 288661 (N.D.N.Y. 1999)**, Senior Federal District Court Judge Munson considered the question of whether defendant's counsel in a civil case had properly and ethically signed a response to interrogatories based upon what his client had told him. Judge Munson explained that "[s]o long as the attorney does not have obvious indications of the client's fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his client's position." Id. at \*4.

- (11) Similarly, a federal district court judge in Georgia in **Knox v. Hayes, 933 F. Supp. 1573 (S.D.Ga. 1995)**, considered the claim that a lawyer had allowed a witness to an accident to sign an affidavit even though he, the attorney, knew that it contained material falsehoods. The judge found that based upon the witness' prior deposition testimony, it was "crystal clear" that the witness actually disagreed with the contents of the affidavit he was signing. In rejecting the lawyer's claims that he had acted in good faith, the judge explained:

All jurists know that the line between advocacy and falsehood is blurry. Lawyers pursue many cases and within each and every case the opportunities for crossing the line are many. Lawyers, both plaintiffs and defendants, in daily competition, will often position themselves as close to the line as possible; it is for the Court to sift the facts from strategic characterizations and word choices, and to carefully decide what is good lawyering and what is fraud.

Id. at 1582.

- (12) Of course, attorney reliance on the “knowledge” standard may be risky in light of two often competing and complimentary principles of civil and criminal law: 1) an attorney may place his or “head in the sand” or otherwise recklessly disregard facts which would provide them knowledge<sup>13</sup>; and 2) under some circumstances, an attorney may be viewed as having a “duty to inquire.”

For example, in F.D.I.C. v. O’Melveny, 969 F. 744 (9th Cir. 1991), rev’d and remanded on other grounds, 512 U.S. 79 (1994), reaffirmed on remand, 61 F.3d 17 (9th Cir. 1995), the receiver of a failed savings and loan institution sued a law firm claiming the firm had been negligent in the advice and services provided. Responding to the firm’s claim that a lawyer owes no duty to uncover a client’s fraud, the court ruled that “[a]n important duty of securities counsel is to make a ‘reasonable, independent investigation to detect and correct false or misleading materials.’” Id. at 749.

Similarly, in F.D.I.C. v. Clark, 978 F.2d 1541 (10th Cir. 1992), the receiver of a defunct bank brought a negligence action against the bank’s outside counsel for having failed to uncover and prevent a fraud perpetrated against the bank by third-parties. One of the allegations against the firm was that it accepted an explanation of suspicious facts given by the bank’s president and did not inquire further about the matter; and this was one of the facts which led the court to uphold the jury’s finding of attorney negligence.

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<sup>13</sup>In a recent criminal trial of an attorney, the judge charged the jury: "In determining whether the defendant [attorney] acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him." Jury Charge, United States v. Cohn, S1 99 Cr. 807, p. 50.

- (3) These decisions concerning the duty to inquire implicate not only civil and criminal liability, but also an attorney's ethical mandate to competently serve his or her client's interests. Model Rule 1.1; D.R. 6-101(A). Or, stated another way, it can be argued that the duty of competence requires the attorney, under certain circumstances, to make an appropriate inquiry of the facts.
- i. Does a lawyer have a duty to correct false testimony elicited by another attorney?
- (1) The prohibition of D.R. 7-102(A)(4) (and its related language in D.R. 7-102[B]) and Model Rule 3.3(a)(4) against offering or using false evidence has been extended to reach those situations in which perjurious testimony is not elicited on direct examination, but rather on cross-examination by an opposing lawyer. See, e.g., RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS Section 120 ("False Testimony or Evidence"), Comment "d" ("A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify. A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness.").
- (2) The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client or another witness favorable to the lawyer's client. See Wolfram, supra, p. 659; Matter of Janoff, 242 A.D.2d 27, 30, 672 N.Y.S.2d 89, 91 (1st Dept. 1998)(court upholds finding of misconduct where attorney failed to correct false deposition testimony by his client which was adduced by his adversary); Matter of Friedman, 196 A.D.2d 280,

**290, 609 N.Y.S.2d 578, 584 (1st Dept. 1994)(court upholds finding that attorney violated D.R. 7-102(B)(2) because he failed to correct false testimony by his witness, elicited on cross-examination); San Diego County Bar Association Advisory Opinion 1983-8 (1983)(where witness testifies falsely on cross-examination, the lawyer who called that witness must nonetheless attempt to rehabilitate, correct or impeach the witness). If those measures fail, the attorney must disclose the perjury. See also Mackler v. Turtle Bay Apparel, Corp., 1999 WL 961987 (S.D.N.Y. Oct. 21, 1999), rev'd in part, vacated in part (on procedural grounds), 225 F.3d 136 (2d Cir. 2000)(Court imposed \$45,000 in sanctions on an attorney who knew his client testified falsely, but did nothing to correct that testimony.).**

- j. A lawyer's obligation when he or she has actual knowledge that the client intends to commit perjury.**
- (1) Surely, no single lawyer's ethics question has been the issue of more television programs or movies than the issue of what a lawyer should do when he or she has actual knowledge that the client will commit perjury. Because the issue has not been addressed with complete clarity in every state it is necessary to examine general ethics treatises and non-New York authority. The lawyer's obligation in such a situation has often been called the "duty to remonstrate."**
  - (2) A lawyer with actual knowledge that a client intends to commit perjury has a duty to attempt to persuade that person not to present such testimony. Nix v. Whiteside, 475 U.S. 157 (1986). The same rule is applicable for a witness that the client intends to call. See Wolfram, supra, p. 657.**
  - (3) The lawyer's obligations are often viewed as a remonstration requirement: to urge the client or the witness not to testify falsely and to explain the**

consequences and dangers (such as criminal liability, the lawyer's responsibility to disclose, etc.) of doing so. After such admonitions, the lawyer may reasonably expect that a client will testify truthfully. See A.B.A. Formal Opinion 353 (1987). And, when a lawyer knows that the witness will testify truthfully as to some questions, but will give false testimony to others, the lawyer may call the witness but may not put a question to that witness knowing that the witness will respond with false testimony. Wolfram, supra, p. 656.

- k. What should a lawyer do if remonstrations are unsuccessful and the client insists on testifying falsely?
- (1) If the client insists on presenting false testimony at a trial, the lawyer may not call the client or witness to testify. A lawyer must refuse to present testimony in a civil case even over the objection of the client.<sup>14</sup>
  - (2) Although ethics scholars have taken varying positions on this issue, the more cautious approach would be that a lawyer may not generally disclose information relating to the representation of a client, and that the lawyer must withdraw from representation of a client who refuses to refrain from testifying falsely.<sup>15</sup> To continue with the representation would violate D.R. 2-110 (B)(3) and Model Rule 1.16(a) which requires mandatory withdrawal when the representation will result in violation of the rules of professional conduct.

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<sup>14</sup>Many have argued that because of Sixth Amendment issues, lawyers have less control over a client's decision in a criminal, as opposed to a civil case. See generally Wolfram, supra, p. 659.

<sup>15</sup>See D.R. 2-110(B)(2) and A.B.A. Model Rule 1.16(a)(1); A.B.A. Formal Opinion 376 (1993)(a lawyer who discovers his or her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court in order to prevent an ongoing fraud). However, this opinion would not necessarily apply to situations in New York due to the D.R. 7-102 exemption from court notification which would disclose client information protected by D.R. 4-101.

- I. **What should a lawyer do if the client or witness surprises the lawyer and testifies falsely?**
  - (1) **D.R. 7-102 (B) and A.B.A. Model Rule 3.3 require that a lawyer take reasonable remedial measures when false evidence has been offered. Those remedial measures are required for “materially” false evidence.<sup>16</sup> The duty to take remedial measures terminates at the conclusion of the proceeding at issue. Wolfram, supra, p. 660.**
  - (2) **The lawyer’s first obligation is, of course, to remonstrate with the witness/client and strongly urge the witness/client to correct the testimony. In addition to the issues mentioned above, the lawyer should discuss with the witness/client the lawyer’s duty, in applicable Model Rules jurisdictions, to disclose the perjurious testimony to the tribunal.**
  - (3) **If the witness persists in wanting to testify, and the lawyer still thinks that the testimony is false, then, in the context of a trial, the lawyer should request a recess and discuss the testimony with the witness/client, urging a correction of the testimony, consistent with the duty to “remonstrate,” as discussed above. In the context of a deposition, the lawyer should seek a suspension of the deposition, and pursue remonstrations.**
  - (4) **In People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (N.Y. Ct. App. 2001), the New York Court of Appeals affirmed the conviction in a somewhat “classic” Nix v. Whiteside scenario. The defense attorney advised the Court that his client intended to perjure himself while testifying on his own behalf at trial. The defense attorney then elicited the testimony in a “narrative,” as opposed to**

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<sup>16</sup>The New York Lawyer’s Code and the A.B.A. Model Code do not have a materiality requirement and each arguably requires the lawyer to correct all fraudulent evidence. The Disciplinary Committee of the Appellate Division, First Department, has acknowledged in one case that the duty to correct would not apply to trivial errors, such as what a witness might have eaten for breakfast.

the traditional question and answer manner; and thereafter did not rely on the testimony in his summation. The Appellate Division, in its lower court decision, rejected the notion that defense counsel should have first tried to withdraw from the case. The Court viewed that option as an “ostrich-like approach which would do little to resolve [the problem].” The Court of Appeals similarly rejected the withdrawal option because it could have resulted in the introduction of perjury or the further delay in the trial.<sup>17</sup>

- (5) In People v. Berroa, 99 N.Y.2d 134, 753 N.Y.S.2d 12 (2002), the New York Court of Appeals reversed a conviction where defense counsel contradicted defense alibi witnesses who claimed that they had been with the defendant at the time of a homicide. The defense witnesses had failed to advise defense counsel of the alibi information prior to trial, even though they had been interviewed by defense counsel and had told her of issues relating to the defendant’s appearance before trial in the context of a misidentification defense. Defense counsel alerted the court to the fact that the witnesses had not provided the alibi information prior to trial in the context of explaining why notice of alibi had not been previously given. To avoid any possibility that she might be called as a prosecution witness to contradict the alibi witnesses, defense counsel stipulated that the alibi witnesses had not provided the information and that the witnesses had not been able to pinpoint the defendant’s whereabouts at the time of the shooting. The stipulation was read to the jury at the start of the People’s rebuttal case. In addition, during summation, defense counsel only argued that the issue in the case related to misidentification issues, not an

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<sup>17</sup>The Wisconsin Court of Appeals applied the Doe actual knowledge standard to the situation of a defendant testifying at trial. In an exceptionally well-reasoned and researched opinion, the Court concluded that defense counsel could not substitute narrative questioning for question-answer questioning unless counsel “knows” that the client intends to testify falsely; and with only extraordinarily rare exceptions, such knowledge must be based on the client’s admission to counsel of the intent to testify falsely.

alibi defense. The Court of Appeals reversed because, in its view, the defense attorney should have moved to withdraw under D.R. 5-102 (the advocate witness prohibition rule), which requires an attorney to move to withdraw if it is obvious that he or she “may be called as a witness on a significant issue other than on behalf of the client ... [and] it is apparent that the testimony is or may be prejudicial to the client.” The court distinguished the case from others where stipulations concerning information which defense had in his or her possession, since in this case, defense counsel was the only source of the information; the information was significant; defense counsel’s stipulation was damaging to the defense and “citing the DePallo decision, noted that “while counsel had a duty to disclose witness perjury to the court ... that duty does not automatically require counsel to provide testimony to rebut the perjury.”

- (6) In People v. Darrett, 2 A.D.3d 16, 796 N.Y.S.2d 14 (1st Dept. 2003), the First Department addressed the manner in which defense counsel in a criminal case can address a client’s intention to commit perjury in a non-jury context – a matter left open in the Berroa case. In Darrett, the Court held in abeyance its decision concerning whether to affirm or reverse a defendant’s murder conviction because defense counsel shared privileged information about the client’s defense with the trial judge. Defense counsel believed that her client “might” perjure himself during a pretrial suppression hearing while under cross-examination. Although the specific decision dealt with the suppression judge being possibly unduly influenced as a fact-finder by defense counsel’s disclosure, the somewhat lengthy decision included the following observations by the Opinion’s author, Justice George D. Marlow:
- (a) In such situations, the attorney should remonstrate with the client and attempt to convince the client to testify truthfully.

- (b) **If remonstration fails, defense counsel should limit as much as possible the amount of damaging information conveyed to the judge. (In Darrett, counsel unnecessarily and after her client had already concluded his testimony, spoke in detail to the judge about the substance of the presumably privileged conversations with the defendant regarding strategy, and even informed the court that she believed the defendant had been at the scene and had shot the victim.) And conversely, the judge should minimize the amount of negative information conveyed by defense counsel.**
- (c) **By way of example, Judge Marlow indicated that defense counsel might have alerted the court to the disagreement between counsel and the defendant, and then allowed the defendant to testify in a narrative form. Further, counsel could then have avoided questioning her client on presumably perjurious matters and not summed up utilizing the questionable testimony.**
- (d) **Justice Marlow also opined that counsel could have made a “private record” concerning how she would be resolving the issues and her reasons for doing so. Such a record could have been a memorandum to the file, signed by the attorney and the client, and witnessed by a lawyer colleague. As to how this latter proposal will be received, one need only consider the opinion of one prosecutor in the Manhattan District Attorney’s Office who noted: “The court is definitely not saying that you can write a memo to the file and forget about it.” Tom Perrotta, “Judges Offer Advice On Handling Perjury, New York Law Jnl., Dec. 8, 2003, pp. 1, 6.**

- (7) More recently, in People v. Andrades, 4 N.Y.3d 805, 795 N.Y.S.2d 497 (2005), the Court of Appeals again considered the issues arising when a defendant in a criminal case intends to, and does commit, perjury. In Andrades, the court was about to conduct a pre-trial Huntley hearing to determine the admissibility of the defendant's written and videotaped statements. Defense counsel filed a motion indicating that there was "an ethical conflict with my continuing to represent [the defendant] and I can't [describe the issue] any further than that." (The prosecutor opposed the motion, based only upon the age of the case.) The judge asked defense counsel to explain the matter further, but counsel declined, prompting the judge to deny the motion, based upon the mistaken assumption that the ethical conflict somehow concerned the defendant's constitutional right to testify.
- (a) Later, during the Huntley hearing, defense counsel advised the court that his client intended to testify; that he had advised his client that he should not testify; that his client nonetheless intended to testify; and that as a result, he (defense counsel) intended to direct his client's attention to the date, time and location of the incident at which point the defendant would testify in a narrative manner. The judge assumed that the defendant intended to testify falsely, but the judge nonetheless denied the attorney's motion to withdraw, based upon the judge's conclusion that the attorney could still provide effective assistance of counsel.
- (b) The defendant did testify at the Huntley hearing (largely in a narrative form), claiming he had been coerced into making the statements and that the statements did not reflect his recollections (as opposed to what the police told him to say). Defense counsel made no closing argument to the court and relied on the written papers submitted to

the court and on the record. The court denied the suppression motion based upon the defendant's lack of credibility. The defendant largely represented himself at trial and was convicted of second degree murder. The Appellate Division, First Department, affirmed, finding that defense counsel's disclosure of the ethical issue and having the defendant testify in a narrative fashion did not deprive the defendant of a fair hearing or of his constitutional right to the effective assistance of counsel. The Appellate Division also found that the defendant did not have a right to be present during the colloquy between the court and the attorneys concerning defense counsel's ethical dilemma.

- (c) The Court of Appeals affirmed, finding that defense counsel's inferential disclosure to the hearing judge that his client intended to commit perjury was consistent with counsel's duty to zealously represent his client within the bounds of the law because the attorney was, in effect, taking steps to avoid using the perjured testimony of his client. A particularly interesting issue presented in the Andrades case was that the hearing judge had to make a credibility finding concerning the defendant; and yet defense counsel had inferentially advised that same judge that his client was committing perjury. The somewhat curious reasoning of the Court of Appeals was that defense counsel had not *expressly* advised the hearing judge that his client would commit perjury and did not otherwise disclose confidences or secrets. Although the reasoning of the Court of Appeals in this regard is somewhat elusive, what is important was that Court's more fundamental conclusion that, in any event, *defense counsel could have expressly advised the hearing judge that his client intended to commit perjury*, because the intent to

commit a crime is neither a confidence or a secret. For a thoughtful discussion of the issue of client perjury under New York law, see Patrick M. Connors and Thomas F. Gleason, “Representing A Recalcitrant Client Who Has Lied During Disclosure,” New York Law Jnl., Sept. 19, 2005, p. 3; Patrick M. Connors, “Confronting Dilemma on Potential Client Perjury,” New York Law Jnl., Sept. 12, 2005, p. S-9.

m. What should a lawyer do if the client or witness refuses to rectify the fraud and correct the false testimony?

(1) In the context of a “witness” and not a “client,” the answer is a somewhat simple one. New York Lawyer’s Code D.R. 7-102(B)(2) and Model Rule 3.3(a)(4)<sup>18</sup> require that the lawyer take action because there is no issue of attorney-client privilege. In short, the duty to correct and notify the tribunal of the fraud is clear.<sup>19</sup>

(2) In the context of a “client,” the issue becomes a bit more complicated.

(a) In New York, lawyers are not governed by the A.B.A. Model Rules on this issue, but instead D.R.

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<sup>18</sup>Model Rule 3.3(a)(4) provides, in pertinent part, that a lawyer “shall not knowingly ... offer evidence that he knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial steps.”

<sup>19</sup>Some have argued that false deposition testimony does not trigger a duty to correct because it has not yet been introduced in court. In such circumstances, a lawyer may continue to represent a client who testified falsely at a deposition, provided that the lawyer does not use or vouch for the client’s untrue statements during negotiations or at trial. See, e.g., N.Y. County Lawyers’ Assn. Committee on Prof. Ethics. Op. 712 (1996)(lawyer may not disclose client’s lies at deposition because the lawyer may be able to resolve the case without using the false testimony, but the lawyer must withdraw to avoid assisting the client fraud if the case cannot be defended without the evidence); but see A.B.A. Formal Opinion 376 (1993)(attorney has duty to correct false deposition testimony because, where a client has lied under oath, the false testimony will continue to influence the proceedings).

**7-102(B)(1) governs. That Rule provides in pertinent part:**

**A lawyer who receives information clearly establishing that:**

**The client has, in the course of the representation, perpetrated a fraud upon the tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.**

**(b) In other words, the exception “swallows the rule” because it is hard to imagine any information disclosing client perjury which would not, under D.R. 4-101(A),<sup>20</sup> be exempt from disclosure.**

**n. In the event that a lawyer moves to withdraw from representing a client, 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 WL 335334, \*1 (S.D.N.Y. 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).**

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<sup>20</sup>D.R. 4-101(A) provides: “‘Confidence’ refers to information protected by the attorney client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Further, in moving to withdraw, the lawyer *cannot* disclose client confidences without client consent. 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); 816 N.Y.S.2d 695, 2006WL 738909, \*4 (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 Code of Professional Responsibility Annotated, 2006 Edition, (2006), "Commentary" to D.R. 2-110(C), pp. 399-400 ("Moving to withdraw does not relieve an attorney of the duty of confidentiality under DR 4-101. 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 client 'secrets' in support of the motion to withdraw because DR 4-101[C][2] permit an attorney to disclose secrets pursuant to a court order. However, a court has no authority to order an attorney to disclose information protected by the attorney-client privilege, so the attorney may not reveal client confidences and secrets.").

3. "The Allocation Of Authority" In A Criminal Case – The Role Of The Criminal Defendant Verses The Criminal Defense Attorney.
  - a. Nothing can be quite as challenging for a criminal defense attorney than having to battle his or her own client in making the day-to-day decisions of how to prepare and carry out a defense in a criminal case. Indeed, in one very recent and much talked about case, People v. Henriquez, 3 N.Y.3d 210, 785, N.Y.S.2d 384 (N.Y. 2004), the New York Court of Appeals addressed what is commonly referred to as the "allocation of authority," that is who

between the defense attorney and the client controls the day-to-day management of a criminal case, as well as making the more strategic decisions in preparing and putting on the defense at trial.

- b. In People v. Henriquez, 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's 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's conviction, he claimed that his constitutional right to a fair trial was violated because "the trial court and defense counsel respected his desire to refrain from presenting a defense." N.Y.3d at 212, 214-15, 785, N.Y.S.2d at 386-87. Rejecting Henriquez' claim of ineffective assistance of counsel – the Court noted that because "the right to defend is given directly to the accused ... the Constitution does not force a lawyer upon a defendant"; and, therefore, the defense attorney could not be charged with failing provide effective representation because Henriquez had knowingly, voluntarily and intelligently waived his right to effective assistance of counsel. Id. (internal citations omitted).
- c. 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.”

Charles Wolfram, Modern Legal Ethics (Hornbook Series-Student Edition), (1986), “Settlement & Waivers Of Client Rights – Waivers,” section 4.6.3, p. 173 (internal citations omitted); see also Brad Rudin and Lazar Emanuel, The New York Professional Responsibility Report, “Allocation Of Authority Between Lawyer & Client In A Criminal Case” (January 2005)(citing and discussing same).

- d. Echoing Professor Wolfram, in People v. Rodriguez, 95 N.Y.2d 497, 719 N.Y.S.2d 208 (N.Y. 2000), the New York Court of Appeals found that the trial court did not error by declining to consider pro se motions submitted by a represented defendant. Rodriguez’ defense attorney was aware of his client’s pro se motions, but declined to adopt the motions and present them to the court on the ground that the defense attorney believed that both motions were frivolous. Based upon these circumstances, the Court of Appeals found that the trial court had no further duty to entertain the defendant’s motions, noting that:

“By accepting counseled representation, a defendant assigns control of much of the case to the lawyer, who, by reason of training and experience, is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings.”

Rodriguez, 95 N.Y.2d at 501-02, 719 N.Y.S.2d at 210-11; see also id. (noting that many jurisdictions have refused to recognize a right of counseled defendants to act on their own defense [internal citations omitted]).

### III. CONCLUSION.

The new millennium presents new and truly difficult ethical issues for criminal defense practitioners. This outline has addressed a number of those issues and has suggested a template for analyzing proposed conduct by the attorneys involved. Experience teaches that lawyers who face disciplinary and court inquiries into their conduct typically get “in trouble” not because they make the “wrong” ethical decisions, but rather, because they do not see the “issues,” or because they ignore the issues. Hopefully, the legal principles discussed above will sensitize criminal defense attorneys to problems which may arise in the future. Because, once those issues are identified, more often than not the lawyer will make the “right” decision.

Michael S. Ross