

CONTINUING LEGAL EDUCATION

Fall 2013

September 19, 2013

*How to Avoid Providing Ineffective Assistance of Counsel
(IAC) and What To Do If Subject to an IAC Claim*

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HOW TO AVOID PROVIDING INEFFECTIVE ASSISTANCE OF COUNSEL AND WHAT TO DO IF YOU ARE SUBJECT TO AN IAC CLAIM

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September 19, 2013

I. Introduction

We do this work because we care about our clients as human beings who, notwithstanding whatever they may have done, are capable of redemption and deserving of compassion.

By approaching your work as a defense attorney with commitment, diligence, and compassion for your clients, you will be much more likely to provide highly competent and effective client-centered representation.

When you truly care about the well-being of your clients, you will be open to honest reflection about any mistakes you may have made, and you will want to help rectify the impact of any such error.

II. Federal and State Standards for Ineffective Assistance of Counsel

Federal Standard

- ***United States Constitution, Amendment VI:***
In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; *and to have the assistance of counsel for his defense.*
- ***Strickland v. Washington, 466 U.S. 668 (1984)***
The right to have “the assistance of counsel” is the right to effective assistance of counsel.

Performance: “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an *objective standard of reasonableness*.”

Prejudice: “The defendant must show that there is a *reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different*. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

State Standard

- ***New York Constitution, Article I, § 6:***
... In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. . . .
- ***People v. Benevento, 91 N.Y.2d 708 (1998):*** “meaningful representation” standard; concerned with fairness of process as whole rather than with an error’s particular impact on outcome of case; ***People v. Baldi, 54 N.Y.2d 137 (1981)*** (examines whether counsel’s performance viewed in totality amounts to meaningful representation); ***People v. Droz, 39 N.Y.2d 457 (1976)*** (must take time to review both law and facts and must be familiar with and able to employ basic principles of criminal law and procedure).

Tension Between the Two Standards

- ***Kimmelman v. Morrison, 477 U.S. 365 (1985)*** (single, serious error may support claim of IAC).
- ***Rosario v. Ercole, 601 F.3d 118, reh. en banc denied, 617 F.3d 683 (2d Cir. 2010)*** (majority rejects argument that New York’s IAC standard is, in some instances, less favorable than, and therefore conflicts with, the federal *Strickland* standard); *see, e.g. People v. Cummings, 16 N.Y.3d 784 (2010)* (finding that counsel provided “meaningful representation” despite failing to move to dismiss a count on legal sufficiency grounds); ***People v. Flores, 84 N.Y.2d 184 (1994)*** (counsel not ineffective for failing to assert *Rosario* violation which,

at time, was per se reversible error), *habeas granted sub nom Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000).

III. Recognized Performance Standards

- **ABA Criminal Justice Section Standards:**
http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html
- **NLADA:**
http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines
- **NYSBA Standards for Providing Mandated Representation:**
<http://www.nysba.org/Content/NavigationMenu53/SpecialCommitteetoEnsureQualityMandatedRepresentationHome/default.htm>
- **NYSDA:** <http://nysda.org/PublicDefenseStandards.html>

IV. Selected Pre-trial Issues

- **Grand Jury proceedings:** CPL § 190.50 notice and the defendant's right to testify. *People v. Fields*, 258 A.D.2d 593 (2d Dep't 1999) (where counsel appeared for "arraignment only" and served grand jury notice, but defendant was without representation at time of grand jury proceeding, defendant was denied effective assistance of counsel); *People v. Moskowitz*, 192 A.D.2d 317 (1st Dep't 1993) (counsel's failure to inform defendant of right to testify held ineffective representation); *but see People v. Simmons*, 10 N.Y.3d 946 (2008) (no showing that defendant prejudiced by counsel's failure to effectuate his right to testify); *People v. Wiggins*, 89 N.Y.2d 872 (1996) (counsel not ineffective where counsel arrived late to grand jury, after vote taken, and declined offer to have client appear before same grand jury).
- **Motion Practice:** *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (counsel ineffective for failing to move to suppress evidence); *People v. Noll*, 24 A.D.3d 688 (2d Dep't 2005) (failure to move to suppress statements deemed IAC).

- **Investigation/Experts:** *Gersten v. Senkowski*, 426 F.3d 588, 609-10 (2nd Cir. 2005) (granting habeas relief where defense counsel decided theory of defense “without having reasonably investigated” whether such a defense was plausible and “lacked sufficient information reasonably to determine that such an investigation was unnecessary”); *Eze v. Senkoswski*, 321 F.3d 110 (2d Cir. 2003) (failure to investigate and consult with expert deemed IAC); *People v. Oliveras*, 21 N.Y.3d 339 (2013) (counsel ineffective for failing to obtain client’s psychiatric records, where prosecution case built entirely on defendant’s inculpatory statement, and where the defense was centered on showing that statement was inconsistent with actual facts of crime and that, due to his mental illness, defendant could not understand *Miranda* rights and was vulnerable to suggestion and coercion); *People v. Cyrus*, 48 A.D.3d 150 (1st Dep’t 2007) (finding ineffective assistance where trial counsel failed to investigate the law and facts, leading to errors that “effectively doomed his client’s defense to failure”); *People v. Fogle*, 307 A.D.2d 299, 301 (2nd Dep’t 2003) (“The failure to investigate is so fundamental to the deprivation of the effective assistance of trial counsel . . . that it cannot be rationalized away with a post hoc construction of the trial theory of defense”); *People v. Wilson*, 133 A.D.2d 179, 180 (2nd Dep’t 1987) (finding counsel ineffective where, inter alia, counsel failed to have client examined by a psychiatrist after he decided to rely only on an insanity defense).
- **Speedy Trial:** *People v. Manning*, 52 A.D.3d 1295 (4th Dep’t 2008) (failure to submit meritorious CPL 30.30 motion is ineffective assistance of counsel).

V. Pleas

- *Hill v. Lockhart*, 474 U.S. 52 (1985) (claim of ineffective assistance of counsel may be asserted where the client pleads guilty based on erroneous advice from counsel and alleges that, in the absence of the defective advice, he would have insisted on going to trial).
- **Duty to Advise as to Immigration Consequences:** *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (because deportation is an integral part of penalty that may be imposed on non-citizen defendant who

pleads guilty to certain crimes, counsel has duty to accurately inform client of immigration consequences of plea).

- **Duty to Convey Plea Offer and to Provide Accurate Information:** *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012): In these companion cases, the U.S. Supreme Court reaffirmed the application of *Strickland's* analysis to counsel's performance during the plea negotiation stage. When an attorney fails to convey a plea offer, or misadvises a client to forego a favorable plea offer, and the client either pleads to a less favorable deal or is convicted after trial and receives a greater sentence than the lapsed offer, the client may have a viable IAC claim. The defendant will have to show a reasonable probability not only that he would have accepted the offer, but also that it would not have been withdrawn by the prosecutor or denied by the court. Left murky is the remedy: is the defendant entitled to specific performance of the improperly lapsed plea offer?
- **Accurate Information re: sentence exposure:** *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998) (decision whether to plead guilty is often single most important decision and counsel must give client advice on this crucial decision; knowledge of comparative sentence exposure between standing trial and pleading guilty often crucial, and counsel must advise client on maximum sentencing exposure after trial); *see also Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000) (IAC found where client offered 10 to life under mistaken belief that he was a mandatory persistent violent felon, but where after trial it was discovered that he was not a PVFO and received 20 to 40 years).
- **Duty to Advise as to Plea:** *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996) (attorney has duty to advise client fully on whether a particular plea offer appears to be desirable).

VI. Selected Trial Issues

- **Preservation generally:** Whenever possible, raise constitutional arguments and cite constitutional provisions, e.g., right to confrontation, right to a fair trial or to present a defense, violation of

due process. A simple evidentiary objection, e.g., “hearsay,” does *not* preserve a constitutional right to confrontation claim.

- **Suppression Hearings:** *People v. Johnson*, 37 A.D.3d 363 (1st Dep't 2007) (IAC where counsel failed to make any argument at conclusion of hearing despite several colorable grounds for suppression); *People v. Vega*, 276 A.D.2d 414 (1st Dep't 2000) (IAC where counsel conceded that police could seize items in plain view based on misapprehension of law).
- **Sandoval:** *People v. Brown*, 98 N.Y.2d 226 (2002) (testifying defendant may be impeached with statements made by counsel during *Sandoval* hearing as to what counsel expected client to testify to, since client was only possible source of counsel's statement).
- **Impeachment of witness with prior inconsistent statement:** *People v. Jenkins*, 68 N.Y.2d 896 (1986) (failure of counsel to impeach witness with proof of prior misidentifications was ineffective in the absence of any strategic basis).
- **Motion for Trial Order of Dismissal:** *People v. Gray*, 86 N.Y.2d 10 (1995) (specificity required in TOD motion to preserve); *see also People v. Hines*, 97 N.Y.2d 56 (2001) (requires renewal after defense case); *but see People v. Cummings*, 16 N.Y.3d 784 (2010) (counsel provided “meaningful representation” despite failure to preserve legal sufficiency claim).
- **Introduction of Evidence:** *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005) (IAC where counsel elicited alibi for wrong time period and argued to jury that case came down to whether it believed victim or alibi witnesses, even though alibi testimony did not contradict victim's testimony).
- **Defendant's Decision Whether to Testify:** Unlike most other constitutional rights which are exercised on behalf of the defendant by counsel, the decision as to whether or not to testify belongs solely to the defendant. *See Jones v. Barnes*, 463 U.S. 745 (1983) (accused has ultimate authority to make fundamental decision as to whether to testify in his or her own behalf); *People v. Rosen*, 81 N.Y.2d 237,

244, 597 N.Y.S.2d 914 (1993) (control of case delegated to counsel except for fundamental decisions, including whether to testify).

- **Prosecutorial Misconduct in Summation: *People v. Fisher*, 18 NY3d 964 (2012)** (Court of Appeals reverses conviction for child sex abuse on IAC grounds, where counsel failed to object to prosecutor's improper comments in summation).

VII. Sentencing Advocacy

- ***Wiggins v. Smith*, 539 U.S. 510 (2003)** (failure to investigate and present mitigation held to constitute IAC); ***Williams v. Taylor*, 529 U.S. 362 (2000)** (same); ***see also Rompilla v. Beard*, 545 U.S. 374 (2005)** (failure to review client's prior conviction files).
- Know the permissible range of sentences for all counts and know whether consecutive sentencing is permissible.
- Review the PSR with client. Object to erroneous information, hearsay allegations, and allegations of uncharged crime.
- After trial, always prepare a pre-sentence memorandum presenting a history of the client and all mitigation available. Submit letters from family, friends, community members, pastors, teachers, employers, etc. Have family and friends in court.
- Even when sentence is imposed on a plea agreement, if sentence is greater than minimum permissible term, you should always make a record of history and mitigation for appellate review of sentence.

VIII. Post-judgment Motions and Ineffective Assistance of Counsel

General Considerations

- Don't be afraid of appellate/post-conviction counsel – they are not your enemy!!

- Retain case files and make them available to appellate/post-conviction counsel. Trial counsel have a continuing duty of loyalty to their client, regardless of whether the client is seeking post-conviction relief.
- Cooperate with appellate/post-conviction counsel, *not* with the D.A.
- Duty of confidentiality remains in effect after representation ends, as does attorney-client and attorney work product privileges. An IAC claim by a client waives the attorney-client privilege only as to those communications that are relevant to the specific allegations of ineffective assistance, unless the client has given explicit consent to broader disclosures. Moreover, absent client consent, disclosures may be made only in a *formal proceeding* that provides for *judicial supervision*. **ABA Standing Committee on Ethics and Professional Responsibility, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim*, Formal Opinion 10-456 (2010); see also David M. Siegel, *What (Can) (Should) (Must) Defense Counsel Withhold from the Prosecution in Ineffective Assistance of Counsel Proceedings?*, The Champion (NACDL December 2011).**
- Be honest, but do not volunteer information adverse to your client.
- Remember that, regardless of any allegations of ineffectiveness, and regardless of any breakdown in the relationship, your client is always your client, and you have an ethical obligation to remain loyal and to protect his or her interests.

Motion to Vacate Judgment

- **CPL § 440.10(1)(h):** The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

- **CPL § 440.10(2)(b):** Motion must be denied when judgment is appealable or pending on appeal and sufficient facts appear on record to permit adequate review on appeal.
- **CPL § 440.10(2)(c):** Motion must be denied where, although sufficient facts appear on record to have permitted appellate review, defendant unjustifiably failed to take or perfect appeal.

Coram Nobis

- **Claim of ineffective assistance of appellate counsel reviewed by *coram nobis* petition filed in appellate court.**
- **Appellate counsel may be ineffective for failing to raise claim of ineffective assistance of trial counsel. *People v. Turner*, 5 N.Y.3d 476 (2005) (appellate counsel ineffective for failing to raise claim of IAC as to trial counsel's failure to raise statute of limitations defense to manslaughter charge).**

New York State Defenders Association
CLIENT-CENTERED REPRESENTATION STANDARDS
(2005)

Clients Want A Lawyer Who—

1. Represents a person, not a case file; represents a client, not a defendant.
2. Listens to them and represents them with compassion, dignity and respect.
3. Makes sure the client's privacy is respected and that communications take place in a space and by means that protect the confidential nature of the client-attorney relationship.
4. Refrains from displays of affection and other behavior with the prosecution that might project the image of a conflict of interest.
5. Meets with them and visits them when incarcerated, accepts phone calls, answers letters, and takes time to counsel and explain in a manner that communicates understanding and respect.
6. Listens to the client's family and with permission of the client shares and exchanges information so that the client, lawyer, and client's family remain informed.
7. Uses language in court, legal writing, and conversation that is clear and understandable to the client.
8. Pursues an investigation of the facts of the case, is culturally sensitive, appreciates the dimensions of the client's life, and becomes familiar with the communities from which his or her clients come.
9. Acknowledges personal cultural values, beliefs, and prejudices that might affect his or her ability to effectively represent a client and takes appropriate steps to shield the client from resulting harm.
10. Thoroughly and carefully reads all documents, discusses them with his or her client, and provides the client with copies.
11. Knows the law and investigates the facts, and applies the knowledge of both creatively, competently, and expeditiously.
12. Aggressively seeks resources, such as interpreters, experts and investigators, necessary for effective representation.
13. Works and strategizes in collaboration with his or her client.
14. Is committed to obtaining the best outcome for the client, zealously advocating on the client's behalf.
15. Identifies disabilities of his or her client, and obtains assessments and services to address needs.

16. Informs the client about plea negotiations, tells the client when a plea has been offered, explains the importance of the client's decision whether or not to plead guilty, advises the client on the appropriateness of any plea and all of its consequences and, acting in the best interest of the client, helps the client reach an informed decision.
17. Aggressively pursues alternatives to incarceration, assesses immigration and collateral consequences of a client's criminal conviction, acts to prevent such consequences, and explains the reason for any fines or penalties.
18. Relays to the client what criminal history information is being relied upon, makes sure the information is accurate, and sees that errors are corrected.
19. Accurately informs the client about sentencing, reviews the presentence report with the client, makes sure the court removes any errors in the report, ensures that the client has a copy of the report, and files where appropriate a comprehensive defense presentence memorandum.
20. Accurately informs the client who may be incarcerated about the incarceration process, including jail and prison programs, and works with the client to plan the future in terms of treatment while incarcerated, transitional issues, and reentry.