The New York State Office of Court Administration

Attorney for the Child Contracts

and

NEW YORK STATE UNIFIED COURT SYSTEM
CHILD WELFARE COURT IMPROVEMENT PROJECT

In collaboration with
The Appellate Division, Fourth Department
present

ATTORNEY FOR THE CHILD LEGAL UPDATE

2011

This program is supported by Federal Court Improvement Grant funding from the U.S. Department of Health and Human Services.

AGENDA
THE OFFICE OF COURT ADMINISTRATION
ATTORNEY FOR THE CHILD CONTRACTS
& CHILD WELFARE COURT IMPROVEMENT PROJECT
IN COLLABORATION WITH
THE APPELLATE DIVISION, FOURTH DEPARTMENT
Present
ATTORNEY FOR THE CHILD UPDATE

JUNE 7TH & 8TH, 2011
EMBASSY SUITES
SYRACUSE, NEW YORK

DAY ONE (CHILD WELFARE)

10:00 A.M. – 10:50 A.M.	REGISTRATION AND BREAKFAST
10:50 A.M. – 11:00 A.M.	WELCOME ***Rachel Hahn, Esq.*** Coordinator, OCA Attorney for the Child Contracts
11:00 A.M. – 12:00 noon	AGING OUT OF FOSTER CARE ***Erika Leveillee, MA*** Youth in Progress Coordinator Adolescent Services Resource Network University of Albany
12:00 noon – 1:00 P.M	EDUCATION LAW ***Judith Gerber, Esq.*** Staff Attorney Legal Aid Bureau of Buffalo, Inc.
1:00 P.M. – 2:00 P.M.	LUNCH
2:00 P.M. – 3:40 P.M.	DISPROPORTIONATE MINORITY REPRESENTATION ***Khatib Waheed, MEd*** Senior Fellow, Center for the Study of Social Policy ***Toni Lang, PhD*** Deputy Director Permanent Judicial Commission on Justice for Children
3:40 P.M. – 3:50 P.M.	BREAK
3:50 P.M. – 5:05 P.M.	RECENT DEVELOPMENTS IN CHILD WELFARE ***Margaret Burt, Esq.*** Attorney in private practice, specializing in child welfare
5:30 P.M. – 7:15 P.M.	RECEPTION
7:15 P.M. – 9:00 P.M.	DINNER

DAY TWO

8:00 A.M. – 9:00 A.M.	BREAKFAST
9:00 A.M. – 10:00 A.M.	THE DISPOSTION PHASE OF DELINQUENCY CASES ***Stephen Weisbeck, Esq.*** Director, Juvenile Justice Division Legal Aid Society of Rochester
10:00 A.M. – 11:00 A.M.	TRAFFICKING & PROSTITUTION ***Elizabeth Fildes*** Erie County Sheriff, Deputy
11:00 A.M. – 11:15 A.M.	BREAK
11:15 A.M. – 12:45 P.M.	ETHICS AND CONFLICT ISSUES ***Gary Solomon, Esq.*** Director of Legal Support The Legal Aid Society (NYC), Juvenile Rights Practice
12:45 P.M.	BOX LUNCH

The Appellate Division, Fourth Department has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from March 2, 2011 to March 1, 2014. This program has been approved for a total of nine (9) credit hours, of which three and one- half (3.5) hours can be applied toward the skills requirement, three (3) hours can be applied to the professionalism and ethics requirement, and two and a one- half (2.5) hours can be applied toward professional practice (family law) requirement. This program is suitable for experienced and newly admitted attorneys.

Destination:

Embassy Suites Hotel
6646 Old Collamer Road
East Syracuse, New York 13057
Tel: 1-315-446-3200

Driving Directions: (From the Embassy Suites Hotel Website)

From 81 North or South take I-90 East. From NYS Thruway (I-90), take Exit 35 to Carrier Circle, follow traffic circle to RT 298 East. Take first left off of 298 East onto Old Collamer Road South and continue through stop sign. Hotel is on the right at the end of the street. From Airport take 81 South and follow above directions.

Ethics and Conflict Issues

Gary Solomon, Esq.

Wednesday, June 8, 2011

Gary Solomon

Gary Solomon is the Director of Legal Support for The Legal Aid Society's Juvenile Rights Practice. In that capacity he participates in the training of staff and acts as a supervisor, consultant and advisor to staff; prepares practice memoranda and other continuing legal education materials and maintains the Juvenile Rights Practice's electronic legal research system; and acts as a supervisor for and consultant to the Juvenile Rights Practice's Appeals Unit and Special Litigation & Law Reform Unit; and participates in New York State Appellate Division-sponsored training programs for assigned counsel, and Unified Court System-sponsored training programs for judges and court attorneys..

Previously, Mr. Solomon served as a staff attorney with the Juvenile Rights Practice doing trial work in the Family Court; served as a staff attorney with The Legal Aid Society's Criminal Appeals Bureau; and served as Director of Training for the Juvenile Rights Practice.

Mr. Solomon prepares the weekly JRD Newsletter, a compilation of annotated court decisions which is made available to judges, lawyers and other professionals throughout New York state and elsewhere, and is the principal author of Volumes One, Two and Three of the Practice Manual for Children's Attorneys, which include extensive materials on criminal/juvenile delinquency and child protective proceedings, legal ethics and the role of the child's attorney, and persons in need of supervision proceedings. He authored a chapter on child abuse and neglect proceedings which appears in West Publishing's New York Family Court Practice, and has written practice commentaries for LexisNexis/Matthew Bender.

In 2003, Mr. Solomon was awarded the Howard A. Levine Award For Excellence in Juvenile Justice And Child Welfare by the New York State Bar Association, Committee on Children and the Law. In 2006, Mr. Solomon received the Kathryn A. McDonald Award For Excellence in Service to Family Court from the Association of the Bar of the City of New York. In 2007, Mr. Solomon received the Orison Marden Award For Outstanding Service and Dedication to the Organization and to the Clients from The Legal Aid Society of New York City.

Mr. Solomon received a B.A. degree from the City University of New York, Queens College and his J.D. from Boston University School of Law.

ETHICS ISSUES FOR CHILDREN'S ATTORNEYS

Gary Solomon, 3/11

A. CONFLICTS OF INTEREST

Child Protective Proceedings

Identifying And Addressing Conflicts

Generally, "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rules of Professional Conduct, Rule 1.7(a); see also Commentary to Rules of Professional Conduct, Rule 1.7 ("Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . . A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases").

Obviously, a lawyer assigned to represent the children in a child protective proceeding must keep these principles in mind. See Commentary to State Bar Standard B-2 (attorney "should not accept assignment for siblings if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other or if so doing would be likely to involve the lawyer in representing differing interests," and may accept assignment or continue assignment when conflict arises only if disinterested lawyer would believe that lawyer can competently represent interest of each child and if each consents to representation after full disclosure of implications of simultaneous representation and advantages and risks involved).

However, to avoid the expense and inconvenience that would result from assignment of a separate lawyer to each child, the existence of potential conflicts has been tolerated more liberally. Compare In re Celine R., 71 P.3d 787 (CA 2003) (ordinarily, court may appoint single attorney to represent siblings, must appoint separate attorneys only if there is actual conflict among siblings, and, if circumstances specific to case make it reasonably likely that actual conflict will arise, should appoint separate counsel at the outset rather than await actual conflict and possible disruption caused by subsequent reappointment) and In re Jasmine S., 153 Cal.App.4th 835 (Cal. Ct. App., 2d Dist., 2007) (attorney representing multiple siblings in dependency proceedings may be disqualified only if siblings have actual conflict of interest, not if there is merely potential conflict; also, separate units of Children's Law Center, which were sufficiently independent to be treated as separate law firms, were representing siblings) with Matter of Chelsea BB., 34 A.D.3d 1085, 825 N.Y.S.2d 551 (3rd Dept. 2006), lv denied 8 N.Y.3d 806 (court should have assigned separate lawyers at outset given complexity of petitions and allegations and conflicting interests among children).

Fact-finding-related conflict problems are the ones most likely to require disqualification. As noted by Douglas J. Besharov in the Practice Commentary to FCA §241:

> For example, one or two children may be the targets of physical battering while the others are comparatively well cared for. Or, the older children may have weathered the storm of parental inadequacy in their earlier years and now may be ready or almost ready to leave the home. For them, it may be in their best interests for a finding of neglect not to be made so that they can get about the business of entering adult society. For the younger brothers or sisters, however, their best interests, and indeed, their very safety and lives, may depend upon a fact-finding, an adjudication, and a proper order of disposition.

Thus, the child's lawyer cannot simultaneously represent two competent teenaged clients when one contends that the alleged acts of abuse or neglect did occur, and the other claims that they did not or that, even if they did occur, he/she does not want to be found to be an abused or neglected child. Such a conflict is particularly acute when one or more of the children might be asked to testify on behalf of the respondent. See, e.g., Matter of H. Children, 160 Misc.2d 298, 608 N.Y.S.2d 784 (Fam. Ct., Kings Co., 1994).

It is true that when there is uncontested evidence that the respondent committed acts of abuse or neglect against one of the children, a lawyer could argue for a finding with respect to that child while at the same time marshaling arguments and case law supporting dismissal of derivative abuse or neglect charges. However, this is possible only in unusual cases in which when there is no legitimate argument for dismissal of the main charge; when such an argument exists, the lawyer is obligated to make it, and an irreconcilable conflict exists.

Conflict problems related to the children's custodial status also can be disabling. First of all, if the respondent contests removal of the children at a preliminary hearing, and the lawyer has one teenaged client who wants to remain out of the home and another who does not, the lawyer may have to challenge the allegations of neglect or abuse on behalf of one client, and endorse the charges on behalf of the other; thus, the conflict becomes one that is fact-finding-related. Even assuming that the lawyer has no hope of contesting the allegations and intends to argue only that one client be returned home and the other kept in foster care, the lawyer may be unable to argue coherently that the respondent poses a threat to certain children but not to others. That lawyer also would be conflicted when deciding whether to raise evidentiary objections that could result in the exclusion of evidence that supports the position of certain clients but not the position of others.

There are cases in which there are compelling reasons why one child should be removed and the others should remain at home. In such cases, a conflict will still arise where the children's lawyer must take different positions with respect to the allegations in the petition in order to ensure that one client remains in foster care while another remains at home. However, when the lawyer is not in a position to contest the charges, the lawyer may be able to zealously represent several older children without being forced to make arguments on behalf of one child which undermine the position of the others. For instance, when the petitioning agency has asked for removal of the child who has been harmed, but not the other children, because of the singular nature of the respondent's relationship with the targeted child, the children's lawyer may be able to argue effectively for disparate treatment. Indeed, in many of these cases the respondent is not contesting removal, and the children's lawyer will never need to highlight the imminent risk of harm to one child while also contending that the other children are safe. Similarly, when one child in foster care wants to visit with the respondent while another does not, or the petitioning agency has denied the respondent visits with one child while permitting visits with another, the children's lawyer may be able to make coherent arguments based on the children's strong needs and desires and/or the unique nature of the parent-child relationship.

In Matter of Taylor G., 270 A.D.2d 259, 703 N.Y.S.2d 523 (2d Dept. 2000), the Second Department concluded that the children's lawyer did not have a conflict of interest under the circumstances described in the following excerpt from the lawyer's brief:

> The Family Court announced that it had decided to continue the status quo but to assign a "separate [lawyer]" to represent Taylor because there was "a conflict of interest." The Family Court found that the "quality of the relationship" between Taylor and respondent was "much different" than that between Louis and respondent; that Louis had been a target child while Taylor was not; and that what was at issue with regard to Taylor was a derivative finding, if any. The attachment that Taylor had for Louis, "which would prohibit her emotionally from separating to the point that she might be able otherwise to return to the custody of her father," created an untenable position" for the [lawyer] who had to represent both of the children's interests. The Family Court did not believe that Ms. Baum had been less than zealous in representing the children to that point, but because Taylor had for some time expressed a desire to renew and expand her relationship with her father yet was attached to Louis,

> "each child needs a separate voice in this courtroom so that [the Family Court] can determine the extent to which each the child feels free to speak without feeling that what that child says will impact upon the result as to the other child." Given the "difference in the nature and quality of the relationship of each child to the parent" and the fact that their interests at disposition might "diverge entirely," it was the Family Court's opinion, that "at this time, in the best interest of each child, it would be prudent for Taylor to have separate representation."

See also Matter of Barbara ZZ. v. Daniel A., 64 A.D.3d 929, 882 N.Y.S.2d 570 (3rd Dept. 2009) (in case in which children often fought and one child dominated and often hit the other and was estranged from mother and wished to remain with father, while other child's best interests required that he live with mother, children's attorney had no potential conflict of interest); In re Ira S., 23 A.D.3d 288, 805 N.Y.S.2d 17 (1st Dept. 2005), appeal dism'd 6 N.Y.3d 841, rearg den'd 7 N.Y.3d 783 (in custody case, no need for separate lawyers where each child expressed desire to live with different parent); Matter of Keith M., 181 Misc.2d 1012, 697 N.Y.S.2d 823 (Fam. Ct., Erie Co., 1999) (court denies motion to disqualify lawyer because of conflict of interest where it appeared that one of the children wanted further contact with the mother and the other did not); but see Corigliano v. Corigliano, 297 A.D.2d 328, 746 N.Y.S.2d 313 (2d Dept. 2002) (separate lawyer should have been assigned where it appeared that eldest child wanted to reside with father rather than with mother and two siblings); Matter of Gary D.B., 281 A.D.2d 969, 722 N.Y.S.2d 323 (4th Dept. 2001) (lawyer should have been permitted to withdraw when children began to express different preferences regarding parent with whom they wished to live).

Other types of conflicts can arise as well. If one of the children should be removed because he or she might harm the other children, a conflict may exist, particularly when the assaultive child wants to remain home, or may become the subject of a FCA Article Seven "PINS" proceeding (Proceedings Concerning Whether A Person Is In Need Of Supervision). A conflict could also arise if there is disagreement among the children with respect to sibling visitation. See Matter of Brooke D., 193 A.D.2d 1100, 598 N.Y.S.2d 633 (4th Dept. 1993).

Even when the children's lawyer can argue effectively for different treatment of different clients, a conflict also may arise when, because of a desire to be with his or her siblings or at least maintain a full relationship with them, one child, whether in foster care or at home, wants the lawyer to advocate that other children reside at the same location, or at least are not adopted. Although it has been argued that one child has no standing to contest the custodial status of another, the fact remains that each child has a liberty interest in his or her sibling relationships, and is entitled to be heard through a non-conflicted lawyer with respect to issues that affect the child's ability to maintain those sibling relationships. If, on the other hand, a child recognizes that it is in a sibling's best interest to reside in another home and does not insist that the lawyer argue otherwise, the potential conflict would not become disabling. Compare Carroll v. Superior Court, 101 Cal.App.4th 1423 (Ct. App., 4th Dist., Div. 1, 2002) (conflict found where lawyer represented seven children who had conflicting permanency goals) with In re Abigail J., 2007 WL 603004 (Cal. Ct. App., 2d Dist., 2007) (no conflict where two children were concerned about maintaining contact with sibling who was about to be adopted, but were happy for sibling and wanted adoption to go through); In re P.X., 2003 WL 21652750 (Ct. App., 3rd Dist., 2003) (no actual conflict where there were no expressions of interest by any of the children in continuing sibling visits, and visits often were not beneficial); In re Va X., 2003 WL 1930300 (Ct. App., 3rd Dist., 2003) (same as P.X.).

When the goals of the children are in conflict, but their lawyer is not obligated to advocate for inconsistent results because certain of the children are too young to make their own decisions, no conflict will exist. See Matter of Jennifer M., supra, 148 Misc.2d 584 (although thirteen-year-old stepdaughter did not want any visitation with her father and four-year-old natural daughter did, lawyer was free to override the stated position of the four-year-old and argue that the father should have no visitation until psychological examinations were completed); In re Jeremy T., 2003 WL 21540965 (Ct. App., 3rd Dist., 2003) (although one child wanted to live with sibling while the sibling did not, conflict was potential and not actual since counsel could still make independent determination that separate placements were appropriate while communicating to court one client's desire to live with her sibling); In re J.P.B., 419 N.W.2d 387 (Iowa 1988) (in termination proceeding, there was no conflict where children wanted different outcomes since counsel's role was to advocate the best interests of the children, not their wishes); Matter of Keith M., supra, 181 Misc.2d 1012 (same result as in J.P.B. where one child wanted further contact with parent and other child did not).

Upon the discovery of a conflict, or potential conflict, the children's lawyer should ask the court to assign new counsel to one or more of the children. See CPLR §321(b)(2) (attorney of record may withdraw or be changed by court order upon motion with notice to client, other parties' attorneys, any pro se party, and any other person as court may direct). If an actual conflict is identified prior to the lawyer's first appearance and formal assignment in court, he/she should indicate to the judge which children he or she can represent. While, in some cases, another lawyer must be left to sort through remaining conflict issues, the first lawyer should alert the judge when it appears that more than one additional lawyer should be assigned, and, whenever possible, assist the judge in determining which children should be represented by each lawyer.

In some cases, the conflict will appear after the children's lawyer has established confidential relationships with all of the children, and, perhaps, has acquired information from each child that could be used to the disadvantage of other children. Although it could be argued that the lawyer may properly continue to represent one or more of the children and simply make no use of the confidential information acquired from the other children, conflict rules suggest that the lawyer should be disqualified from representing any of the children. See Matter of C. Children, 282 A.D.2d 455, 723 N.Y.S.2d 199 (2d Dept. 2001) (lawyer was improperly relieved from representation of all five children where lawyer had only brief contact with child in public area before asking to be relieved as to that child); Matter of H. Children, supra, 160 Misc.2d 298 (court disqualifies lawyer entirely after disclosure of conflict between 14-year-old and 16-year-old); Burda Media, Inc. v. Blumenberg, 1999 WL 1021104 (S.D.N.Y. 1999); Rules of Professional Conduct, Rule 1.9 (except with informed written consent of former client, lawyer who has formerly represented client in matter shall not thereafter represent another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client; lawyer who has formerly represented client in matter or whose firm has formerly represented client in matter shall not thereafter use confidential information of former client to disadvantage of former client except as permitted or required by Rules or when information has become generally known); but see Commentary to Rules of Professional Conduct, Rule 1.9 ("Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c)"); In re T.E., 582 A.2d 160 (Vt. 1990) (no conflict where public defender represented children while their interests coincided, and later, at hearing on motion to modify, represented only child who wanted to be adopted).

While it is usually the children's lawyer who announces the conflict, it is not unusual for a judge to notice the problem, or for a respondent who is unhappy with the lawyer's position to move for disqualification. While the respondent's standing could be questioned, the court arguably has a duty to address a conflict problem. See In re S.A., 182 Cal. App.4th 1128 (Cal. Ct. App., 4th Dist., 2010) (respondent lacked standing to challenge competency of child's counsel); Matter of TM, 19 Misc.3d 1113(A), 859 N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (while denying mother's motion to have child's attorney relieved due to inadequate performance and bias against respondent, court notes, inter alia, that while issues regarding quality of representation by child's attorney are not properly raised by parent's attorney, such claims must be considered once they have been made); Raymond v. Raymond, 174 Misc.2d 158, 662 N.Y.S.2d 1016 (Fam. Ct., Albany Co., 1997). If the children's lawyer wishes to challenge a disqualification order, the appropriate remedy is an appeal, not a writ of prohibition. See Matter of Ernest H., 49 A.D.2d 907, 374 N.Y.S.2d 28 (2d Dept. 1975), appeal dism'd 38 N.Y.2d 771, 381 N.Y.S.2d 1028.

A conflict may, but does not necessarily arise when the children's lawyer previously represented an adverse party to the proceeding or an adverse witness, or from other factors. While a lawyer has a duty to preserve a former client's confidences, there is no ongoing duty of loyalty that prevents a lawyer from representing a person with adverse interests, and, despite the rule that imputes a conflict to all the members of a law firm that employs a conflicted lawyer, large law firms have substantial discretion to construct conflict walls. See Rules of Professional Conduct, Rule 1.10(a) ("While 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 Rule 1.7, 1.8 or 1.9, except as otherwise provided therein"); Commentary to Rules of Professional Conduct, Rule 1.10 ("In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter if (i) the information is protected by Rule 1.6 and Rule 1.9(c) and likely to be significant and material to the current matter, and (ii) the documents or files containing confidential client information are retained in a place or in a form that is accessible to lawyers participating in the current adverse matter. A law firm seeking to avoid disqualification under this Rule should therefore take reasonable steps to ensure that any confidential information relating to the prior representation that is maintained in the firm's hard copy or electronic files is not accessible to any lawyer who is participating in the current adverse representation"); Rules of Professional Conduct, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing"); Commentary to Rules of Professional Conduct, Rule 1.9 ("Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter"; however, "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related"); Commentary to Rules of Professional Conduct, Rule 1.18 ("In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2). . . . In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter"); Rules of Professional Conduct, Rule 1.0(t) ('Screened' or 'screening' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law"); Commentary to Rules of Professional Conduct, Rule 1.0 ("The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.. . . In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening"); NY Eth. Op. 723, 1999 WL 1756274 (NYSBA, 12/12/99), ("The most important factor, however, is whether the moving lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation"); NY Eth. Op. 628, 1992 WL 465630 (NYSBA, 3/19/92) (issue "turns on the scope of the prior representation and the likelihood that the lawyer would obtain confidences and secrets of the former client which may be relevant to the current litigation"); NYCLA Eth. Op. 671(89-5), 1989 WL 572096 (N.Y. Co. Lawyer's Assoc., 5/22/89); MI Eth. Op. RI-46, 1990 WL 504867 (Michigan State Bar, 3/28/90) (matters substantially related if there is likelihood that information obtained in former representation will have relevance to subsequent representation; for example, criminal history of former client may be relevant to subsequent custody matter); People v. Wilkins, 28 N.Y.2d 53, 320 N.Y.S.2d 8 (1971) ("While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm (citation omitted), we do not believe the same rationale should apply to a large public-defense organization such as the Legal Aid Society. The premise upon which disqualification of law partners is based is that there is within the law partnership a free flow of information, so that knowledge of one member of the firm is knowledge to all. Even if we were to treat the Legal Aid Society to be analogous to a law partnership, there is no evidence that information concerning defendants being represented by the society flows freely within the office, or that there was actual knowledge of the dual representation by the society. The New York City Legal Aid Society, a nonprofit membership organization authorized by law to represent indigent persons, consists of four branches and three units, and is undoubtedly the largest legal defense organization in the world. In Criminal Court work alone, the society has approximately 150 lawyers engaged in all of the courts in the city exercising criminal jurisdiction. In view of the nature of the organization and the scope of its activities, we cannot presume that complete and full flow of 'client' information between staff attorneys exists, in order to impute knowledge to each staff attorney within the office"); In re Nelissa O., 70 A.D.3d 572, 894 N.Y.S.2d 431 (1st Dept. 2010) (child's attorney had no conflict where representation of subject children's sibling in neglect proceeding ceased before commencement of custody proceeding in which sibling was not party); Matter of T'Challa D., 3 A.D.3d 569, 770 N.Y.S.2d 649 (2d Dept. 2004), aff'g 196 Misc.2d 636, 766 N.Y.S.2d 500 (Fam. Ct., Kings Co., 2003) (Legal Aid Society's Juvenile Rights Division, which had represented child since 1998, not disqualified where Criminal Defense Division was representing mother in criminal matter where CDD, upon learning of the dual representation, immediately withdrew, and child's lawyer alleged that there had been no exchange of information and that Society had constructed conflict wall to prevent disclosure of confidential information); In re Charlisse C., 194 P.3d 330 (Cal. 2008) (juvenile court erred in disqualifying Children's Law Center from representing infant where CLC had represented respondent mother in previous dependency proceeding, but CLC must establish that it had protected, and would continue to protect, mother's confidences through screening and/or structural safeguards); B.A. v. L.A., 196 Misc.2d 86, 761 N.Y.S.2d 805 (Fam. Ct., Rockland Co., 2003) (Legal Aid lawyer disqualified where custody litigant's attorney was President of Legal Aid); Matter of Destiny D., 2002 WL 31663251 (Fam. Ct., Queens Co.) (no disqualification where Legal Aid Society's Juvenile Rights Division had represented children since approximately 1997, and Criminal Defense Division represented father in 2002 and between 1983-1991, where it was not shown that JRD's representation of children would result in disclosure of confidential information, and issues in permanent neglect proceeding and criminal action were dissimilar); Herbert v. Herbert, N.Y.L.J., 6/26/98, p. 31, col. 5 (Sup. Ct., Putnam Co.) (child's lawyer's representation of plaintiff's witness in prior criminal proceeding in which plaintiff was complainant did not require disqualification); see also Matter of Hurlburt v. Behr, 70 A.D.3d 1266, 897 N.Y.S.2d 271 (3rd Dept. 2010) (no conflict where lawyers assigned to represent child and father were Public Defender and Assistant Public Defender; Public Defender and assistants had separate office addresses and there was no showing that client information flowed freely among them); Matter of Susan K. v. Thomas C., 25 Misc.3d 1207(A), 901 N.Y.S.2d 903 (Fam. Ct., Monroe Co., 2009) (mother's attorney not disqualified in custody proceeding where father met previously with partner in mother's attorney's firm; presumption of disqualification rebutted by assurances that other attorney would be kept away from present litigation and that there were no records of meeting between father and other attorney other than billing document, and present litigation was substantially different from matters resolved when father met with other attorney).

Anticipating And Avoiding Conflicts

The children's lawyer must attempt upon assignment to identify potential conflicts. Early disqualification can prevent disruption to attorney-client relationships, and, in some cases, prevent a mistrial. See Commentary to Rules of Professional Conduct, Rule 1.7 ("Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. . . . A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised"). Although adults can waive a conflict [see Rules of Professional Conduct, Rule 1.7(b); People v. Gomberg, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1975)], it is not clear whether, and under what circumstances, a child should be permitted to do so. See Matter of H. Children, supra, 160 Misc.2d 298.

The children's lawyer should attempt to identify conflict problems before interviewing the children. The lawyer should examine the petitions carefully for signs of a conflict. Sometimes, it is alleged that one child has abused another; the child charged with misconduct could become the respondent in a juvenile delinquency proceeding, and, in any event, needs a lawyer who has no duty to protect the other children. Sometimes the respondent is charged with abusing a teenaged child, but other teenagers deny that the alleged incidents took place, and/or insist upon remaining in the home. The children's lawyer should speak to the other attorneys, and, with their permission, to the parties and the caseworker, to ascertain what, if anything, the children have said about the allegations and where they want to live. The children's lawyer might learn that a sibling has accused the allegedly victimized child of lying, or that certain children will be called as defense witnesses.

When the lawyer has decided to withhold final judgment regarding a potential conflict until interviewing has begun, the lawyer must schedule and conduct separate interviews of the children in a manner designed to uncover actual conflicts before the lawyer has established a confidential relationship with children who have conflicting interests. There are several ways to accomplish this.

Relying upon available information and reasonable inferences, the lawyer should tentatively divide the children into interest groups, and plan to interview the members of one group before interviewing the others. For example, if it is alleged that the father, with the mother's knowledge and complicity, forcibly raped their teenaged daughter for several years, and that she has two teenaged brothers and two other siblings who are under the age of five, the lawyer reasonably could view the victimized child, and the younger children on whose behalf the lawyer will make best interests determinations, as one interest group, and the teenaged boys as another. If the lawyer begins by interviewing the alleged victim, and she confirms that she was raped and wants to remain in foster care, but also reveals that her brothers do not believe her and want to remain at home, the lawyer would know that another lawyer should be assigned to represent the boys. The lawyer also could begin by interviewing the teenaged boys. But in the end, what is learned in each interview -- what if the alleged victim disowns the rape charges and instructs the lawyer to advocate for dismissal of the petition, or the first boy interviewed reveals that he witnessed the abuse and does not want to remain at home -- will dictate the lawyer's next move.

Because full disqualification is required only after the lawyer has established a confidential relationship with children who have conflicting interests, the lawyer also should attempt to tease out conflict problems at the very beginning of each interview, before the child discloses any useful information. For instance, if the lawyer in the sexual abuse scenario described above begins by interviewing the alleged victim, who repeats her charges but has no idea what her teenaged brothers will say, the lawyer could open an interview with one of the brothers by asking him whether he believes what his sister has said. If he says no, and the interview is immediately cut short, the lawyer might be able to argue later that, because no useful information regarding the charges was obtained, he or she should be permitted to continue representing the alleged victim. Matter of C. Children, supra, 282 A.D.2d 455 (lawyer was improperly relieved from representation of all five children where lawyer had only brief contact with child in public area before asking to be relieved as to that child); see also Rules of Professional Conduct, Rule 1.18(c) ("A lawyer. . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter"); Rules of Professional Conduct, Rule 1.18(d) ("When the lawyer has received disqualifying information. . . representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter"); Commentary to Rules of Professional Conduct, Rule 1.18 ("In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client").

Waiver

"Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." Rules of Professional Conduct Rule 1.7(b). "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." Rules of Professional Conduct, Rule 1.0(j). "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." Rules of Professional Conduct, Rule 1.0(e).

"Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved." "The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent 'informed' be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. . . . " Commentary to Rules of Professional Conduct, Rule 1.7.

B. ADVOCATE-WITNESS RULE

Rules of Professional Conduct, Rule 3.7 states as follows:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

See also Commentary to Rules of Professional Conduct, Rule 3.7 ("Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. . . . Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses").

Obviously, the appearance of an advocate-witness rule problem during the course of litigation can severely disrupt the proceedings, and thus should be reported promptly to the court. See People v. Gray, 50 A.D.3d 392, 855 N.Y.S.2d 115 (1st Dept. 2008) (defense counsel's request during trial to be relieved so he could be witness regarding type of pants defendant wore at arraignment was untimely where, four months before trial, counsel was made aware that officers would be testifying as to what defendant wore at time of drug sale and arrest; since counsel did not suggest that new attorney would be able to take over trial, granting application would have necessitated mistrial).

Child Protective Proceedings

In Naomi C. v. Russell A., 48 A.D.3d 203, 850 N.Y.S.2d 415 (1st Dept. 2008), the First Department found error where, in connection with its evaluation of the adequacy of a pleading, the court asked the child's lawyer, on the record, to discuss the position of the ten-year-old child regarding how well the current custody arrangement was working. This colloquy made the lawyer an unsworn witness, "a position in which no attorney should be placed." The court did act properly in disallowing "cross-examination" of the lawyer by petitioner's counsel. See also Matter of Jamie C., 245 A.D.2d 889, 666 N.Y.S.2d 820 (3rd Dept. 1997) (in custody proceeding, court erred when it allowed child's attorney to be called as a witness, but there was no harm to the children since the testimony was limited to attorney's observations during home visits).

To be contrasted with what happened in Naomi C. v. Russell A. is informal colloquy during which lawyers voluntarily disclose information that supports their client's position. Indeed, while family court judges are sensitive to advocate witness problems when they arise at a formal hearing -- perhaps the pleading scenario in Naomi C. v. Russell A. is analogous -- at all other court appearances judges permit, indeed encourage, lawyers to disclose factual information that is relevant to critical issues such as removal, visiting, and violations of court orders. It is common for lawyers to pass on to the judge information provided by, e.g., the child (of course, that should be after the child, if competent to make decisions, has waived confidentiality), by caseworkers, by medical professionals, by probation officers, or by parents, foster parents and other custodians. Judges often rely on this information when making these important decisions. In addition, there are some instances in which lawyers report facts that they have personally observed.

Surely, in this context, the lawyer's credibility is at issue. This is true even when the lawyer is passing on hearsay information, since the lawyer is asking the court to believe that the information reported is, in fact, what the informant told the lawyer. Typically, however, neither judges nor lawyers raise advocate witness rule objections when this happens. For judges, perhaps, it would be unthinkable to insist that, rather than pass on information in this way, lawyers bring their sources to court to testify or routinely present affidavits. In addition, the lawyers who engage in this practice want to continue to do so. And, except in unusual circumstances, neither lawyers nor judges are willing to suggest that a lawyer is lying.

But, as Naomi C. v. Russell A. suggests, judges should not be asking lawyers questions that run a risk of eliciting confidential information, or any information that could be prejudicial to the client's interests. Lawyers and their clients should be left free to volunteer confidential information only when it serves the client's interests. A lawyer who has been asked a question by the judge is placed in an awkward position not only because of the advocate witness rule, but because, in a practice in which the advocate witness rule is selectively ignored, the lawyer often will have to choose between disclosing information that will hurt the client, or declining to answer, which, given the lawyer's volubility in other instances, will have the same effect.

When interviewing a witness whose testimony might have to be impeached with prior inconsistent statements, an attorney should, if possible, secure the presence of a third person in order to avoid the trappings of the rule. In addition, when one attorney in a Legal Aid or Public Defender office must be disqualified, it does not mean that the entire office is disqualified. But see Matter of Janel E., 173 A.D.2d 413, 570 N.Y.S.2d 290 (1st Dept. 1991) (entire prepaid legal services firm should not have been disqualified, since respondent might have been unable to afford other counsel).

Juvenile Delinquency Proceedings

Statements By Witnesses To Defense Counsel: Prosecution Witnesses

An essential element in preparing for any type of litigation is an attempt to interview the other side's witnesses. Often, witnesses provide new information that supports the planned defense, or make statements inconsistent with those in the accusatory instrument or in police reports and other documents obtained during discovery proceedings. However, witnesses sometimes revert to their original story while testifying, or, in any event, do not testify in a manner consistent with statements made to defense counsel.

What usually happens first in such instances is that defense counsel asks the witness: "When I interviewed you, didn't you tell me that ....?" Obviously, if the answer is "yes," there is no problem. But, if the answer is "no," or "I don't remember," there is an advocate-witness rule problem. See, e.g., United States v. Kliti, 156 F.3d 150 (2d Cir. 1998) (clear conflict existed where defense counsel was in position to testify about exculpatory statement made by prosecution witness; the court was required to question defendant to determine whether he was willing to waive his right to a conflict-free lawyer and forgo confronting the witness with the statement through the testimony of counsel); People v. Tillman, 179 A.D.2d 886, 579 N.Y.S.2d 197 (3rd Dept. 1992) (defendant was denied effective assistance of counsel where, after prosecutor objected to inquiry concerning witness' prior statement to defense counsel, counsel abandoned that area of inquiry; court notes that counsel should have continued, and, if his testimony became necessary, he could have sought disqualification); People v. Coney, N.Y.L.J., 2/2/01, p. 33, col. 3 (County Ct., Nassau Co.) (should case proceed to trial, defense firm would be disqualified where counsel took written statement from co-defendant which inculpates co-defendant and exculpates defendant).

Clearly, there are ways to avoid such a problem. The best solution is to interview witnesses in the presence of another person, such as an investigator or a paralegal, who can testify about prior inconsistent statements unencumbered by the advocate-witness rule. See ABA Defense Standards, 4-4.3(e) ("Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person"); People v. DeVecchio, 17 Misc.3d 1114(A), 851 N.Y.S.2d 65 (Sup. Ct., Kings Co., 2007) (while concluding that limited value of counsel's testimony was outweighed by prejudicial effect of disqualification, court notes that "[w]hile counsel interviewing a witness personally in the absence of an additional witness may be imprudent," there is nothing inappropriate or remarkable about an attorney investigating a case on behalf of his client; "Witnesses do not belong to any party and each side in our adversary system has the right, indeed the obligation, to learn as much about the case as they can while acting in a professional and ethical manner"). It is true that the court will be aware of defense counsel's presence during the pre-trial interview, and that counsel impliedly vouches for the truth of the evidence merely by presenting it. See People v. Paperno, 54 N.Y.2d 294, 445 N.Y.S.2d 119 (1981). However, since the advocate-witness rule cannot be applied in a manner that would effectively deprive the accused of the opportunity to have his or her attorney interview witnesses and then freely cross-examine and impeach them at trial, defense counsel's mere presence should not be an issue.

Statements By Witnesses To Defense Counsel: Defense Witnesses

It is true that a friendly defense witness is unlikely to say anything at trial that will require attempts at impeachment. And, even if the witness does change his or her story, there are rules prohibiting the impeachment of a party's own witness that might in any event limit defense counsel's ability to present impeachment evidence. Nevertheless, even putting aside the fact that any careful lawyer should anticipate and prepare for the worst, it is advisable to conduct the interview of a defense witness in the presence of another person.

First of all, the pool of common "defense" witnesses includes reluctant police officers, and individuals who, despite their ability and apparent willingness to testify for the defense, are sympathetic to the prosecution and may "double cross" defense counsel at trial. In many instances, it will be possible to secure a ruling declaring the witness to be "hostile" either before the testimony commences, or, if the court prefers to wait until the witness exhibits signs of "hostility," in the middle of the witness' testimony. In those cases, counsel will be able to impeach the witness.

Moreover, whether or not the witness has been declared hostile, counsel can argue that the accused in a criminal case has a constitutional right to present evidence, even if the admission of certain evidence would violate state evidentiary rules concerning the impeachment of a party's own witness. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973). Common law limitations on the ability to impeach a party's own witness can also be overcome when the witness executed a signed statement during the pretrial interview. If the witness "gives testimony upon a material issue of the case which tends to disprove the position of [the respondent]," the respondent "may introduce evidence that such witness has previously made ... a written statement signed by him ...." FCA §343.5(1). Although it is unlikely that complications will arise when counsel offers a written statement containing a signature that can easily be shown to be that of the witness, as always it is a good idea to have another person present during the interview who can later testify that the witness actually examined the statement and signed it. Obviously, when interviewing an adverse witness it is usually desirable to obtain a statement written and/or signed by the witness. However, it should not be forgotten that such statements, and, more importantly, the statements of friendly witnesses, are subject to disclosure to the prosecution at trial pursuant to FCA §331.4(2)(a).

Visits To The Crime Scene

Defense counsel's visit to the crime scene to examine sight lines, lighting conditions, general geography, etc., can lead to an advocate-witness rule problem when a witness testifies at trial in a manner inconsistent with counsel's observations. Again, the simplest solution is to bring a companion to the scene or arrange for another person to review the scene independently. The taking of photographs, either by the attorney or the other person, will further reduce the chances that an advocate-witness rule problem will arise. If an advocate-witness problem does develop and it appears to be necessary for defense counsel to testify, but counsel will merely authenticate a photograph or provide facts which will not be in dispute, it can be argued that there is no advocate-witness rule problem.

Counsel's Contacts With Police During Investigatory Stage

When defense counsel enters the case at an investigatory stage during which the police are questioning the accused, factual disputes can arise that are germane to the court's decision on a motion to suppress a confession on right to counsel grounds. For instance, if defense counsel alleges that the accused's New York State constitutional right to counsel attached when counsel "entered" the proceeding by calling the police and directing them not to speak any further to the accused [see, e.g., People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980)], but the police deny receiving such a call, a serious advocate-witness rule problem exists. See People v. Amato, 173 A.D.2d 714, 570 N.Y.S.2d 817 (2d Dept. 1991), lv denied 78 N.Y.2d 961, 574 N.Y.S.2d 940, cert denied 502 U.S. 1058, 112 S.Ct. 935 (1992) (since member of defense firm testified at suppression hearing that he had contacted police, and People indicated an intent to use the illegally obtained statement to impeach defendant if he testified at trial, trial court did not violate defendant's right to counsel of choice by disqualifying the firm); see also People v. Brand, 13 A.D.3d 820, 787 N.Y.S.2d 169 (3rd Dept. 2004), lv denied 4 N.Y.3d 851 (no disqualification where, after officer testified at Huntley hearing that he did not hear any other officers give defendant Miranda warnings and never told that to defense counsel, and People then called defense counsel because the officer's testimony contradicted counsel's notes, counsel testified that his notes were inaccurate due to a misunderstanding and thereby confirmed officer's testimony and strengthened defendant's suppression argument) People v. Reily, 305 A.D.2d 430, 759 N.Y.S.2d 178 (2d Dept. 2003) (court should have allowed defense counsel to testify regarding suggestiveness at lineup); cf. Schwab v. Crosby, 451 F.3d 1308 (11th Cir. 2006) (no right to counsel violation where members of public defender's office were called to lay foundation for admission of incriminating letter which was received by public defender's office and had defendant's fingerprints on it; defendant not prejudiced).

Disqualification Of Prosecutor

The advocate-witness rule also applies to a prosecuting attorney. "If the prosecutor will be called as a witness for the People, to testify to a disputed material issue, he should be disqualified from trying the case." People v. Paperno, supra, 54 N.Y.2d at 300. See also United States v. Torres, 503 F.2d 1120 (2d Cir. 1974) (prosecutor who was sitting at counsel's table should not have been used to testify about impeaching event that occurred before trial); United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); People v. Donaldson, 93 Cal.App.4th 916 (Ct. App., 5th Dist., 2001) (prosecutor violated rule when she called herself to impeach a prosecution witness). Similarly, "if it appears that the court will allow the defense to call the prosecutor as a witness, and that the prosecutor will testify adversely to the People, the prosecutor should be disqualified." People v. Paperno, supra, 54 N.Y.2d at 300.

The court has discretion to deny the accused's application to call the prosecutor as a witness, and thereby avoid advocate-witness rule problems, if there is no showing of necessity. People v. Paperno, supra, 54 N.Y.2d at 302-303. See also United States v. Schwartzbaum, 527 F.2d 249 (2d Cir. 1975), cert denied 424 U.S. 942, 96 S.Ct. 1410 (1976) (defendant showed no "compelling and legitimate need" to call prosecutor whose memo had been used to refresh witness' recollection); People v. Wynn, 176 A.D.2d 443, 574 N.Y.S.2d 350 (1st Dept. 1991), lv denied 79 N.Y.2d 866, 580 N.Y.S.2d 738 (1992) (denial of recusal motion was proper where defendant alleged that prosecutor had taken defendant's videotaped confession, but failed to show that prosecutor's investigative role would be a material issue at trial). And, as in any case, an apparent advocate-witness rule problem can be defused when the prosecutor's testimony is not a subject of controversy. See, e.g., United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980) (no plain error where prosecutor briefly testified without objection about uncontested formal matter to which no other witness could have testified); People v. Lester, 99 A.D.2d 611, 472 N.Y.S.2d 162 (3rd Dept. 1984) (no error where co-prosecutor testified on rebuttal to prior inconsistent statements made by defense witness; court notes that there was no violation of advocate-witness rule, since the prosecution had no alternative other than calling the prosecutor, and the prosecutor's testimony was limited to a description of the prior statement).

Issues similar to those raised by an advocate-witness problem arise when a prosecutor has been involved in the investigatory stage of a case, and, as a result, will be eliciting testimony concerning events, such as the taking of a confession or a witness statement, that were witnessed by the prosecutor. By eliciting such testimony, and impliedly vouching for its credibility, the prosecutor becomes an unsworn witness. However, to secure a disqualification of the prosecutor, the accused must show "that there is a significant possibility that the prosecutor's pretrial activity will be a material issue in the case." People v. Paperno, supra, 54 N.Y.2d at 302. See also People v. Ramashwar, 299 A.D.2d 496, 749 N.Y.S.2d 886 (2d Dept. 2002) (reversible error where prosecutor sought to impeach defense witnesses with statements they made to her). The Court of Appeals also noted in Paperno that redaction of references to the prosecutor's involvement can mitigate the problem. Id. at 303-304. However, if redaction is an inadequate remedy because, for example, a confession which was taken by the prosecutor and will be offered at trial was videotaped, the unsworn witness problem remains. Id. at 303, n. 9.

Since the appointment of a special prosecutor whenever an assistant public prosecutor testifies would constitute an unreasonable burden on the prosecution, the advocate-witness rule "does not contemplate disqualification of all attorneys in the [prosecutor's office] merely because one of them will testify." People v. Freeman, 172 A.D.2d 1045, 1046, 569 N.Y.S.2d 857, 859 (4th Dept. 1991), lv denied 78 N.Y.2d 1011, 575 N.Y.S.2d 819. Thus, if the witness' colleague prosecutes the case, "the `advocate-witness' rule [is] not violated because no attorney serve[s] as both a witness and an advocate ...." Id. See also United States v. Armedo-Sarmiento, 545 F.2d 785 (2d Cir. 1976), cert denied 430 U.S. 917, 97 S.Ct. 1330 (1977) (member of U.S. Attorney's office is not disqualified as witness in case in which he plays no other role); Matter of Johnson v. Collins, 210 A.D.2d 68, 620 N.Y.S.2d 28 (1st Dept. 1994) (defendant failed to establish likelihood of prejudice resulting from testimony of 3 prosecutors); People v. Strawder, 106 A.D.2d 672, 482 N.Y.S.2d 922 (2d Dept. 1985) (no advocate-witness problem where summer intern, who was seated at counsel's table and did not otherwise participate in trial, testified to inconsistent statement made by defense witness).

Like defense counsel, the prosecutor can avoid advocate-witness problems by interviewing witnesses in the presence of a third person. See ABA Prosecution Standards, 3-3.1(g)("Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony ... or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person").

Bench Trials vs. Jury Trials

Although a judge "may be better able to take account of a witness-prosecutor's adversarial role in weighing the objectivity of his testimony" and "be less apt than a jury to confuse the roles of witness and prosecutor," and "would not be swayed by the prominence or prestige of a government prosecutor in assessing the credibility of his testimony," it has been held that the rule applies because "the maintenance of public confidence in the ultimate fairness of judicial proceedings is no less applicable to proceedings before a judge than it is to those before a jury." United States v. Johnston, 690 F.2d 638, 644 (7th Cir. 1982). Moreover, it can be argued that in institutional settings in which organizations like The Legal Aid Society operate, it is particularly important that the attorneys, who appear before the same judges on a regular basis, not place their own credibility into proceedings.

The "Substantial Hardship" Exception

The exceptions for testimony concerning an uncontested issue or a matter of formality seem relatively straightforward. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. Ct. App., 2009) ("uncontested issue" exception contemplates that facts about which attorney would testify are undisputed, and that facts go to issue that is undisputed). Determining when disqualification "would work substantial hardship on the client" (Rule 3.7[a][3]) seems more difficult.

When the advocate-witness problem becomes evident before the commencement of trial, it may be difficult to argue that defense counsel's involvement in the case is so intimate that a substitution of counsel would be unduly prejudicial, particularly when the accused is not in pretrial detention. The absence of a longstanding attorney-client relationship which provides defense counsel with special insight into the issues at hand would also militate against use of the "substantial hardship" exception.

In contrast, when an advocate-witness problem does not surface until the time of trial, a court should be reluctant to order disqualification, since defense counsel's preparation for and/or participation in the trial usually produces a unique perspective that cannot be replaced. See Nassau Bar Ethics Opinion 95-12, N.Y.L.J., 9/25/95, p. 7, col. 1 (attorney is not required to withdraw merely because he or she might have to testify in support of client's CPL §30.30 speedy trial claim); Deans v. Aranbayev, 28 Misc.3d 1220(A), 2010 WL 3153950 (Sup. Ct., Queens Co., 2010) (motion for disqualification denied where counsel had been involved in more than ten related matters and in four appeals); People v. Ortiz, N.Y.L.J., 9/26/95, p. 29, col. 2 (Sup. Ct., Kings Co.) (no disqualification where defense counsel testified and denied that defendant had made threatening gesture toward prosecution witness). Cf. People v. Baldi, 54 N.Y.2d 137, 149, n. 1, 444 N.Y.S.2d 893, 899 (1981).

Of course, a judge might choose to declare a mistrial when an intractable advocate-witness problem arises. If a mistrial is declared over the accused's objection, double jeopardy rules would bar a subsequent prosecution if the advocate-witness problem did not create a "manifest necessity" for a mistrial. See Hall v. Potoker, 49 N.Y.2d 501, 427 N.Y.S.2d 211 (1980).

C. INTERVIEWS WITH REPRESENTED PERSONS

Rule 4.2(a) of the New York State Rules of Professional Conduct provides that 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." However, an entity cannot claim blanket protection from ex parte interviews by stating that house counsel is responsible for all future legal matters affecting the entity. See Schmidt v. State, supra, 279 A.D.2d 62 (Attorney General did not commence representation of the Department of Transportation when claimants filed notice of intention to file a claim); see also State Bar Opinion 652, 1993 WL 555952.

Under Lawyer Conduct Rule 4.2(b), "[n]otwithstanding the prohibitions of [Rule 4.2(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." See also Commentary to Rules of Professional Conduct, Rule 4.2 ("Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel. . . . A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4"); State Bar Ethics Opinion 768, 2003 WL 22379946 (lawyer may silently attend meeting involving client and represented party if lawyer gives reasonable advance notice to opposing counsel).

Child Protective Proceedings

It is clear that neither the child's lawyer nor the petitioner's lawyer may speak to a represented respondent concerning "the subject of the representation" without the consent of the respondent's lawyer. Compare Commentary to Rules of Professional Conduct, Rule 4.2 ("Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings"). However, representation of the respondent by counsel does not result in attachment of the indelible State constitutional right to counsel and preclude police interrogation of the respondent during a related criminal investigation. See People v. Smith, 62 N.Y.2d 306, 476 N.Y.S.2d 797 (1984); People v. Kent, 240 A.D.2d 772, 658 N.Y.S.2d 530 (3rd Dept. 1997), lv denied 91 N.Y.2d 875, 668 N.Y.S.2d 573; People v. Snyder, 221 A.D.2d 870, 634 N.Y.S.2d 557 (3rd Dept. 1995), lv denied 88 N.Y.2d 885, 645 N.Y.S.2d 460 (1996).

For purposes of Rule 4.2(a), the child is considered a "party," and thus neither the respondent's lawyer nor the petitioner's lawyer may communicate with the child without the consent of the child's lawyer. See State Bar Ethics Opinion 656, 1993 WL 555956. See also Matter of Awan v. Awan, 75 A.D.3d 597, 906 N.Y.S.2d 70 (2d Dept. 2010) (in custody/visitation proceeding, no error where family court struck testimony of father's expert and precluded further testimony by expert because father's attorney violated Rule 4.2 of Rules of Professional Conduct by allowing retained physician to interview and examine child regarding pending dispute and prepare report without knowledge or consent of attorney for child); Matter of Brian R., 48 A.D.3d 575, 853 N.Y.S.2d 565 (2d Dept. 2008) (attorney for father disqualified where he communicated with one of the subject children, and used her as interpreter when speaking with parties, without knowledge and consent of child's lawyer); Matter of Marvin Q., 45 A.D.3d 852, 846 N.Y.S.2d 356 (2d Dept. 2007), appeal dism'd, 10 N.Y.3d 927 (respondent's attorney properly disqualified where attorney violated rule by allowing members of firm to interview child, and by procuring affidavit from child regarding pending proceedings, without consent of child's lawyer, and violated child's due process rights; family court also properly precluded use of child's affidavit); Campolongo v. Campolongo, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dept. 2003) (where, in matrimonial action, defendant's counsel caused defendant to retain psychiatrist to interview child and prepare report without knowledge of child's lawyer, counsel was properly disqualified and psychiatrist's report and testimony were properly precluded); Matter of Thea T., 174 Misc.2d 227, 663 N.Y.S.2d 502 (Fam. Ct., Suffolk Co., 1997) (County Attorney denied permission to interview child where child had already been interviewed repeatedly).

Non-lawyer agency employees are not bound by Rule 4.2, but it can be argued that because such employees are part of the litigation team, they act as agents for the agency's attorney when they interview the child about litigation-related matters, and that such interviewing should not take place without the permission of the child's attorney. But see Matter of Cristella B., 77 A.D.3d 654, 909 N.Y.S.2d 109 (2d Dept. 2010) (child's attorney not entitled to order directing Department of Social Services to refrain from interviewing children concerning issues beyond those related to safety without forty-eight hours notice to attorney; Rule 4.2 of Rules of Professional Conduct protects child's right to counsel, but applies only to attorneys and does not prohibit caseworker from interviewing child entrusted to agency's care, or justify significant restriction on agency's access to child via a requirement that caseworker notify attorney before interviewing child on issues unrelated to safety, where agency has obligations which distinguish role of caseworker from that of attorney representing a party); Matter of Tiajianna M., 55 A.D.3d 1321, 867 N.Y.S.2d 287 (4th Dept. 2008) (petitioner not required to notify child's attorney prior to interviewing child, since disciplinary rule applies only to attorneys; also, child's attorney had agreed to ACD condition permitting caseworker to examine and interview children, and family court restricted petitioner's scope of questioning to matters involving safety of child and, if it was appropriate, would have precluded any statements made by child that might be against her interest).

There is authority for application of the rule to represented non-parties involved in the litigation. New York State Bar Ethics Opinion 656, 1993 WL 555956.

The issues are somewhat more complex when the child's lawyer or the respondent's lawyer wishes to communicate with employees of the petitioning department of social services. In Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990), the Court of Appeals held that when a corporate "party" is involved, the rule limits contacts with corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation ... or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." 76 N.Y.2d at 374. See also Commentary to Rules of Professional Conduct, Rule 4.2 ("In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent"); Siebert & Co. v. Intuit Inc., 32 A.D.3d 284, 820 N.Y.S.2d 54 (1st Dept. 2006) (rule does not apply to contacts with former employee, and trial court erred in disqualifying defense counsel because of appearance of impropriety flowing from possibility that privileged information was disclosed; although some courts have acknowledged that lawyer must avoid obtaining privileged information from former employee of adversary, there is no evidence that such information was disclosed); Schmidt v. State, 279 A.D.2d 62, 722 N.Y.S.2d 623 (4th Dept. 2000), lv denied 731 N.Y.S.2d 136 (2001) (employees of State Department of Transportation were "parties" under Niesig test). Since the caseworker who has investigated the charges and signed the petition is acting on behalf of the department of social services, it can be argued that rule requires that the child's lawyer and the respondent's lawyer obtain the permission of the petitioner's lawyer before communicating with the caseworker with respect to the charges in the petition. However, since it is critical that the child's lawyer and the respondent's lawyer be able to advocate on behalf of their clients with respect to the agency's custodial arrangements and provision of services, it may well be that contacts with the caseworker and other department of social services employees constitute protected First Amendment activity. See Commentary to Rules of Professional Conduct, Rule 4.2 ("Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government"); State Bar Opinion 652, 1993 WL 555952 (where adverse party is government, "questions arise as to the proper scope of the prohibition contained in rule, including issues raised by legal principles such as the constitutional right of citizens to petition their government"); City Bar Ethics Opinion 1991-4, 1991 WL 639878. Indeed, since department of social services employees are making critical decisions affecting the fundamental rights of the child and parents, it seems inappropriate to apply rule rigidly in such a context. See In re Michael C., 2002 WL 1399115 (Calif. Ct. App., 4th Dist., 2002) (court expresses disapproval of any policy prohibiting communication between party and his/her attorney and county social worker); State ex rel. Children, Youth and Families Dept. v. George F., 964 P.2d 158 (N.M. App. 1998), cert denied 964 P.2d 818 (1998) (guardian ad litem assigned to represent child in civil damages suit brought against DSS should not be deemed to be acting as traditional lawyer, and therefore could communicate freely with DSS social workers).

The Administration for Children's Services has issued a protocol to be used in connection with communications by its own caseworkers, and provider agency caseworkers, with parents' and children's lawyers. According to the protocol, at the initial court appearance ACS's attorney "introduces the ACS and foster care agency caseworkers to the parent's and children's attorneys to clarify and facilitate anticipated communication outside of court, including a discussion about the appropriate parameters of the communication...." The protocol cites "Examples of Appropriate Communication," which include: Pick up and drop off times, schedules and locations for family visits, as opposed to discussion regarding quality or frequency of the visits, and any changes in the visiting schedule; Information regarding programs with family involvement; Relatives' contact information as visiting or caretaking resources; Discussion of court-ordered services without interpreting orders; Dates, times and locations of SPRs or other meetings; Request for copies of service plans; Information regarding a child's medical and educational progress (e.g. report cards, medical updates), notice of doctor's appointments and school meetings that the parent can attend; Update on changes in the child's placement or other service plan issues; Information on programs that could assist the parent and inquiry about the status of pending referrals; Discharge grants, clothing allowances, enrollment of a child in school, establishing Medicaid and housing programs; Communication of parents' requests for letters for public housing, public assistance (e.g., to request visiting allowance) or for other social service programs. "Examples of Inappropriate Communication" include: Interpretations of court orders; Allegations of abuse or neglect; A position regarding the outcome of the court case; Requests for orders against ACS; The caseworker's own opinion of a case or his/her opinion regarding any issue in the case. "If an ACS or provider agency caseworker is asked about any of the items listed above, then he/she should ask the parent's or children's attorneys to contact their supervisor or the FCLS attorney directly. Attorneys for parents and children should not give directives to ACS and provider agency caseworkers during any communication. In addition, any and all reports prepared in anticipation of a court appearance must be provided to the ACS attorney before they are provided to any other parties." "The children's attorney has a right and obligation to meet with the child privately at his/her office and/or foster care placement, and to communicate about how to best make these arrangements. If a child has been brought to court, the ACS/provider agency caseworker should inform the child's attorney as soon as possible." See also Commentary to Rules of Professional Conduct, Rule 4.2 ("This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter").

While expert witnesses are not represented by counsel, some courts have attempted to restrict ex parte communications between attorneys and experts, particularly court-appointed experts who are expected to be neutral evaluators. See, e.g., Kenneth C. v. Delonda R., 10 Misc.3d 1070(A), 814 N.Y.S.2d 562 (Fam. Ct., Kings Co., 2006); Board of Managers of the Bay Club Condominium v. Bay Club of Long Beach Inc., 15 Misc.3d 282, 827 N.Y.S.2d 855 (Sup. Ct., Nassau Co., 2007).

Finally, attorneys should be familiar with the ethical standards governing contacts with unrepresented persons involved in the case. Under Lawyer Conduct Rule 4.3, a lawyer, "[i]n communicating on behalf of a client with a person who is not represented by counsel ... shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should 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." See also Commentary to Rules of Professional Conduct, Rule 4.3 (An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. . . . The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations"); Opinion 843, 2010 WL 3961381 (New York State Bar Association, 9/10/10) (lawyer who represents client in pending litigation, and has access to Facebook or MySpace network used by another party, may access and review public social network pages of party to search for potential impeachment material as long as lawyer does not "friend" other party or direct third person to do so); Formal Opinion 2010-2 (Ass'n of the Bar of the City of New York, Sept. 2010) (lawyer may not use deception to access information from social networking webpage, and Rules are violated whenever attorney "friends" an individual under false pretenses to obtain evidence even if lawyer employs agent, such as investigator, to engage in ruse; however, lawyers can and should seek such information by availing themselves of informal discovery, such as truthful "friending" of unrepresented parties, or formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on individual's social networking page); NYC Bar Association Formal Opinion 2009-2: Ethical Duties Concerning Self-Represented Persons (February, 2009) (lawyer may advise self-represented party to retain counsel and identify legal issues that could be usefully addressed by counsel, and may be obligated to do so when it would advance interests of layer's own client; may provide certain incontrovertible factual or legal information, such as client's own position in negotiations, or existence of legal right such as right against self-incrimination; may direct a self-represented adversary to available court facilities designed to aid those litigants; should avoid misleading self-represented party; should be ready to clarify when necessary that lawyer does not and cannot represent the self-represented person, represents another party who may or does have interests adverse to the self-represented person, and cannot give any advice other than to secure counsel or consult available court facility designed to assist self-represented persons, and lawyer must provide this clarification whenever lawyer knows or has reason to know self-represented person misapprehends lawyer's role; and should determine whether explanation should be in writing).

D. PREPARATION AND EXAMINATION OF WITNESSES

Presentation Of Accused's Testimony

As in any other type of litigation, defense counsel in a criminal case is often faced with ethical issues arising out of counsel's knowledge, or mere suspicion, that the client's version of events is untruthful. If the client wishes to take the stand and testify, what are counsel's options?

First of all, there is a critical distinction between counsel's knowledge that a client intends to give perjured testimony, and counsel's subjective, even well-reasoned, opinion concerning the veracity of the client's story. For example, if a client tells the attorney that he is guilty, but has no intention of being incarcerated if he can help it and will make up a story that the judge might believe, counsel is squarely confronted with an ethical dilemma. In contrast, if the prosecution has five seemingly reliable witnesses to a robbery, but the respondent has four alibi witnesses, defense counsel's personal belief that the defense witnesses are lying appears to present no ethical dilemma at all, since counsel has no duty to decide who is and is not telling the truth. This is true even if the defense witnesses contradict each other, or provide an unlikely version of events, as long as counsel is not in possession of information that makes it clear that the witnesses will be perjuring themselves. The only issue facing counsel in the latter scenario is a strategic one: will any or all of these possibly dishonest witnesses further the defense cause?

The Interviewing Process

It is clear that defense counsel is in a position to help the accused develop testimony designed to enhance the probability of acquittal. Indeed, an attorney concerned only with winning the case might want to describe the version of events that would be most helpful before the accused says anything, or at least make suggestions identifying the "better" scenarios while the accused is describing the relevant events. However, there are ethical rules limiting counsel's ability to conduct this type of questioning. See generally Hal R. Lieberman, Be Aware of Ethical Witness Preparation Rules, N.Y.L.J., 5/25/00, p. 1, col. 1.

Rules of Professional Conduct, Rule 3.4(a)(5) provides that a lawyer shall not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." Addressing the issue more directly, section 4-3.2 of the ABA Defense Standards states:

> (a) As soon as practicable defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

> (b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by the lawyer's knowing of such facts.

Read together, these provisions make it clear that defense counsel should not knowingly assist a person in the development of false testimony. And, by prohibiting lawyers from "seeking to influence the direction of the client's responses," the <u>ABA Defense Standards</u> seem to preclude any suggestions by counsel concerning scenarios that would be most helpful, whether those scenarios are presented before, during, or after the accused has given a statement. Finally, section 4-3.2(b) of the <u>ABA Defense Standards</u> clearly makes it improper for counsel to state prior to the interview that the accused should not admit guilt if he or she plans to give perjured testimony, or tell defense counsel which portions of the planned testimony are untrue.

Although these rules encourage defense counsel to conduct an open-ended fact-finding inquiry and avoid putting words in the accused's mouth, the use of leading questions during an interview will often be necessary, and should not be considered unethical. For instance, if the accused is raising a justification defense, there would be nothing unethical in asking the accused if he has ever been threatened by the complainant, or has ever heard about violent incidents involving the complainant. Similarly, after interviewing the accused about a street encounter with the police, it would not be unethical to ask whether the officers displayed their guns. Such questioning constitutes a legitimate attempt to obtain relevant information, not an attempt to signal to the accused that certain facts would be helpful.

Moreover, it has been suggested that "as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence," he or she may advise the client of applicable law before hearing the client's version of the facts. <u>Nassau Bar Ethics Opinion 94-6</u>, N.Y.L.J., 3/23/94, p. 4, col. 4. To require an attorney to withhold legal information until after the interview "would in effect be to legislate mistrust of the client's honesty, would run counter to the attorney's basic function ... and would impede the attorney's ability to avoid a lengthy discourse on extraneous matters by focusing the client's attention on the relevant elements." <u>Id.</u> It might be noted that the Nassau Bar opinion was provided in the context of a civil matter: given the accused's constitutional right to the effective assistance of counsel and to present a defense, it is even more important for a criminal defense attorney to be unfettered by overly restrictive rules when providing advice to the accused. In any event, there is a notable difference between literally telling a client what it would be best to say, and providing a description of the legal rules governing the case.

<u>Use Of Perjured Testimony</u>

The Rules of Professional Conduct, Rule 3.4(a)(4) states that a lawyer shall not "knowingly use perjured testimony or false evidence." Addressing the issue more comprehensively, Rule 3.3 states as follows:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; * * *
> (3) 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.
> (b) 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.
> (c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

See also Rules of Professional Conduct, Rule 1.0(b) ("'Belief' or 'believes' denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances"); Rules of Professional Conduct, Rule 1.0(k) ('Knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances"); Rules of Professional Conduct, Rule 1.0(r) ('Reasonable belief' or 'reasonably believes,' when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable"); Commentary to Rules of Professional Conduct, Rule 3.3 ("This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.... A lawyer's actual knowledge that evidence is false ... can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.... The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6.... The lawyer ...

may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client"); Comment, Rule 3.3 ("A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood"); ABA Defense Standards, 4-3.7(b), 4-7.5(a) ("Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity"); People v. Bournes, 60 A.D.3d 687, 874 N.Y.S.2d 556 (2d Dept. 2009) (reversible error where detective testified inaccurately that defendant had admitted he "forcibly raped and sodomized the victim," and prosecutor failed to correct testimony).

This issue was addressed by the United States Supreme Court in Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986). The murder defendant, who claimed justification based upon his belief that the deceased had had a gun, told defense counsel that he had, in fact, seen something "metallic" in the deceased's hand, and opined that, "[i]f 'I don't say I saw a gun I'm dead." When the defendant insisted on giving such testimony despite counsel's protestations concerning perjury, counsel indicated that he would seek to withdraw if the defendant insisted on committing perjury, and would disclose to the court any perjury committed by the defendant. At trial, the defendant testified but did not claim that he had seen a gun, and was convicted of murder. In a federal habeas proceeding commenced after he exhausted state appeals, the defendant argued that he had been denied the effective assistance of counsel, and his right to present a defense, by counsel's refusal to allow him to testify.

While rejecting the defendant's claim, the Supreme Court concluded that counsel's actions fell within "the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment." 475 U.S. at 166. The Court noted that in various codes of professional conduct, the legal profession has affirmed that a lawyer may not allow a client to give false testimony. Specifically, the Court stated that "[i]t is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct [citations omitted]." Id. at 169. The Court then noted that certain codes permit an attorney to withdraw in response to a threat to commit perjury and to disclose actual perjury to the court, and that the duty of confidentiality does not protect a client's stated intention to commit a future crime. See also People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (at Huntley hearing, defense counsel properly discharged ethical obligations by advising defendant against lying on witness stand and encouraging defendant not to take the stand at all); People v. Darrett, 2 A.D.3d 16, 769 N.Y.S.2d 14 (1st Dept. 2003) (counsel was ineffective and defendant was denied due process when counsel advised the court at a Huntley hearing that she expected defendant to falsely claim either self-defense or an alibi, but that she did not believe defendant had perjured himself regarding his claim that he was coerced into giving the statements he made to the police, since these disclosures were unnecessary, and were especially harmful given that the court was the finder of fact at the hearing; generally, counsel should make every reasonable effort to limit amount of information conveyed to judge and judge should discourage attorneys from disclosing more information than is necessary); People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001) (no ineffective assistance of counsel where, after attempting to dissuade defendant from his planned course, defense counsel revealed to the court defendant's intention to commit perjury); People v. Campos, 249 A.D.2d 237, 672 N.Y.S.2d 680 (1st Dept. 1998), lv denied 92 N.Y.2d 923, 680 N.Y.S.2d 464 (no conflict of interest existed after defense counsel revealed to court defendant's intent to lay a false foundation for speedy trial claim); Andrades v. Ercole, 2010 WL 3021252 (SDNY, 2010) (as a practical matter, it is difficult for counsel to allow defendant to testify via narrative without prior explanation; if defendant begins to testify via narrative, there would likely be objection from prosecution, and use of narrative form also would signal to court that counsel believes defendant intends to commit perjury); Comment, Rule 3.3 ("If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.... If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false").

Consistent with the definition of "knowingly," "known," "know," and "knows" in Rule 1.0(k), court decisions have made it clear that counsel must have well-founded knowledge, and not merely suspicions, regarding the perjurious nature of the accused's testimony before any ethical duty arises. See State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (absent the most extraordinary circumstances, knowledge must be based on client's unambiguous admission made directly to counsel); Commonwealth v. Mitchell, 781 N.E.2d 1237 (Mass. Sup. Jud. Ct., 2003) (counsel may disclose belief that defendant will testify falsely when counsel has a firm basis in fact for such belief); People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (defense counsel should not have asked to be relieved when he suspected, but did not know, defendant was going to perjure himself); United States v. Midgett, 342 F3d 321 (4th Cir., 2003) (defendant's right to effective assistance of counsel violated where defense counsel disbelieved defendant's proffered testimony, but did not have information sufficient to justify his conclusion that defendant's testimony would be perjurious since defendant never indicated that he would testify untruthfully, and had been consistent in his statements to counsel); see also New York County Lawyers' Ethics Opinion, Question 712, 1996 WL 592653 (lawyer may not decide to reveal that client gave false deposition testimony based on lawyer's prediction that client will lie on the witness stand); but see United States v. Litchfield, 959 F.2d 1514 (10th Cir. 1992) (counsel was not ineffective or unethical when he told judge during trial that he was worried his client might lie on the stand; counsel was not obligated to remain silent until he knew for certain the defendant would lie).

With respect to defense counsel's ethical duty before perjured testimony is presented, Rule 3.3(b) states that when counsel "knows that a person intends to engage . . . in criminal or fraudulent conduct related to the proceeding," counsel "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This provision arguably precludes counsel from seeking to withdraw without disclosing the false evidence to the court since withdrawal, which does prevent counsel from participating in the presentation of false evidence, can facilitate the presentation of false evidence by new counsel, who may be unaware of the false nature of the evidence. However, the authorities have gone in different directions regarding this issue. See People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (defense counsel sought to withdraw prior to hearing; while counsel told court that ethical dilemma concerned defendant's right to testify, counsel never stated that defendant intended to commit perjury or otherwise disclose client secrets and court inferred defendant's perjurious intent); People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001) (substitution of counsel would not have solved problem and might have facilitated a fraud; with respect to bench trials, court states in footnote that it was not addressing whether similar disclosure in a bench trial would be appropriate or implicate due process concerns, while citing authorities suggesting disclosure is inappropriate); State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (counsel should attempt to dissuade client and consider moving to withdraw if client is not dissuaded); People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (disqualification can lead to endless cycle of defense continuances and motions to withdraw as accused informs each new attorney of the intent to testify falsely, or the accused may be less candid with his new attorney and keep his perjurious intent to himself and thereby facilitate the presentation of false testimony or find an unethical attorney who would knowingly present and exploit false testimony); United States v. Bruce, 89 F.3d 886 (D.C. Cir. 1996) (rather than reveal defendant's request that counsel lie to court, counsel should have sought leave to withdraw); State Bar Ethics Opinion 681, 1996 WL 421808 (lawyer who requests disqualification must do so without revealing secret or confidence; lawyer is permitted to reveal "secret" if ordered by court to reveal reason, and, if lawyer believes information is a confidence protected by attorney-client privilege, lawyer has a duty to follow court order to disclose but may be obligated to attempt to appeal order); Queens Bar Ethics Opinion 3-87, N.Y.L.J., 1/12/88, p. 5, col. 1 (when defendant intends to commit future crime, counsel can disclose it to authorities or withdraw in a way that preserves confidentiality); see also Rules of Professional Conduct, Rule 1.16(b)(1) (lawyer shall withdraw when lawyer knows or reasonably should know that representation will result in violation of Rules or of law); Rule 1.16(c) (lawyer may withdraw when "(1) withdrawal can be accomplished without material adverse effect on the interests of the client," or "(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or "(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules"); Comment, Rule 3.3 ("The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases").

Although Rule 3.4(a)(4) states that a lawyer shall not "knowingly use perjured testimony or false evidence," courts have held that after disclosure regarding false testimony is made by counsel to the court, the court may permit counsel to present false testimony in narrative form. People v. DePallo, supra, 96 N.Y.2d 437; Commonwealth v. Mitchell, supra, 781 N.E.2d 1237; People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (calling defendant to witness stand to testify in free narrative manner is solution that best balances defendant's constitutional right to testify and counsel's ethical obligations); State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (defense counsel should inform opposing counsel and court of change of questioning style prior to use of narrative form); United States v. Bruce, supra, 89 F.3d 886; American Trial Lawyer's Association Code, Chapter I., Illustrative Cases (presentation of false testimony not barred); People v. Johnson, 72 Cal.Rptr.2d 805 (Ct. App., 4th Dist., 1998); see also People v. Tyler, 245 A.D.2d 1100, 667 N.Y.S.2d 578 (4th Dept. 1997), lv denied 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (no ineffective assistance of counsel where defense counsel refused to conduct direct and defendant, upon taking stand, refused to give narrative account); Comment, Rule 3.3 ("If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form").

In those instances in which defense counsel learns after-the-fact that he/she has, in fact, presented false testimony through traditional direct examination, it appears that the only remedial action available usually will be to ensure that some type of disclosure is made to the court. It may suffice to simply withdraw the evidence. See NY State Bar Ethics Opinion 837, 2010 WL 2977924 (3/16/10) (where lawyer learned that document admitted into evidence based on client's testimony was forged, and that some of client's testimony concerning the document was false, lawyer was required to take reasonable remedial measures, but disclosure of falsity is required only if necessary; Committee approves of lawyer's suggestion that he inform tribunal that specific item of evidence and related testimony were being withdrawn, and also notes that in criminal, as opposed to civil sphere, mandate to disclose confidential information may be limited by Fifth Amendment right against self incrimination and/or Sixth Amendment right to effective assistance of counsel); Comment, Rule 3.3 ("A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as ... ordering a mistrial, taking other appropriate steps or doing nothing"); see also People v. Berroa, 99 N.Y.2d 134, 753 N.Y.S.2d 12

(2002) (while counsel has duty to disclose perjury to court, counsel is not required to provide testimony rebutting perjury; thus, defendant was denied effective assistance of counsel when defense counsel not only revealed to court that alibi witnesses had previously told her they could not provide alibi, but also stipulated to that fact and mentioned it during summation); Torres v. Donnelly, 554 F.3d 322 (2d Cir. 2009) (no violation of right to effective assistance of counsel where defense counsel stipulated that, contrary to witness's testimony, she had identified defendant when counsel showed her photo array; tension between counsel's duty to zealously represent defendant, and duty to be candid with court and correct the record, did not result in conflict of interest, nor did counsel's decision to enter into stipulation).

Self-Incrimination Issues

Defense counsel is sometimes in a position to interview, and then call to the stand, a witness who will give self- incriminating testimony concerning the charges. Although some attorneys might feel uneasy about coaxing a witness to walk into such a "trap," the ABA Defense Standards state in section 4-4.3(c) that "[i]t is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel." Indeed, since defense counsel's primary duty is to zealously prepare a defense, even at the expense of the interests of a witness, it would be unreasonable to require counsel to take affirmative action that could result in the witness' refusal to make a statement. See State Bar Ethics Opinion 728, 2000 WL 1692766 (lawyer for municipality may advise pro se civil claimant of risk of self incrimination, but is not required to do so). Of course, if the witness raises self-incrimination concerns, defense counsel cannot say anything that would constitute "advice" in order to encourage the witness to testify. Rules of Professional Conduct, Rule 4.3. Obviously, ethical issues arise if the witness is represented by counsel.

On the other hand, it does the accused no harm, and is not improper, for defense counsel to inform a prosecution witness of the potential for self-incrimination. A prosecutor may not advise a defense witness that he or she may be the subject of a criminal prosecution "for the purpose of influencing the witness in favor of or against testifying." ABA Prosecution Standards, 3-3.2(b); see also State v. Feaster, 877 A.2d 229 (NJ, 2005) (prosecutor violated state Constitution by threatening defense witness with perjury prosecution if witness recanted trial testimony); United States v. Straub, 538 F.3d 1147 (9th Cir., 2008) (in order to establish entitlement to use immunity for defense witness, defendant must show that witness's testimony was relevant; that prosecutor either intentionally caused witness to invoke Fifth Amendment for purpose of distorting fact-finding process or granted immunity to prosecution witness to obtain testimony but denied immunity to defense witness whose testimony would have directly contradicted government witness; and that fact-finding process was so distorted as a result that defendant was denied due process right to fundamentally fair hearing). However, it can be argued that defense counsel's special responsibility to zealously defend the accused permits counsel to make reference to self-incrimination problems while talking with a prosecution witness even if counsel's hope is that the witness will have second thoughts about testifying. And, since the prosecutor must inform such a witness that he or she may be prosecuted [ABA Prosecution Standards, 3-3.2(b)], defense counsel can hardly be faulted for providing such information. However, it would be improper to encourage the witness not to testify or provide information to the prosecutor, or otherwise give the witness legal "advice." Rules of Professional Conduct, Rule 4.3; ABA Defense Standards, 4-4.3(d).

Interference With Adversary's Contact With Witness

The ABA Defense Standards state in section 4-4.3(d) that "[d]efense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor," and that "[i]t is unprofessional conduct to advise any person other than a client, or cause such person to be advised to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give." Defense counsel should also ensure that the accused does not engage in such behavior, or other forms of tampering. See ABA Defense Standards, 4-5.1(c).

And, it is clear that a prosecutor may not engage in this type of conduct in order to deprive defense counsel of an opportunity to speak with prosecution witnesses. See ABA Prosecution Standards, 3-3.1(c); Pennsylvania Ethics Opinion 98-134, 1999 WL 516727 (1999); State v. Zhao, 137 P.3d 835 (Wash. 2006) (Sanders, J., concurring, criticizes prosecution policy denying plea bargains to sex offenders who interview their alleged victim); State v. Hofstetter, 878 P.2d 474 (Wash. Ct. App., Div. 2, 1994) (counsel may request opportunity to be present, but may not make presence a condition of interview); United States v. Carrigan, 804 F.2d 599 (10th Cir. 1986); State v. York, 632 P.2d 1261 (Or. 1982) (prosecutor may not state that "it would be better if [witness] didn't say anything"); United States v. Peter Kiewit Sons' Co., 655 F.Supp. 73 (D. Colorado, 1986) (prosecutors improperly discouraged witnesses from talking to defense by persuading them that if they gave interviews, what they said would be twisted so that it would appear they had given conflicting versions of the facts, and by giving the witnesses the clear impression that the prosecutors preferred that they not talk to the defense).

However, although defense counsel should not "discourage or obstruct" communication with the prosecutor when the witness has a genuine desire to communicate, it cannot be the case that defense counsel, who has an obligation to zealously defend the accused's interests, must stand by idly and say nothing when a prosecutor intends to interrogate defense witnesses. Surely, defense counsel can inform a witness of the advantages and disadvantages of speaking to the prosecutor, such as the risk of being impeached at trial with pretrial statements. Indeed, faced with an inquiry from a witness, particularly one who is a member of the accused's family, no one should expect a competent (and ethical) defense attorney to remain aloof from the witness' decision-making. Consistent with the spirit of ABA Defense Standards, 4-4.3(d), defense counsel should be permitted to advise the witness that he or she has the right to decline to speak to the prosecutor, and that, in the end, it is the witness' decision. See United States v. Black, 767 F.2d 1334 (9^{th} Cir. 1985) (advice given to witnesses that they could speak to defense "but have no obligation to do so" was appropriate); United States v. Pinto, 755 F.2d 150 (10th Cir. 1985); United States v. Bittner, 728 F.2d 1038 (8th Cir. 1984) (no impropriety where special agent advised witness that she had right to decline interviews with defense).

Of course, expert witnesses and others who have been retained by the defense team can be specifically instructed not to reveal privileged information.

In Gregory v. United States, 369 F.2d 185 (D.C. Cir., 1966), the court held that defendant was denied a fair trial where the prosecutor advised witnesses not to talk to anyone unless the prosecutor was present. Sanctions also may result where a party improperly interferes with an adversary's access to a witness. See United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999) (court abused discretion in suppressing witness' statements and testimony); United States v. Carrigan, supra, 804 F.2d 599 (no error where court ordered that government witnesses be deposed); United States v. Peter Kiewit Sons' Co., supra, 655 F.Supp. 73 (court directs that witnesses be deposed); People v. Marino, 87 Misc.2d 542 (County Ct., Monroe Co., 1976) (where defense counsel's attempts to interview witnesses were "frustrated," court orders production of witnesses for interview). In United States v. Causey, 2006 WL 44073 (S.D. Tex., 2006), the court, to reassure potential witnesses and their attorneys, issued an order stating, inter alia, that should a witness provide information or assistance to defense counsel, the government shall not view that witness's decision as any lack of cooperation with the government and shall not use such cooperation as a basis for decisions regarding prosecution.

In addition, when a witness' refusal to be interviewed by defense counsel is relevant to the witness' credibility, the accused should be permitted to cross-examine the witness about such refusal. See State v. Riggs, 942 P.2d 1159 (Ariz. 1997).

Mid-Testimony Contact With Witnesses

It is generally agreed that an attorney should not discuss his or her witness' testimony with the witness during breaks in the testimony. Indeed, judges often issue formal directives, or cautionary "reminders," to that effect. There appear to be no formal ethical rules prohibiting such contacts. See United States v. Bautista, 23 F.3d 726, 731 (2d Cir. 1994) ("While the contact may well have been improper, it did not rise to the level of a constitutional violation or a violation that would in some way cause us to exercise our supervisory powers"). Sometimes a prosecutor has a legitimate reason to speak to a witness, but a sanction should be sought if it appears that improper coaching caused a change in the witness's testimony. Compare People v. Branch, 83 N.Y.2d 663, 612 N.Y.S.2d 365 (1994) (no error where court allowed prosecutor to question witness during recess to determine whether witness had been intimidated by defendant's family); United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) (no right of confrontation violation where court permitted AUSA to speak to complainant during overnight break in cross-examination, but court stated that prosecutor "may have conversations with his witness" but "may not coach the witness"); People v. DelPilar, 293 A.D.2d 365, 742 N.Y.S.2d 200 (1st Dept. 2002), lv denied 98 N.Y.2d 696 (where witness initiated contact and told prosecutor she had originally been too frightened to identify defendant but had changed her mind, truth-seeking function of trial was not impaired); People v. Neil, 289 A.D.2d 611, 733 N.Y.S.2d 528 (3rd Dept. 2001), lv denied 97 N.Y.2d 758 (2002) (no proof that witness's changed answers and failure of memory were result of improper coaching, and defense did not request that ADA be questioned about contents of alleged discussion with witness) and People v. Giap, 273 A.D.2d 54, 709 N.Y.S.2d 62 (1st Dept. 2000), lv denied 95 N.Y.2d 872 (no sanction where defendant was able to exploit prosecutor's contact with witness resumed cross-examination) with People v. Robinson, 190 A.D.2d 697, 593 N.Y.S.2d 279 (2d Dept. 1993) (officer was "prepped" during recess, and changed testimony the next day).

However, the accused's Sixth Amendment right to counsel may be violated when the court bans attorney-client contacts while the accused is on the stand. Generally, ban is permissible if it covers a brief recess, but overnight bans, especially when they effectively cover several days, usually are improper. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct 1330 (1976); People v. Joseph, 84 N.Y.2d 995, 622 N.Y.S.2d 505 (1994); United States v. Triumph Capital Group, 487 F.3d 124 (2d Cir. 2007).