CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535
http://appellate-litigation.org/

ISSUES TO DEVELOP AT TRIAL

February-March 2018 - Vol. 3, Issue 2

This issue addresses a potentially sensitive topic — C.P.L. 440.10 motions brought by post-conviction counsel (us) alleging ineffective assistance of trial counsel (you).
We appellate lawyers understand the reluctance, if not hostility, you may feel when the phone rings and an appellate lawyer is on the other end, nosing around in your business. Perhaps it's a friendly call, seeking your input on the issues at trial, an answer to a specific factual question not found in the record we have, or your impressions of the courtroom atmosphere that we can't glean from the cold record.

But maybe it's a call that, directly or in a roundabout way, seems to be second-guessing your handling of the case – your investigation, your advice to the client, your decisions and choices at critical junctures — all from an appellate perch far removed from the exigencies and realties of the case and the many moving parts of a trial.

It's not a situation anyone relishes, but there are ethical rules governing the relationship between former counsel (you) and successor counsel (us) that govern. Following these rules ensures that the client's interests are protected and that you are not breaching your ongoing duties. Will you have the opportunity to defend yourself against unfair and wrongful accusations? Yes, read on. Will you face a malpractice claim if your cooperation results in a successful 440? No - except in the most unusual of situations, read on.

Below are five guiding principles in this potentially fraught situation.

- **TAKE OUR CALL OR CALL US BACK - PLEASE RESPOND, WE WON'T (AND CAN'T) GO AWAY AND YOU HAVE A DUTY TO COOPERATE.**

  - Even though your representation of the client may be long over, you have a continuing duty of loyalty that extends into the post-conviction phase, even when a claim of IAC is being made. *See* New York Rules of Professional Conduct 1.6, 1.9, 1.16; ABA Standards for Criminal Justice: The Defense Function, Standard 4-1.3.

  - We have an ethical duty to "reasonably advise and act to protect the client's possible collateral options." ABA Standard 4-9.5(b).

- **GIVE US THE ENTIRE TRIAL FILE (OR LET US COPY IT).**

  - We know it feels like your personal workproduct, and that nobody likes their

work put under a microscope. But we need the trial file to investigate any claims of IAC and to determine whether even to pursue a motion, and you are ethically (and legally) required to provide it. NYSBA, Comm. On Prof'l Ethics, Opn. 766 (2003); NYSBA Rules of Prof'l Conduct, Opn. 970 (2012); NYRPC 1.15 (c)(4), 1.16(e); Sage Realty Corp. v. Proskauer Rose Goetz & Mendolsohn, LLP, 91 N.Y.2d 30 (1997)(affirming general right of client to the contents of the attorney's file upon termination of the attorney-client relationship).

- You can require us to pay for copies, or to provide a release from the client, but ethical rules do require you to give us access (with a limited and non-absolute exception when you are still owed money).

- **COOPERATE WITH US – ANSWER OUR QUESTIONS AS COMPLETELY AND AS THOROUGHLY AS POSSIBLE, PROVIDE US WITH AN AFFIDAVIT IF APPROPRIATE.**

  - ABA Standards for Criminal Justice impose an explicit duty on the part of former counsel to "provide such assistance as possible" in cooperation with post-conviction counsel.

  - Be forthright with us. That's the best way for us to assess whether to pursue a 440 motion.

- **BUT YOU SHOULD NOT COOPERATE WITH THE DISTRICT ATTORNEY. YES, WE'VE SEEN IT AND THAT'S NOT THE WAY TO DEFEND YOURSELF.**

  - We know you may feel wrongly accused and attacked and want to defend yourself, your representation of the client, and your reputation. But providing information and evidence to the District Attorney opposing our 440 is not the way to go about this.

  - Doing so implicates your continuing duty of confidentiality, which generally bars revealing a former client's confidential information or using it to the disadvantage of the former client or the advantage of the lawyer. NYRPC Rules 1.6(a), 1.9 (c), (2).

  - While you certainly have a right to defend yourself against an accusation of wrongful conduct, disclosure of information should be made only

    - when necessary for the purposes of a court-ordered proceeding AND
    - under judicial supervision. ABA Standard 4-9.6(c).

MEANING: in court, at a hearing, if one is ordered.

- A claim of IAC waives privilege *to a degree*, but not for all purposes. The claim does not mean that a defense lawyer should cooperate with the District Attorney during motion practice! ABA Formal Ethics Opinion 10-456: "[I]t is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

Attached to this month's newsletter is a sample letter to the DA you can send to fulfill your ethical obligations if contacted in connection with a 440 motion alleging IAC.

- **ABSENT HIGHLY UNUSUAL CIRCUMSTANCES, YOU CANNOT BE SUCCESSFULLY SUED IF YOU ARE FOUND INEFFECTIVE, SO THIS IS NOT A REASON TO BECOME OUR ADVERSARY.**

  - It is *highly unlikely* that a finding of ineffectiveness against you will ever put you at risk of a malpractice suit for damages, as a cause of action exists only if the 440 alleges the client's innocence or a colorable claim of innocence AND the criminal proceeding has been finally terminated in the client's favor, as by dismissal of the indictment or an acquittal after a new trial. As long as the charges are pending, even if the 440 results in vacatur of the conviction, there is no cause of action. See Carmel v. Lunney, 70 N.Y.2d 169 (1987); Britt v. Legal Aid Society, Inc., 75 N.Y.2d 443 (2000).

  - As IAC 440s typically request a new trial, not dismissal, and a successful 440 generally results in a replead to a favorable plea, a cause of action for malpractice even from a successful 440 is unlikely at best.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case as to "each and every element" does **not** preserve a sufficiency issue for appeal.

- Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client, unless you specifically join in it, on the record.

See past issues at https://www.appellate-litigation.org/issues-to-develop-at-trial/

[Sample Former Counsel response to Prosecutor]

Dear Assistant District Attorney:

Thank you for your recent inquiry concerning my representation of Defendant in People v. Defendant, in which Defendant has filed a motion to vacate his judgment of conviction under Criminal Procedure Law § 440.10 alleging ineffective assistance of counsel.

Given my continuing ethical obligations to my former client, set forth in NY Rules of Prof'l Conduct 1.6(a) and 1.9(c), I cannot release any information relating to the representation without informed written consent from Defendant. In addition, I cannot under any circumstances do so outside a proceeding subject to judicial supervision. *See* ABA Opinion 10-456, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim* (2010) (copy attached). I appreciate your assistance in avoiding any effort to induce violation of my ethical obligations, pursuant to NY Rule of Prof'l Conduct 8.4(a).

Defendant is now represented by Post-Conviction Attorney, to whom I have provided a copy of my file from People v. Defendant.

Sincerely,

Prior Counsel

Cc: Successor Counsel

100% Recycled 30% PCW