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CLE Seminar

**EFFECTIVE, ZEALOUS AND ETHICAL
CRIMINAL DEFENSE ADVOCACY**

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EFFECTIVE, ZEALOUS AND ETHICAL CRIMINAL DEFENSE ADVOCACY

I. Introduction

This outline is intended as a non-exhaustive guide to common ethical issues confronting attorneys representing those accused of crimes.

From the outset, we caution the inexperienced practitioner that the consequences flowing from a criminal conviction can be quite deleterious and far-reaching. While the *direct* consequences of a criminal conviction are oftentimes obvious and typically placed on the record in the course of the criminal proceeding (the most onerous consequence of course being incarceration), a host of other devastating collateral consequences unforeseen by the inexperienced practitioner may also follow, such as deportation, loss of licenses, and summary judgment motions in civil proceedings.

Accordingly, we alert the attorney inexperienced in the practice of criminal defense that he or she can be disciplined for failing to act competently when representing an accused and should seek appropriate advice when representing a person accused of a crime:

DR 6-101 [§1200.30] Failing to Act Competently

- A. “A lawyer shall not:
1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with him a lawyer who is competent to handle it.
 2. Handle a legal matter without preparation adequate in the circumstances.
 3. Neglect a legal matter entrusted to the lawyer.

With this caveat in mind, we proceed to review the applicable standards governing the practice of criminal defense and the most common ethical issues confronting criminal defense counsel in their dual role as professional advocates and as officers of the court.

II. Standards for Criminal Defense Counsel

- A. Sixth Amendment: U.S. Const. Amend VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984) – The *Strickland* inquiry: Was defense counsel’s performance deficient under the totality of the circumstances using an objective standard of reasonableness and did the deficient performance deprive the accused of a fair trial and a reliable result?

- B. The New York State Constitution: NY Const art. I §6; *People v. Baldi*, 54 N.Y.2d 137, 147 (1981); *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995) – The *Baldi* inquiry – Was defense counsel’s performance “meaningful” under the “totality of the circumstances.” The *Hobot* inquiry – Did a single, substantial error by defense counsel deny the accused a fair trial?
- C. The New York State Bar Association’s Code of Professional Responsibility (“The Code”): Judiciary Law §90(2) authorizes the Appellate Divisions “to censure, suspend or remove from office any attorney . . . who is guilty of professional deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.” The Code is codified in 22 NYCRR Part 603 (First Department); 22 NYCRR Part 691 (Second Department); 22 NYCRR part 806 (Third Department); and 22 NYCRR Part 1022 (Fourth Department).

The Code (which can be downloaded from the NYSBA’s website free of charge) consists of three parts:

- i. Canons – The Axioms of Our Profession
- ii. Disciplinary Rules (“DR’s”) – Mandatory Rules flowing from the Canons that must be complied with on pain of discipline, if violated.
- iii. Ethical Considerations (“EC’s”) – Ethical precepts to be used as guides for conducting oneself in accordance with the Canons.

Further guidance is provided for criminal defense counsel by the advisory Ethics Opinions issued by various New York State and Criminal Bar Associations (many of which can be downloaded from the web free of charge) including:

1. New York State Bar Association (“NYSBA”)
2. Association of the Bar of the City of New York (“ABCNY”)
3. New York County Lawyer’s Association (“NYCLA”)
4. Nassau County Bar Association
5. Suffolk County Bar Association
6. National Association of Criminal Defense Lawyer (“NACDL”)

Defense counsel must also be mindful of other laws, rules and regulations relating to the practice of law. See e.g., 22 NYCRR 1215 (Written letter of engagement rules for fees in excess of \$3,000); IRS Form 8300 (Form to be filed for legal fees paid in cash in excess of \$10,000).

D. National Standards for Criminal Defense Counsel

- i. ABA, Model Code of Professional Responsibility
- ii. ABA, Annotated Model Rules of Professional Conduct
- iii. ABA Standards for Criminal Justice – Defense Function

E. Legal Malpractice: *See, Carmel v. Lunney*, 70 N.Y.2d 169 (1987)(No cause of action “for so long as the determination of guilt remains undisturbed.”); *Britt v. Legal Aid Society*, 95 N.Y.2d 443 (2000)(Statute of Limitations accrues when indictment dismissed, even though many years later).

III. Constitutional and Ethical Issues Arise at ALL stages of representation

- A. Retention: *See, e.g., Matter of Cooperman*, 83 N.Y.2d 465, 611 N.Y.S.2d 465 (1994)(non-refundable retainer agreements violate DR 2-110[A][3]; *Degen v. Steinbrink*, 202 A.D. 477, 481, aff’d mem. 236 N.Y. 669 (1923).
- B. Communication with Client: *See, e.g., People v. Droz*, 39 N.Y.2d 457, 462-463 (1976) (Ineffective assistance - Meeting client day of trial); *People v. Simmons*, 110 A.D.2d 666 (2d Dept. 1985) (Ineffective assistance - Single interview with client); *People v. Thomson*, 719 N.Y.S.2d 171 (3d Det. 2001)(Ineffective Assistance - Failing to advise client that he had potential intoxication defense to attempted murder charge). Failing to properly communicate with client is professional misconduct. *Matter of Wachs*, 225 A.d.2d 23 (1st Dept. 1996). NYSBA Opinion No. 396, ABA Criminal Justice Standards – Defense Function Standards 4-3.2, 4-3.8, 4-5.1
- C. Factual Investigation: *See, e.g., Droz, supra*; ABA Criminal Justice Standards – Defense Function Standards 4-4.1.
- D. Legal Investigation: *See, e.g., People v. Bennett*, 29 N.Y.2d 462, 464-466 (1972)(No knowledge of legal elements of insanity defense); *People v. Jenkins*, 68 N.Y.2d 896 (1986)(Defense counsel unaware that law permitted him to use certain evidence of eyewitnesses misidentification of others); *People v. Sullivan*, 209 A.D.3d 558, 558-559 (2d Dept. 1994)(No legal research).
- E. Guilty Pleas: *See, e.g., People v. Van Wie*, 238 A.D.2d 876, 876-877 (4th Dept. 1007)(Failure to investigate prior to encouraging guilty plea); *People v. Reed*, 152 A.D.2d 481 (1st Dept. 1981)(Inaccurate information regarding plea.)

- F. Motion Practice: *See, e.g., People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept., 1992)(Failing to move for Mapp hearing); *People v. Detling*, 73 A.D.2d 937, 937-938 (2d Dept. 1980)(Failing to move for Huntley hearing); *People v. Sullivan*, 209 A.D.2d 558, 558-559 (2d Dept. 1994)(Failing to seek Wade hearing).
- G. Trial Performance: *See, e.g., Pavel v. Hollins*, 261 F.3d 217, 217-218 (2d Cir. 2001)(Failure to call witnesses); *People v. LaBree*, 34 N.Y.2d 257 (1974)(Confusing opening, inadequate cross-examination and changed defense theory to one that had no support in record)
- H. Appeal: *See, e.g., Restrepo v. Kelly*, 178 F.3d 634, 640-641 (2d Cir. 1999); *People v. Gonzalez*, 47 N.Y.2d 606, 610 (1979); *Matter of Israel*, 205 A.D.2d 101 (1st Dept. 1994).

IV. Conflicts of Interest – Constitutional and Ethical Obligations

- A. Canon 5 – A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client. DR 5-105 Conflict of Interest; Simultaneous Representation; DR 5-108 Conflict of Interest – Former Client.

“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflict of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *United States v. Schwarz*, 283 F.3d 86 (2d Cir. 2002).

“The right to effective assistance of counsel ensures not only meaningful representation but also the assistance of counsel that is ‘conflict-free and single mindedly devoted to the client’s best interests.’” *People v. Berroa*, 99 N.Y.2d 134, 139 (2002)

- B. Common Issues

- i. Payment of Legal Fees by a Third Party: *Wood v. Georgia*, 101 S.Ct. 1097, 1102 (1981); DR 5-107A Avoiding influence by Others than the Client (Compensation by third parties only if the client consents after full disclosure); DR5-107B (Person who pays fees cannot direct defense or be privy to confidential communications between counsel and client.)
- ii. Preserving confidences of former clients who might be government witnesses: *People v. Ortiz*, 76 N.Y.2d 652 (1990)(Inquiry is whether conflict bore a “substantial relation” to the conduct of the defense.); *People v. Lombardo*, 61 N.Y.2d 97; *People v. Hall*, 46 N.Y.2d 873, 414 N.Y.S.2d 678 (1979); *Ciak v. United States*, 59 F.3d 296, 304-305 (2d Cir. 1995); *United States v. Oberoi*, 331

F.3d 44 (2d Cir. 2003)(Error to deny motion to withdraw because of conflict of interest); *United States v. Feyrer*, 333 F.3d 110 (2d Cir. 2003)(Disqualification not required because pursuit of prior client's testimony not plausible trial strategy); NYCLA Opinion 716(Issued 7/9/96)(An attorney must obtain the consent of a former client after full disclosure in order to represent a present client who will provide testimony against the former client in a matter substantially related to the prior client's representation. DR 5-108(A); DR 5-101(A); DR 4-101(A); DR 4-101(B) (2) and (3); DR 4-101(C); DR 2-110(B); EC 2-32; EC4-A; EC 4-5; EC 4-6; EC 5-1; Canon 6; Canon 7.)

- iii. Representation of multiple defendants: *Holloway v. Arkansas*, 435 U.S. 475 (1978); *People v. Jordan*, 83 N.Y.2d 785 (1994) (Conflict must “affect” the conduct of the defense to require reversal); *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1974); *People v. Jones*, 184 A.D.2d 405, 406 (1st Dept. 1992)(Co-defendants with conflicting defenses); *People v. Dell*, 60 A.D.2d 18, 22-23 (4th Dept. 1977)(One co-defendant offered cooperation agreement against other co-defendant); NYCLA Opinion 707 (03/14/95)(Joint representation of multiple clients having differing interests in a criminal investigation is disfavored even with consent of each client. DR 5-105(B), DR 5-105(C), EC 5-15, EC 5-17.
- iv. Representation of Clients with Conflicting Interests: *People v. Jones*, 381 F.3d 114 (2d Cir. 2003)(Leaking discovery materials to unindicted others made attorney potential witness for prosecution resulting in disqualification); *People v. Ortiz*, 76 N.Y.2d 652, 656 (1990); *People v. Carillo*, 218 A.D.2d 505, 506 (1st Dept. 1995); ABCNY Formal Opinion 2004-02 (Representing Corporations and Their Constituents in the Context of Governmental Investigations.).

V. Zealous Advocacy and Preserving Confidences While Acting as an “Officer of the Court”

A. The Inherently *Conflicting* Professional Obligations When Representing the Guilty Client.

Contrast:

- i. Canon 7 – A Lawyer Should Represent a Client Zealously Within the Bounds of the Law; and,
- ii. Canon 4 – A Lawyer Should Preserve the Confidences and Secrets of a Client;

with:

DR 1-102 [§1200.3] Misconduct.

- A. A lawyer or law firm shall not:
 - 2. Circumvent a Disciplinary Rule through actions of another.
 - 4. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
 - 5. Engage in conduct that is prejudicial to the administration of justice.

Query: Once the client admits his or her guilt in confidence to the attorney, is not any advocacy by defense counsel designed to exonerate the guilty client conduct involving dishonesty and deceit that is prejudicial to the administration of justice?

B. Common Issues

- i. Undisclosed tape recording of Conversations by Lawyers: NYCLA Opinion 696 (06/21/93)(A lawyer may secretly record telephone conversations with third parties, provided one party to the conversation consents and the recording does not violate any applicable law or specific ethical rule. DR 1-102(A)(4), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-109(A); ABCNY Formal Opinion 2003-02 (Undisclosed taping ethically impermissible as a routine practice but permissible if reasonable basis for believing it advances a generally accepted societal good.)
- ii. Counseling others on Surreptitious Taping of Others. *See, Mena v. Key Food Stores Co-operative*, 195 Misc.2d 402 (Sup. Ct. NY Co. 2003); NYSBA Opinion No. 515 (No prohibition).
- iii. The attorney who makes himself a witness for the defense: Tape recording a witness without a third party present. NACDL Opinion No. 04-03 (not unethical and may not require withdrawal); *People v. Rivera*, 172 A.D.2d 633 (2d Dept., leave to appeal den. 77 N.Y.2d 999 (1991)(no ineffective assistance even though defense counsel should have sought to withdraw so he could testify to private conversations had with the complainants that could have assisted in the defense); *Compare People v. Ortiz*, 9/26/95 N.Y.L.J. p.29 (col.2)(Disqualification not required where it would cause great hardship in ongoing trial); *People v. Papa*, 119 Misc.2d 595 (Co. Ct. Suffolk Co. 1983)(Legal Aid Society not disqualified but individual attorney from Society with conflict is); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984)(Attorney disqualified pursuant to DR 5-102A because he became a potential

witness for the defense); *United States v. Cunningham*, 674 F.2d 1062 (2d Cir. 1982)

- iv. Destroying the credibility of the witness who defense counsel knows is truthful and accurate.

“But defense counsel has no comparable obligation to ascertain or present the truth. 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. More often than not, defense 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. As part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.” *United States v. Wade*, 388 U.S. 218, 257-258(White, dissenting).

- v. The guilty client who refuses to accept advice to plead guilty: *United States v. Davis*, 239 F.3d 283 (2d Cir. 2001); *Lopez v. Scully*, 58 F.3d 38, 41-43 (2d Cir. 1995); EC 7-7.
- vi. Failing to tell a client to plead guilty: *Boria v. Keene*, 99 F.3d 492, 496-99 (2d Cir. 1996); *United States v. Gordon*, 156 F.3d 376, 379-80 (2d Cir. 1998).
- vii. Preserving confidences when the client intends to or, in fact, commits perjury: *People v. Andrades*, ___ N.Y.2d ___, 2005 WL 705969 (3/29/05); *People v. Darrett*, 2 A.D.3d 16, 769 N.Y.S.2d 14 (1st Dept. 2003); NYCLA Opinion 712 (1996)(Where a client advises lawyer that prior deposition testimony was false, lawyer may continue in the representation provided that the lawyer does not knowingly use the perjured testimony or false evidence. DR 2-110(A), (B); DR 4-101(A), (C); DR 7-102(A); EC 4-1, 7-5); NACDL Advisory Opinion No. 92-02 (Lengthy discussion of defense counsel’s role where client seeks to commit perjury).
- viii. Preserving confidences when the client hands you the smoking gun: Defense counsel cannot instruct client to destroy or hide evidence or give untruthful answers to law enforcement. *Matter of Backal*, 219 A.D.2d 1 (1st Dept. 1996). If obligation to turn over evidence attaches, disclosure must be done in a manner that minimizes prejudice to client. See, DR 7-102, EC 7-27; ABA Criminal Justice Standards – Defense Function, Standard 4-4.6 Physical Evidence

- ix. Preserving confidences when the client leads you to the decaying body: *People v. Belge*, 83 Misc.2d 186, aff'd 50 A.D.2d 1088, aff'd 41 N.Y.2d 60, 390 N.Y.S.2d 87 (1976). NYSBA Opinion 479 (1978), NYSBA Opinion 405 (1975)(Cannot divulge confidential information relating to location of stolen property).
- x. Preserving confidences when the client announces his intention to commits a new crime or commits a new crime: NYCLA Opinion 616 (10/10/73)(Absent clear proof of fraud having been committed or of client's intent to commit a crime, lawyer not required to disclose protected information. DR 2-110(C)(1)(e), DR 4-101(A), DR 4-101(B), DR 4-101(C), DR 7-102(B), EC 4-1); NACDL Opinion No. 04-01(Disclosure of Client's Stated Intent to Harm Prosecutor required); ABCNY Formal Opinion 2002-1 (Disclosure permitted only when conduct necessary to satisfy all elements of crime has not been completed and lawyer reasonably believes client intends to commit crime.)
- xi. Contacting Witnesses who are represented by counsel: *Compare: In the Matter of Chan*, 271 F. Supp.2d. 539 (S.D.N.Y. 2003) and *In the Matter of Simels*, 48 F.3d 640 (2d Cir. 1995) with NYCLA Opinion 676 (02/12/90) (A lawyer who represents a defendant in a criminal case may not interview a non-party potential witness who is represented by counsel in a non-related criminal proceeding without the consent of the potential witness's attorney. DR 7-104(A), EC7-18).
- xii. Contacting the complainant: NYCLA Opinion 711 (1996) A criminal defendant's lawyer may contact the complainant to discuss dropping the charges against the client without the consent of the prosecutor, provided the lawyer's conduct comports in all respects with the Code of Professional Responsibility. DR-1-102(A)(4), (5); DR 7-102(A); DR 7-104(A)(2); DR 7-109(B); EC 7-18; EC 7-27

VI. Conclusion – Practice Pointer Do's and Don'ts

- Do not blindly take cases
- Do not blindly follow your client's instructions
- Do not blindly inject yourself into the case
- Do obtain consent after full disclosure
- Do write private memos to file
- Do seek appropriate advice
- Do not forget your reputation is your most important asset