

# Table of Contents

INTRODUCTION	Pg. 1	<a href="#">GO TO PAGE</a>
THE STANDARD FOR INEFFECTIVENESS	Pg. 1	<a href="#">GO TO PAGE</a>
ACP RESOURCES ARE AVAILABLE FOR THE ASKING	Pg. 2	<a href="#">GO TO PAGE</a>
A FEW CASES	Pg. 2	<a href="#">GO TO PAGE</a>
REVIEW OF INEFFECTIVE ASSISTANCE CLAIMS	Pg. 3	<a href="#">GO TO PAGE</a>
COUNSEL'S ETHICAL OBLIGATION TO INVESTIGATE	Pg. 4	<a href="#">GO TO PAGE</a>
RULE 1.1 OF THE NEW YORK RULES OF PROFESSIONAL CONDUCT	Pg. 4	<a href="#">GO TO PAGE</a>
DUTY OF DILIGENCE	Pg. 4	<a href="#">GO TO PAGE</a>
COMMUNICATION	Pg. 5	<a href="#">GO TO PAGE</a>
FINAL THOUGHT	Pg. 6	<a href="#">GO TO PAGE</a>

## A FEW WORDS ON INVESTIGATION, COMPETENT REPRESENTATION AND EFFECTIVE ASSISTANCE OF COUNSEL.

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November 15, 2021

### INTRODUCTION:

There are many grounds that an unhappy client may assert for alleged ineffective assistance of counsel when the outcome of the case is something less than he or she expected.

When things go wrong, (e.g., conviction as charged, harsher sentence than expected), counsel may be called out for every possible shortcoming, real or imagined, at every stage of the representation from the initial investigation to arguments made or not made on appeal.

Common complaints can include: a failure to locate, interview and prepare witnesses for trial, failure to review and effectively utilize important documents (e.g., police reports, medical records, prior inconsistent statements), failure to fully review discovery materials or make motions (e.g., to suppress statements, physical evidence, identification testimony) or seek appropriate hearings, not moving to preclude unduly prejudicial evidence by motion in limine, failing to fully counsel the client about the consequences and benefits of a particular plea offer vis-a-vis the risks and potential benefits of proceeding to trial, conducting an aimless cross examination or, worse yet, one that opens the door to damaging testimony, failing to preserve issues for appeal by not objecting to objectionable testimony or inflammatory prosecution arguments in summation, not calling an expert witness who might have neutralized or refuted the opposing expert. The possibilities are almost endless.

### THE STANDARD FOR INEFFECTIVENESS:

The good news for counsel is that the standard for demonstrating ineffective assistance is fairly high (e.g., on the federal side, a showing of prejudice based on a reasonable probability of a different outcome but for counsel's failings [Strickland v Washington, 466 US 668 (1984)], and in New York State, the absence of any meaningful strategy or other legitimate explanation for counsel's conduct (whether omission or commission) which deprives the defendant of a fair trial for lack of MEANINGFUL REPRESENTATION. (People v Baldi, 54 NY2d 137 [1987]), People v Benevento, 91 NY2d 708 [1998]).

BUT:

THIS IS NOT TO SUGGEST THAT COUNSEL SHOULD TAKE COMFORT IN MEDIOCRITY OR IN FAILING TO CONDUCT A THOROUGH AND COMPLETE INVESTIGATION (beyond reading all the discovery provided) before advising the client about a possible guilty plea or proceeding to trial.

ACP RESOURCES ARE AVAILABLE FOR THE ASKING:

To help counsel not only minimize claims of ineffective assistance but more importantly, to provide the best possible legal representation for every client, the Assigned Counsel Program (ACP) has an arsenal of resources to assist in the investigation, preparation and effective defense of cases including experienced LAWYERS to discuss procedural, substantive and strategic issues, SOCIAL WORKERS to assist in the representation of clients with mental health challenges, addiction issues or a history of trauma and a team of seasoned INVESTIGATORS (FORMER MEMBERS OF LAW ENFORCEMENT) who can help attorneys, for example, find and interview witnesses, locate elusive clients, examine and photograph crime scenes and provide a cop's practical assessment of the case.

While investigators should never be used as a substitute for counsel's own independent legal judgment, they can certainly provide valuable information, insight and perspective that cannot be found in book of statutes or cases. They, along with the ACP FORENSIC UNIT can also help counsel identify subject areas where the assistance of an outside expert is not only valuable, but necessary to understand the evidence and to counter any prosecution expert testimony. Not engaging such resources can be an invitation to a claim of ineffective assistance of counsel and even provide grounds for a complaint to the Grievance Committee.

A FEW CASES:

In *People v Casey*, 133 AD3d 1236 (4<sup>th</sup> Dep't 2015), the Fourth Department reversed the lower court's summary denial of the defendant's CPL 440.10 motion to set aside her judgment of conviction for Arson 1<sup>st</sup> degree and Murder 2d degree stemming from a house-fire that resulted in the death of her seven-month-old daughter.

The defendant argued that her trial counsel was ineffective for, inter alia, failing to confront the People's arson expert on cross examination with fire investigation standards set forth by the National Fire Prevention Association (NFPA) 921 Guidelines which she contended would have cast doubt on the People's theory of an intentionally set fire. The defendant also faulted defense counsel for not calling an expert to rebut the prosecution's proof.

Noting that there can be cases in which a SINGLE FAILING IN AN OTHERWISE COMPETENT PERFORMANCE IS SO EGREGIOUS AND PREJUDICIAL AS TO DEPRIVE A DEFENDANT OF HER RIGHT TO A FAIR TRIAL, (*People v Turner*, 5 NY3d 476 [2005]), the Court held that the defendant raised a factual question whether COUNSEL'S FAILURE to utilize the NFPA 921 Guidelines, either on cross examination or by calling a defense expert, was unreasonable. (Citing *People v Conway*, 118 AD3d 1290 [4<sup>th</sup> Dep't 2014]).

In *Conway*, the Court remanded the case for a hearing on whether counsel's FAILURE TO INVESTIGATE TWO POTENTIAL ALIBI WITNESSES AND THE STATEMENTS OF A THIRD PARTY ADMITTING TO THE CRIME, amounted to ineffective assistance so as to RENDER THE DEFENDANT'S GUILTY PLEA INVOLUNTARY.

As the court observed, "it is well settled that a defendant's right to effective assistance of counsel includes defense counsel's REASONABLE INVESTIGATION AND PREPARATION OF DEFENSE WITNESSES." (Citing *People v Jenkins*, 84 AD3d 1403 [2d Dep't 2011]).

Similarly, in *People v Ross*, 2021 NY Slip Op 04820 (4<sup>th</sup> Dep't 8/26/21): the Fourth Department reversed the lower court's summary denial of the defendant's CPL 440.10 motion to set aside his judgment of conviction for Attempted Murder 2d degree and Criminal Possession of a Weapon 3d degree, finding that a question of fact had been raised whether counsel's failure to call two witnesses (who would have testified that the defendant had fired the rifle in the air rather than at the victim) constituted ineffective assistance of counsel. (Citing *People v Howard*, 175 AD3e 1023 [4<sup>th</sup> Dep't 2020]).

At such hearing, as in *People v Casey*, supra, counsel would be called upon to provide some plausible strategic explanation (other than negligence) for failing to call certain witnesses who arguably would have been helpful to the defense.

In contrast, see *People v Meyers*, Docket # 2020-02429 (4<sup>th</sup> Dep't 4/24/20): where, unlike *People v Casey*, supra, defense counsel did utilize NFPA 921 Guidelines both on cross examination of the People's expert and in examining the defense expert.

The Court also rejected the defendant's ineffective assistance claims based on counsel's failure to make motions to suppress statements or to controvert the search warrant absent some showing of a LIKELIHOOD OF SUCCESS (*People v Caban*, 5 NY3d 743 [2005]). Moreover, the failure to seek a Frye hearing with respect to the general acceptance of GPS tracking expert testimony was of no moment since it did not involve a matter of new or novel science. (*People v Clayton* 175 AD3d 963 [4<sup>th</sup> Dep't 2019]).

As the Court observed, in order to prevail upon an ineffective assistance claim, the defendant must demonstrate the ABSENCE OF STRATEGIC OR OTHER LEGITIMATE EXPLANATION for counsel's alleged failure. (Citing *People v Pavone*, 26 NY3d 629 [2015]).

#### REVIEW OF INEFFECTIVE ASSISTANCE CLAIMS:

The New York approach as set forth in *People v Baldi* supra requires review of counsel's performance NOT through the lense of 20-20 hindsight but as of the TIME OF THE REPRESENTATION, in light of the TOTALITY OF THE EVIDENCE, LAW AND CIRCUMSTANCES OF THE PARTICULAR CASE TO DETERMINE WHETHER MEANINGFUL REPRESENTATION WAS AFFORDED.

While counsel's conduct is considered in the context of the overall representation, (e.g., in the context of an ineffective assistance claim in connection with a guilty plea, was there a favorable outcome), sometimes, a singular, substantial error may, as noted above, be considered in determining whether the defendant was deprived of a fair proceeding. (*People v Hobot*, 84 NY2d 1021 [1995]).

In *Hobot*, the defendant who was convicted of raping his girlfriend's young daughter, argued that he was deprived of a fair trial by his counsel's failure to utilize a medical report of a general practice (GP) doctor who examined the victim and noted an "intact hymen."

However, at the CPL 440 hearing, the doctor testified that he did NOT perform an internal examination (unlike the People's expert who had found two vaginal tears).

In deciding that the defendant did not meet his burden of demonstrating that he was deprived of a fair trial, the Court noted that defense counsel nevertheless got the People's expert to concede that the tears were NOT conclusive evidence of penetration (a necessary element of rape), and their time of origin was undetermined. Counsel also challenged the victim's bias, offered alibi testimony and argued that the

physical evidence was inconsistent with rape. Overall, it could not be said that counsel's failure to use the GP'S report denied him a fair trial.

#### COUNSEL'S ETHICAL OBLIGATION TO INVESTIGATE:

It is important to keep in mind that counsel owes each client a duty to provide COMPETENT LEGAL REPRESENTATION, whether acting as advisor, negotiator or advocate. It's hard to imagine how even the most basic level of representation could be provided without conducting (and, in most cases, enlisting an investigator to assist with) an INDEPENDENT INVESTIGATION of the People's evidence, the crime scene (whether the location of a homicide or the route allegedly travelled by the defendant before being stopped for DWI), of the People's witnesses (including experts) and any documentary evidence.

#### RULE 1.1 OF THE NEW YORK RULES OF PROFESSIONAL CONDUCT (RPC) STATES THAT:

- (a) A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. COMPETENT REPRESENTATION REQUIRES THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS AND PREPARATION REASONABLY NECESSARY FOR THE REPRESENTATION.

COMMENT 5 TO THE RULE STATES THAT COMPETENT HANDLING OF A PARTICULAR MATTER INCLUDES INQUIRY INTO AND ANALYSIS OF THE FACTUAL AND LEGAL ELEMENTS OF THE PROBLEM, AND USE OF METHODS AND PROCEDURES (THAT MEET) THE STANDARDS OF A COMPETENT PRACTITIONER. IT ALSO INCLUDES ADEQUATE PREPARATION. THE REQUIRED ATTENTION AND PREPARATION ARE DETERMINED IN PART BY WHAT IS AT STAKE.

While the seriousness and complexity of the case will often dictate the depth of analysis and preparation, counsel should get in the habit of investigating and analyzing all assigned cases, whether violations, misdemeanors, or felonies with an appropriate level of curiosity and attention to detail. That way, rather than jump at first plea offer, counsel may have learned enough to hold out for a better disposition or, perhaps, make a motion to dismiss based on legal insufficiency or other grounds.

Also, if the case goes to trial, not only will counsel's investigation (e.g., of the scene) inform his/her ability to frame effective questions on cross examination, it will send a message to the witnesses that their testimony will be challenged and, where appropriate, impeached when they indulge in generalities, inaccuracies or misrepresentations that are belied by the facts that counsel (and/or the investigator) has uncovered.

#### DUTY OF DILIGENCE:

Counsel's efforts on behalf of every client should be anything but perfunctory.

RPC 1.3 states that:

- (a) A LAWYER SHALL ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT.
- (b) A LAWYER SHALL NOT NEGLECT A LEGAL MATTER ENTRUSTED TO HIM/HER.

(c) A LAWYER SHALL NOT INTENTIONALLY FAIL TO CARRY OUT (AN ASSIGNMENT) OF REPRESENTATION, BUT MAY WITHDRAW AS PERMITTED BY (RPC 1.16).

THE COMMENTS STATE:

1. A LAWYER SHOULD PURSUE A MATTER ON BEHALF OF A CLIENT DESPITE OPPOSITION, OBSTRUCTION OR PERSONAL INVONVENIENCE...HE/SHE MUST ALSO ACT WITH COMMITMENT AND DEDICATION TO THE INTERESTS OF THE CLIENT AND IN ADVOCACY UPON THE CLIENT'S BEHALF.
2. LAWYERS ARE ENCOURAGED TO CONTROL THEIR WORK LOADS AND ADOPT AND FOLLOW EFFECTIVE OFFICE PROCEDURES AND SYSTEMS SO AS TO AVOID NEGLECT OF THE CLIENT.
3. A LAWYER SHOULD ACT WITH REASONABLE PROMPTNESS AND NOT PROCRASTINATE OR ENGAGE IN UNREASOANBLE DELAY.

Using investigative assistance can not only provide counsel with important information that is relevant to the defense, but also free counsel up to focus on and be more responsive to the client's reasonable requests for information.

COMMUNICATION:

RPC RULE 1.4 STATES THAT A LAWYER SHALL:

1. PROMPTLY INFORM THE CLIENT OF:
  - i. ANY DECISION/CIRCUMSTANCE REQUIRING THE CLIENT'S INFORMED CONSENT.
  - ii. ANY INFORMATION REQUIRED BY COURT RULE OR OTHER LAW TO BE COMMUNICATED TO THE CLIENT.
  - iii. MATERIAL DEVELOPMENTS IN THE MATTER INCLUDING PLEA OFFERS.

Clearly, counsel must not only convey the fact of a plea offer but must also provide sufficient information as to the risks and benefits of any offer so that the client can make an INFORMED DECISION whether to accept or reject a plea. In addition to advising the client of the DIRECT CONSEQUENCES of the plea (e.g., the sentence range), counsel should also inform him/her of the COLLATERAL CONSEQUENCES (e.g., possible effect on employment) which requires a full awareness of the client's life situation.

In this regard, an ACP social worker can help counsel get a better handle on the client's circumstances and ACP'S SENTENCE MITIGATION SPECIALIST can be instrumental in helping to persuade a court to impose a more restorative rather than punitive sentence.

Under RPC 1.4, a lawyer SHALL ALSO:

(2) REASONABLY CONSULT WITH THE CLIENT ABOUT THE MEANS BY WHICH THE CLIENT'S OBJECTIVES ARE TO BE ACCOMPLISHED.

(3) KEEP THE CLIENT REASONABLY INFORMED ABOUT THE STATUS OF THE MATTER.

(4) PROMPTLY COMPLY WITH A CLIENT'S REASONABLE REQUESTS FOR INFORMATION AND

(5) CONSULT WITH THE CLIENT ABOUT ANY RELEVANT LIMITATIONS ON THE LAWYER'S CONDUCT WHEN HE/SHE KNOWS THAT THE CLIENT EXPECTS ASSISTANCE NOT PERMITTED BY THE RULES OR OTHER LAW.

(b) A LAWYER SHALL EXPLAIN A MATTER TO THE EXTENT REASONABLY NECESSARY TO PERMIT THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.

COMMENT #4 STATES THAT REGULAR COMMUNICATION WITH CLIENTS WILL MINIMIZE THE OCCASIONS ON WHICH A CLIENT WILL NEED TO REQUEST INFORMATION CONCERNING THE REPRESENTATION. WHEN A CLIENT MAKES A REASONABLE REQUEST FOR INFORMATION, HOWEVER, THE RULE REQUIRES PROMPT COMPLIANCE WITH THE REQUEST, OR IF A PROMPT RESPONSE IS NOT FEASIBLE, THE LAWYER OR A MEMBER OF HIS/HER STAFF SHOULD ACKNOWLEDGE RECEIPT OF THE REQUEST AND ADVISE THE CLIENT WHEN A RESPONSE MAY BE EXPECTED.

A LAWYER SHOULD PROMPTLY RESPOND TO OR ACKNOWLEDGE CLIENT COMMUNICATIONS, OR ARRANGE FOR AN APPROPRIATE PERSON WHO WORKS WITH THE LAWYER TO DO SO.

FINAL THOUGHT:

While a lawyer should not use an investigator to do his/her work in preparing the case, or defer to an investigator's (i.e., police officer's) assessment of the legal/constitutional merits of the matter, (you're the one who went to law school), investigators can provide invaluable assistance in running down leads, examining and documenting crime scenes, obtaining statements from witnesses, and providing insight into the practical realities of the case.

Utilizing their skills and services can only help in the representation of clients and resolution of cases. Not using them can be the difference between a grateful client and a one bent on blaming the unwelcome result on the alleged ineffectiveness of counsel.

Aside from minimizing the opportunities for meritorious ineffective assistance claims or grievances, relying on available resources represents good lawyering that should inure to the benefit of every ACP client.