

CONTINUING LEGAL EDUCATION

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**AN INTRODUCTION TO THE NEW STATEWIDE
UNIFORM DISCIPLINARY PROCEDURES AND A 2016
ETHICS UPDATE FOR CRIMINAL LAW PRACTITIONERS**

MICHAEL S. ROSS, ESQ.

POWERPOINT PRESENTATION

Sponsored by:

Appellate Division, First Department and the
Assigned Counsel Plan for the First Department

**THE APPELLATE DIVISION, FIRST DEPARTMENT,
ASSIGNED COUNSEL PLAN**

PRESENTS:

**"AN INTRODUCTION TO THE NEW STATEWIDE
UNIFORM DISCIPLINARY PROCEDURES
AND A 2016 ETHICS UPDATE FOR
CRIMINAL LAW PRACTITIONERS"**

A CONTINUING LEGAL EDUCATION COURSE

Michael S. Ross, Esq.

(These slides are a highly abbreviated and oversimplified summary of key issues covered in the monograph. They are not a substitute for the source materials.)

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An Overview Of The New Statewide Uniform Rules

- ▶ The new Statewide Uniform Rules for Attorney Disciplinary Matters ("Uniform Rules"), which go into effect on July 1, 2016, are the product of an extraordinary effort by the four Appellate Divisions; the Court staff; the Commission on Statewide Attorney Discipline; and the public, which provided significant input.
- ▶ The Uniform Rules represent a compromise among the four Appellate Divisions, each of which had to concede to changes in their independent disciplinary processes.

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An Overview Of The New Statewide Uniform Rules

- ▶ The new Uniform Rules represent a “work in progress” inasmuch as each of the four Appellate Divisions will have to amend/change their current Rules to conform to the new Uniform Rules and fill in gaps with respect to the new Rules. In addition, the new Uniform Rules provide latitude for each of the four Appellate Divisions with respect to implementation and mechanical issues in each Department.
- ▶ The new Uniform Rules were not intended to create overly simplistic uniformity as to sanctions; rather, they were intended to create a uniformity in the *types* of sanctions imposed (i.e., no longer will there be different forms of “Letters of Dismissal With Guidance,” “Letters of Caution,” etc.).

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Questions Raised By The New Statewide Uniform Rules

- ▶ Standardization of sanction: Is it needed; how is it achieved; etc.? Do the new Uniform Rules provide better standards to achieve this?
- ▶ The discipline by consent provisions (i.e., plea bargaining): Were they needed? If so, should it be permitted in advance of charges being lodged? And to what extent will there be charge and sanction bargaining?
- ▶ The discovery provisions: Are they an improvement on the present system? Is the option of seeking discovery from the Appellate Division a change to and/or improvement over the current system?

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Questions Raised By The New Statewide Uniform Rules

- ▶ From the point of view of “process,” do the provisions dealing with a Statement of Disputed Facts (which is similar to a pretrial order in a civil case) make a meaningful change to the disciplinary process? Are there challenges presented by the terms or timetable in the Uniform Rules as to the Statement of Disputed Facts?
- ▶ More generally, do the new Uniform Rules provide for timetables which are fair and workable?
- ▶ How will the provision allowing the Committee Staff to argue sanction impact the disciplinary process?

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Questions Raised By The New Statewide Uniform Rules

- ▶ Is the ability of an attorney to challenge an Advisement important?
- ▶ How will the provisions dealing with diversion for impaired attorneys impact the disciplinary process?
- ▶ Are the provisions dealing with foreign discipline and, by implication, collateral estoppel, a change to the former disciplinary process?
- ▶ Have the rules governing reinstatement of disbarred and suspended attorneys changed in any meaningful way?

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Key Fee Issues For Criminal Defense Attorneys

► Non-Refundable And Minimum Fees

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

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Key Fee Issues For Criminal Defense Attorneys

▪ General Retainers For Availability vs. Special Retainers For Services:

“A general retainer is an agreement between attorney and client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney’s promise to be available to perform, at an agreed price, any legal services (which may be of any kind or of a specified kind) that arise during a specified period. Because the general retainer fee is given in exchange for availability, it is a charge separate from fees incurred for services actually rendered. In other words, such fees are earned when paid because the payment is made for availability. ...

The nonrefundable retainer, a subspecies of the special retainer, arises only in conjunction with the rendering of specified services for a specified fee. A general retainer is not paid for the rendition of legal services, but rather for assured availability to perform legal services. Thus the nonrefundable retainer and the general retainer are separate and distinct arrangements.”

Lester Brickman and Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C.L. Rev. 1, 6-8 (1993).

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The Right To Keep Fees Upon Early Discharge

- ▶ NYSBA Committee on Professional Ethics Opinion No. 570 (1985) (and various other opinions and authorities) allow a lawyer to deposit advance fees in their operating account (and not their escrow account).
- ▶ Where an attorney is discharged "without cause" prior to the completion of a case, the attorney is entitled to be paid *quantum meruit* for services rendered. See generally United States v. Brumer, 420 F.Supp. 206 (S.D.N.Y. 2005). [Monograph pp. 6-7] The factors to be considered are much the same as in Rule 1.5(a)(1), which governs what is or is not an "excessive" fee in New York:
 - "The factors a court considers in making a quantum meruit determination of the reasonableness of attorneys' fees include: (1) the difficulty of the questions involved; (2) the skill required to handle the problem; (3) the time and labor required; (4) the lawyer's experience, ability and reputation; and (5) the customary fee charged by the Bar for similar services. See Mar Oil, S.A. v. Morrissey, 982 F.2d 830, 841 (2d Cir.1993)." Brumer, 420 F.Supp. at 210.
- ▶ Of course, where many criminal law practitioners find difficulty is in *proving* what work was performed – a key component of the *quantum meruit* analysis. The burden of keeping adequate and complete records to support a criminal lawyer's entitlement to fees upon discharge rests upon the attorney. See Wong v. Kennedy, 853 F.Supp. 7 (E.D.N.Y. 1994).

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Definition of "Knowledge" That Triggers Duty To Report Fraudulent Trial Conduct To The Court

- ▶ United States v. Parse, 789 F.3d 83 (2d Cir. 2015) [Monograph p. 39].
- ▶ The Second Circuit reversed a denial of a defendant's motion for a new trial, which motion was premised on egregious juror misconduct, i.e., a juror had lied about almost every aspect of her identity and background during voir dire. The district court had found that defense counsel allegedly "knew" about the juror's gross misconduct before deliberations began, but failed to bring this to the court's attention.
- ▶ The Second Circuit held that a finding that counsel had waived the right to move for a new trial required proof that counsel "knew" about the juror misconduct, and that the district court erred in concluding that the defendant's lawyers did, in fact, have such knowledge before deliberations began. The Second Circuit found that the record demonstrated that defense counsel only "suspected," prior to the start of deliberations, that the juror had lied during voir dire. The record demonstrated that counsel knew that the juror had engaged in misconduct only after the jury had delivered its verdict and had been discharged.

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Withdrawal Of Counsel When Attorney-Client Relationship Has Broken Down

- ▶ People v. Gibson, 126 A.D.3d 1300 (4th Dept. 2015) [Monograph p. 35].
- ▶ The Fourth Department reversed a conviction because the trial court had refused to appoint new counsel and refused to permit the defendant's counsel to withdraw, notwithstanding the fact that both the defendant and defense counsel agreed that they were unable to communicate. The Court held that the trial court had abused its discretion by refusing to replace counsel, because the defendant presented more than mere conclusory allegations of a breakdown in the attorney-client relationship and because there was evidence in the record that suggested that the breakdown in communications resulted from legitimate concerns by the defendant as to his lawyer's representation.

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Validity Of Waiver Of Conflict Of Interest

- ▶ People v. Richens, 2014 N.Y. Misc. LEXIS 2327 (App. Term, 2d Dept. May 9, 2014) [Monograph p. 15].
- ▶ A jointly-represented defendant who is represented pursuant to a conflict waiver, cannot claim that the waiver is invalid when:
 - 1) the court conducted two extensive hearings during which every potential risk of the joint representation was discussed; and
 - 2) the defendant repeatedly acknowledged that he understood all of the potential ramifications of the joint representation.

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Conflict Of Interest – Propriety Of Screening Mechanism

- ▶ United States v. Kwiatkowski, 2014 U.S. Dist. LEXIS 88892 (W.D.N.Y. Jun. 30, 2014) [Monograph p. 13].
- ▶ The court refused to disqualify counsel for a police officer who was charged with civil rights violations in connection with arrests arising out of an incident, even though a partner of defense counsel had briefly represented one of the victims in a state court proceeding involving the underlying incident.
- ▶ The court held that, although the partner who had briefly represented the victim was personally disqualified in the officer's case, disqualification would not be imputed to the rest of the firm because: 1) the representation of the victim was brief and had occurred 5 years earlier; 2) the lawyer who had represented the victim had never discussed the matter with the lawyers who were representing the officer and would not participate in the defense of the officer; 3) the firm had, after it learned of the conflict, immediately established a screen and because of the size of the firm (50 lawyers), the screen could be adequate; and 4) the officer had provided an informed written consent to the firm's continued representation of him.

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Conflict of Interest – Lawyer With Personal Interest Conflict

- ▶ Christenson v. Roper, 135 S. Ct. 891 (2015)
- ▶ The Supreme Court held that a criminal defendant was entitled to have substitute counsel appointed in a habeas corpus proceeding because his original appointed counsel had missed a statutory deadline for filing the petition.
- ▶ The original lawyers had a disabling conflict of interest because they could not be expected to make a critical argument for the defendant, i.e., that he was entitled to equitable tolling of the habeas limitations period. This was because an equitable tolling argument would have to be premised on a claim that those lawyers had seriously breached their professional responsibilities to the defendant.

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Conflict of Interest – Imputation Of Conflict Between Lawyers Employed By Large Public Defense Organizations

- ▶ People v. Watson, 2016 N.Y. LEXIS 86 (Feb. 11, 2015) [Monograph p. 7].
- ▶ The Court of Appeals held that a trial judge had not abused his discretion in disqualifying defendant's trial counsel. Defendant's counsel was a staff lawyer with New York County Defender Services ("NYCDS"). During this representation, he learned that another NYCDS lawyer had previously represented another person who had been arrested in connection with the same incident. NYCDS supervisors, upon being informed of the conflict, ordered the defendant's lawyer to take steps that could impair his defense of the defendant, e.g., he could not question NYCDS' former client and could not cross-examine him at trial.
- ▶ The Court of Appeals held that, although the general rule in New York is that the conflicts of one lawyer who is employed by a large public defense organization are not imputed to other lawyers in that organization, under the facts in this case, the trial court did not abuse its discretion in replacing trial counsel because: 1) original trial counsel was aware of NYCDS' prior representation of the other person before the defendant's trial; 2) the other NYCDS lawyer had represented the other person with respect to the same incident; and 3) NYCDS supervisors had taken steps that directly impinged on the representation of the defendant.

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Relative Of Client Who Pays The Client's Fees Is Not, Without More, A Client Of The Lawyer

- ▶ New York State Bar Association Ethics Opinion No. 1063 (2015) [Monograph p. 35].
- ▶ The Opinion expressed the view that a person who pays a relative's legal fees does not, without more, become a client of the lawyer whose fees s/he has paid. Rather, the person who pays the fee becomes a client of the lawyer only if the lawyer gives the payor reason to believe that he or she is, in fact, a client.

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Fifth Amendment – Miranda Warnings

- ▶ People v. Dunbar, 24 N.Y.3d 304 (2014) [Monograph p. 43].
- ▶ The Court of Appeals held that the Queens County District Attorney's Office's pre-arraignment interview program was improper, particularly because the "preamble" which was given to suspects before they were given Miranda warnings undermined the subsequently-communicated Miranda warnings. This was because the "preamble" had the effect of preventing the Miranda warnings from effectively conveying to the suspects their Fifth Amendment rights against self-incrimination before they agreed to speak with the authorities.

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Waiver Of Right To Appeal In Connection With Entering Plea

- ▶ People v. Brown, 122 A.D.3d 133 (2d Dept. 2014) [Monograph p. 37].
- ▶ The Second Department set forth suggested procedures which trial courts should follow when a defendant waives his/her right to take an appeal in connection with a guilty plea. The Court recommended that trial courts provide defendants with a deliberate and thorough on-the-record explanation of the nature of the right to appeal and the consequences of waiving that right. This explanation should include an advisement that, while a defendant ordinarily retains the right to appeal even after he or she pleads guilty, the defendant is being asked, as a condition of the plea agreement, to waive that right. And the trial court should explain the consequences of waiving the right to appeal, i.e., that the conviction and sentence will not receive any further review, and shall be final.

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Ineffective Assistance Of Counsel

- ▶ Curshen v. United States, 2015 U.S. App. LEXIS 173 (2d Cir. Jan. 7, 2015) (unpublished opinion) [Monograph p. 32].
- ▶ The Second Circuit reversed a district court order that had summarily denied a pro se petition for relief under 28 U.S.C. § 2255. The petitioner had alleged that he had been denied effective assistance of counsel because his lawyer allegedly had a conflict based upon the lawyer concurrently representing another person who was implicated in the same securities fraud matter as was the petitioner.
- ▶ The Second Circuit stated that, except in “highly unusual circumstances,” a district court should not resolve an “off the record” claim of ineffective assistance without receiving some evidentiary submission from the lawyer in question. The Second Circuit noted that this is particularly so in the present case, because the allegations of ineffective assistance were not contradicted by available court records of prior court proceedings.

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Ineffective Assistance Of Counsel

- ▶ People v. Clark, 129 A.D.3d 1 (2d Dept. 2015), leave to appeal granted, 25 A.D.3d 1 (2d Dept. 2015), leave to appeal granted, 25 N.Y.3d 1174 (2015) [Monograph p. 19].
- ▶ A sharply divided Second Department held, in this case, that the trial court’s failure to present a justification defense, which was inconsistent with and might undercut the client’s claim of actual innocence and which would be contrary to the defendant’s instruction that the lawyer not pursue a justification defense, did not constitute ineffective assistance of counsel. The majority expressed the view that the decision of whether or not to rely solely on the actual innocence defense was one for the client to make. The dissent expressed the view that the decision was one for counsel to make.
- ▶ The Court of Appeals has recently granted leave to appeal and should hear and decide the case later this year. Accordingly, there is a possibility that the Court of Appeals will, in the foreseeable future, hand down an important ineffective assistance opinion.

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Ineffective Assistance Of Counsel

- ▶ United States v. Ashburn, 2015 U.S. Dist. LEXIS 61012 (E.D.N.Y. May 8, 2015) [Monograph p. 29].
- ▶ The court denied a motion by defense counsel to withdraw based upon the possibility that the defendant might later raise an ineffective assistance of counsel claim. According to counsel, continued representation of the defendant would violate the Rules of Professional Conduct if the defendant would make an ineffective assistance claim.
- ▶ The court held that the motion to withdraw was meritless because any ineffective assistance claim which the defendant might make would either be without a factual basis or frivolous.

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The Attorney's Role In Making Tactical Decisions As It Relates To The Issue Of Ineffective Assistance Of Counsel

- ▶ Rule 1.2 defines the scope of representation and allocation of authority between client and lawyer.
- ▶ Rule 1.2(a) provides: "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." (For a classic application of Rule 1.2[a], see United States v. Velez, 2010 U.S. Dist. LEXIS 11817 [S.D.N.Y. Feb. 9, 2010].)

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The Attorney's Role In Making Tactical Decisions As It Relates To The Issue Of Ineffective Assistance Of Counsel: Oppedisano v. United States

- ▶ In Oppedisano v. United States, 2013 U.S. Dist. LEXIS 113198 (E.D.N.Y. Aug. 13, 2013), the court denied a motion for relief under 28 U.S.C. Section 2255 that was premised on the claim that the petitioner had been deprived of his right to effective assistance at trial.
- ▶ The petitioner had been under investigation for alleged insurance fraud involving a yacht. A magistrate judge issued a search warrant authorizing a search at four addresses associated with the petitioner for evidence of the fraud. When the warrant was executed at one of the locations, the officers discovered a white powder and ammunition on the premises. They did not remove that material from the location because the search warrant only sought evidence relevant to the alleged insurance fraud. A second search warrant was then issued, which led to the seizure of the ammunition and the white powder, which tested positive as cocaine. Id. at *1-3.
- ▶ The petitioner was indicted on a felon-in-possession count with respect to the ammunition and a possession of cocaine count.

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The Attorney's Role In Making Tactical Decisions As It Relates To The Issue Of Ineffective Assistance Of Counsel: Oppedisano v. United States

- ▶ Petitioner's trial counsel moved, unsuccessfully, to challenge the second search warrant, but did not move to challenge the first search warrant (which was directed to insurance fraud evidence, but which led to the discovery of the ammunition and the cocaine).
- ▶ At trial, petitioner's counsel stipulated to the prior felony conviction element of the felon-in-possession charge, and mentioned in his opening statement that petitioner was under investigation for alleged insurance fraud. This concession was apparently meant to set the stage for a defense that the authorities, frustrated by a lengthy and so-far fruitless insurance fraud investigation, had planted the ammunition and cocaine in one of the petitioner's apartments. Id. at *2-3.

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The Attorney's Role In Making Tactical Decisions As It Relates To The Issue Of Ineffective Assistance Of Counsel: Oppedisano v. United States

- ▶ Petitioner's Section 2255 petition asserted that his trial counsel had provided ineffective assistance of counsel for three reasons, but the court rejected all of them. **First**, petitioner claimed that he had received ineffective assistance because trial counsel did not challenge the first search warrant.
 - The court dismissed this argument, noting that the Second Circuit had long held that defense counsel will be afforded great deference in examining whether counsel exercised professional discretion in determining whether to challenge a warrant. The court noted that a challenge to the first search warrant would have been unsuccessful.
- ▶ **Second**, the petitioner argued that he had been denied effective assistance of counsel because counsel should have moved to bifurcate the two counts of the indictment and erred by stipulating to the fact that the petitioner had previously been convicted of a felony.
 - The court ruled that the stipulation was a proper strategic decision because it introduced the prior conviction in an almost clinical manner, rather than potentially permitting the prosecution to spend substantial time placing multiple prior felony convictions before the jury. In addition, the court concluded that a motion to sever would likely have been denied, and that counsel's decision to have the two counts tried together may have "paid off" because the jury acquitted the petitioner on the cocaine charge. Id. at *14-15.

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The Attorney's Role In Making Tactical Decisions As It Relates To The Issue Of Ineffective Assistance Of Counsel: Oppedisano v. United States

- ▶ **Finally**, the court quickly disposed of petitioner's assertion that he was denied effective assistance because trial counsel had mentioned in his opening statement that petitioner had been under investigation for insurance fraud.
 - First, the court noted that it was a sound strategy to be forthright with a jury about matters which will inevitably come out at trial. Id. at *15. Moreover, it was necessary for trial counsel to concede the fact of the investigation, because a major defense theory was that the authorities had planted the ammunition and cocaine because they were frustrated that the long-standing insurance fraud investigation had not borne fruit. Id.

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The Attorney's Role In Making Tactical Decisions As It Relates To
The Issue Of Ineffective Assistance Of Counsel: Other Important
Cases

- ▶ In Graham v. Portuondo, 732 F. Supp. 2d 99 (E.D.N.Y. Aug. 12, 2010), vacated and remanded, 2011 U.S. App. LEXIS 22947 (2d Cir. Nov. 15, 2011), in the context of a defense based on mental illness, Judge Weinstein explored the contours of defense counsel's duty to investigate possible defenses and noted that "the duty to investigate does not require counsel to conduct a searching investigation into every defense, ... or 'to scour the globe on the off-chance that something will turn up.' ... 'Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.'" (Internal citations omitted.)
- ▶ In People v. Reid and Thomas, 918 N.Y.S.2d 863 (Sup. Ct. N.Y.Co. 2011), the court provided a helpful insight into when judges will consider a decision not to investigate as constituting inadequate assistance of counsel (and it explained the somewhat slippery approach of judges to the "everything to gain and nothing to lose" theory of investigation).

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The Important Privilege Issue Relating To The Self-Defense Doctrine

- ▶ New York Rule 1.6(b)(5)(i) provides, in relevant part, that "a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."
- ▶ However, in A.B.A. Formal Opinion 10-456 (Jul. 14, 2010), the A.B.A. announced a rather controversial view of the attorney-client privilege in the context of claims of ineffective assistance of counsel. The Opinion expressed the view that a criminal defense attorney whose ex-client brings an ineffective assistance claim may not unilaterally provide information about the client's case to the prosecution.

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The Important Privilege Issue Relating To The Self-Defense Doctrine

- ▶ Whether the views expressed by A.B.A. Formal Opinion 10-456 (and Virginia Bar Opinion 1859) would be adopted by a New York court is far from clear; and, indeed, in two separate 2011 decisions, the United States District Court for the Southern District of New York has taken seemingly opposing views on this issue.
 - In Melo v. United States, 825 F. Supp. 2d 457, 463 n.2 (S.D.N.Y. 2011) – a case concerning a claim of ineffective assistance in the context of a petition for habeas corpus – the court held that “an ABA ethics opinion is not binding on this Court,” and further noted that *even if* A.B.A. Formal Opinion 10-456 “were controlling, the Opinion does not purport to prohibit an attorney from providing an affidavit to the Government when confronted with an ineffectiveness of counsel claim in a habeas petition.”
 - On the other hand, in Azzara v. United States, 2011 U.S. Dist. LEXIS 10971, 5-6 (S.D.N.Y. 2011) – another case concerning a claim of ineffective assistance in the context of a petition for habeas corpus – the court adhered to the reasoning of A.B.A. Formal Opinion 10-456, and held that, even despite a waiver of the attorney-client privilege, the attorney could not provide the court with an affidavit concerning his services unless the client executed a consent form.