THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Selected Ethics Issues

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CONFLICT OF INTEREST

Defense Counsel's Prior Representation Of Prosecution Witness

Because attorneys in The Juvenile Rights Practice generally do not represent a respondent where the same attorney previously represented a prosecution witness, this discussion will address cases in which a different attorney represented the witness, which involve a greater likelihood of avoiding disqualification.

Rules of Professional Conduct, Rule 1.9 states as follows:

> (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.
> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
> (1) whose interests are materially adverse to that person; and
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and paragraph (c) that is material to the matter.
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Lawyers are not prohibited from representing a client whose adversary is the lawyer's former client. There is no residual duty of loyalty that bars the lawyer from seeking to undermine the legal interests of an individual to whom the lawyer previously owed a duty of undivided loyalty, even if the new representation occurs close in time to the prior representation.
Huusko v. Jenkins, 556 F.3d 633 (7th Cir. 2009), *cert denied*, 558 U.S. 950 (lawyer has duty to protect former client's confidences but not former client's current legal interests; thus, defense counsel could call as a witness, and challenge credibility of, former client

who was on probation even if it exposed former client to risk that probation would be revoked);
People v. Griffin, 249 A.D.2d 244 (1st Dept. 1998) (while finding no right to counsel violation, court notes that defense counsel, who did not personally represent prosecution witness, "perceived no conflict of interest and no loyalty owing to the former Legal Aid Society client");
Gussack v. Goldberg, 248 A.D.2d 671 (2d Dept. 1998) (witness's feeling of being "betrayed" by lawyer's representation of defendants, whom witness had previously sued while represented by lawyer, was insufficient to warrant disqualification);
United States v. Perrone, 2007 WL 1575248 (SDNY, 2007) (there was no continuing duty of loyalty preventing attorneys from attacking credibility of former client);
NY Eth. Op. 628, 1992 WL 465630 (NYSBA, 3/19/92) (problem of former client conflicts is only one of client confidences, and does not involve duty of undivided loyalty, and temporal element would find justification solely in concept of client loyalty, which ends with termination of lawyer-client relationship);
NYCLA Eth. Op. 671, 1989 WL 572096 (N.Y. Co. Lawyer's Assoc., 5/22/89).

What is implicated when a lawyer goes up against a former client on behalf of a new client is the lawyer's continuing duty to preserve confidential information acquired during the prior representation. *Rules of Professional Conduct*, Rule 1.9(c). The Court of Appeals has stated: "The possibility that a lawyer may give one client less than undivided loyalty because of obligations to another client can also exist when the conflicting representations are not simultaneous. Even though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets [citation omitted], which may potentially create a conflict between the former client and a present client." *People v. Ortiz*, 76 N.Y.2d 652 (1990). When the previous representation is factually unrelated to the new litigation, and there is no risk that confidential information could be used against the former client, there is no problem.

However, when there is such a risk of disclosure, Rule 1.9(a) on its face applies a strict, prophylactic rule barring a lawyer from representing a client in litigation involving a non-consenting former client: "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." On its face, Rule 1.9(a) is absolute, and allows for no exceptions once the elements ("formerly represented," "same" or "substantially related matter," and "interests … materially adverse to the interests of the former client") are found. It creates an irrebuttable presumption. *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123 (1996) (addressing DR 5-108(A)(1), the predecessor to Rule 1.9(a)); *but see United States v. Kliti*, 156 F.3d 150 (2d Cir. 1998) (no error where court conducted inquiry and determined that there were no conversations between counsel and the witness during the prior representation which were relevant to the case at hand).

Regarding what is and is not a "substantially related matter":

see Rules of Professional Conduct, Comment, 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");
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");
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).

Former counsel's lack of memory regarding the prior representation should be a relevant factor.
Johnson v. Wilson, 960 F.3d 648 (D.C. Cir. 2020), *cert denied* 141 S.Ct. 1127 (conflict claim rejected where counsel did not remember he had represented prosecution witness years earlier and testified that he did not recognize witness at trial; unknown conflict is not actual conflict);
Harvey v. United States, 798 Fed.Appx. 879 (6th Cir. 2020) (mere possibility that co-defendant's former counsel likely learned about drug distribution rings in Detroit and co-defendant's involvement in them did not establish inconsistent interests, particularly in light of counsel's testimony that he did not remember co-defendant);
Cummin v. Cummin, 264 A.D.2d 637 (1st Dept. 1999) (disqualification improper where, inter alia, lawyer could not remember defendant).

Rule 1.9(a) refers to "a" lawyer, suggesting an individual lawyer. However, an imputed conflict of interest rule is contained in Rule 1.10(a), which states: "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." The *Commentary* to Rule 1.10 states: "Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." *Matter of Yeomans v. Gaska*, 152 A.D.3d 1040 (3d Dept. 2017) (where attorney represented father in custody proceeding in 2013, entire firm at which that attorney was working as part-time associate disqualified from representing mother in 2016 custody litigation where father's former attorney signed bill of particulars prepared

by mother's attorney and there was no sufficient firewall in small, informal law office environment).

But the imputed conflict rule has not been strictly applied in cases involving sufficiently large Legal Aid/Defender offices and private firms. The Court of Appeals specifically recognized in *People v. Wilkins*, 28 N.Y.2d 53 (1971) that the size and modus operandi of The Legal Aid Society rendered inapplicable the concerns reflected in the imputed disqualification rule. There was no evidence that information concerning defendants being represented by the LAS flowed freely within the firm. "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." 28 N.Y.2d at 56; *see also*
Jamaica Public Service Co. Ltd. v. AIU Insurance Co., 92 N.Y.2d 631 (1998) (generalized allegations that counsel had access to confidences and secrets were insufficient to establish reasonable probability that confidences or secrets would be disclosed);
Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994) (court notes that there is a presumption that rights of former client are jeopardized, but, where those who had contact with former client are no longer with firm, presumption could be rebutted by with showing that remaining attorneys possess no confidences or secrets);
Rhaburn v. Superior Court, 140 Cal.App.4th 1566 (Cal. Ct. App., 4th Dist., 2006) (assistant public defender whose office has previously represented prosecution witness is not subject to automatic disqualification; court should evaluate totality of circumstances, including, inter alia, whether the assistant was with the office when the witness was represented and whether the assistant who represented the witness remains with the office);
Cummin v. Cummin, 264 A.D.2d 637 (no disqualification of plaintiff's attorney where a member of the firm had had a 1-2-hour consultation with defendant 6 years earlier, but there were no records of the consultation and no indication that the attorney shared any information with colleagues, and the firm used a screening mechanism to shield the case from the attorney with whom defendant had consulted);
United States v. Reynoso, 6 F.Supp.2d 269 (S.D.N.Y. 1998) (no disqualification where another lawyer in Federal Defender Division of Legal Aid represented witness 4 years earlier; court notes that, given volume of cases in office, it is unlikely that lawyers will reveal client confidences in routine cases);
People v. Chambers, 133 Misc.2d 868 (Sup. Ct., Kings Co., 1986) (court denies People's motion to disqualify The Legal Aid Society, and notes that defense counsel, who was not involved in prior cases, has assured the court that he will not look in any files).

When a large law firm and two different attorneys are involved, rules applicable to successive representations, and not rules applicable to simultaneous representations, may govern where representations were simultaneous at one point but counsel immediately withdrew from the representation of one of the clients.
People v. Britt, 198 A.D.3d 1326 (4th Dept. 2021), *lv denied* 37 N.Y.3d 1095 (any conflict resulting where Public Defender was also representing individual charged with murder, and defendant had information relevant to that crime and wanted to use information to secure advantageous plea bargain, was resolved when court presiding over murder case

relieved PD's Office); *United States v. Oberoi*, 331 F.3d 44 (2d Cir. 2003) (although defendant cannot complain on appeal if he and witness who is counsel's former client waive any conflict, question in this case was whether defense counsel should have been permitted to withdraw, and court abused its discretion by accepting former client's consent as sufficient basis for denial of counsel's motion);
People v. Pagan, 57 Misc.3d 486 (Crim. Ct., Bronx Co., 2017) (no disqualification of Bronx Defenders where different Bronx Defenders attorney simultaneously represented complainant at arraignment in unrelated case before Bronx Defenders promptly was relieved in that case after becoming aware of dual representation; ethical wall was built, and there was no evidence that counsel felt restricted);
People v. Cristin, 30 Misc.3d 383 (Sup. Ct., Bronx Co., 2010) (Bronx Defenders, who had represented co-defendant at separate arraignment upon felony complaint, disqualified entirely after defendants indicted together; although Bronx Defenders alleged that they constructed "wall," it had already failed since two different attorneys from Bronx Defenders appeared on two different dates to represent co-defendant and make arguments on her behalf even after Bronx Defenders was relieved from representing her, and Court of Appeals' refusal in People v. Wilkins to impute knowledge to attorneys in Legal Aid Society was in response to ineffective assistance of counsel claim flowing from "unknowing dual representation," while this case involves known conflict);
Matter of Destiny D., 2002 WL 31663251 (Fam. Ct., Queens Co.) (no disqualification where The Legal Aid Society Juvenile Rights Division had represented children since approximately 1997, and Legal Aid's Criminal Defense Division represented father in 2002 and between 1983-1991; court notes that it has not been shown that representation of children by JRD will unavoidably result in disclosure of confidential information, and that issues involved in permanent neglect proceeding are sufficiently dissimilar from issues involved in criminal actions);
but see People v. Prescott, 21 N.Y.3d 925 (2013) (although representation of co-defendant ended prior to completion of defendant's appeal, successive representation concerned substantially related matters and depended on legal strategies that undermined counsel's loyalties, and ineffective assistance claim based on conflict would be rendered meaningless if conflicted counsel could merely terminate representation of one party while continuing to represent another);

Regarding law office screening designed to avoid disqualification:
see Rules of Professional Conduct, Comment, 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 1.0(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"); *Rules of Professional Conduct, Comment*, 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").

Wilkins and other cases have involved a claim that a conflict resulted in the denial of the right to the effective assistance of counsel, which requires a showing of prejudice - *i.e.*, that the conflict had an impact on the defense.
Compare People v. DiPippo, 82 A.D.3d 786 (2d Dept. 2011) (defendant deprived of effective assistance of counsel where initial police investigation identified defense counsel's former client as possible suspect, and counsel failed to disclose prior representation and failed to investigate him as possible perpetrator);
People v. Ortiz, 76 N.Y.2d 652 (defendant denied effective assistance where counsel called former client, who had confessed to the crime, to exculpate defendant, but had duty to maintain confidentiality of confession);
United States v. Arrington, 941 F.3d 24 (2d Cir. 2019) (violation of defendant's right to effective assistance of counsel where defense counsel previously represented co-defendant, and suggested severance in response to co-defendant's disqualification motion while offering to have defendant tried first; once defendant established that alternative strategic approach - not severing, or pressing to be tried after co-defendant - was not undertaken due to conflict, presumption of prejudice applied);
People v. McGillicuddy, 103 A.D.3d 1200 (4th Dept. 2013) (defendant deprived of effective assistance of counsel where People introduced recorded conversation between defendant and counsel's former client to show defendant's motive and intent for burglary and statement by defendant regarding former client; counsel raised potential conflict but court failed to ascertain whether defendant was aware of potential risk and knowingly chose to continue with counsel, and conflict affected defense because counsel indicated he was unable to cross-examine officer with respect to defendant's statement concerning former client; stipulated that former client's voice was on recording, and did not call former client to testify regarding recorded conversations with defendant) and
People v. Jones, 184 A.D.2d 405 (1st Dept. 1992), *lv denied* 80 N.Y.2d 905 (defendant denied effective assistance where counsel also represented co-defendant, whose case had been dropped and who testified for defendant; another attorney might have sought evidence of co-defendant's guilt)
with People v. Perez, 70 N.Y.2d 773 (1987) (no reversal where Legal Aid defense counsel examined confidential file of witness who had been represented by another Legal Aid

attorney in an unrelated case, but was not involved in the prior case and attacked witness' honesty at trial);
People v. Alicea, 61 N.Y.2d 23 (1983) (no violation where defendant was tried 3 years after co-defendant, who had absconded after pleading guilty while represented by same attorney; potential conflict did not affect conduct of defense);
People v. Robles, 115 A.D.3d 30 (3d Dept. 2014), *lv denied* 23 N.Y.3d 1042 (no violation of right to effective assistance where defense counsel had briefly represented witness in connection with same drug charges he was seeking to have reduced through cooperation with People in defendant's case; potential conflict existed, but defendant failed to demonstrate that defense was affected);
United States v. Feyrer, 333 F.3d 110 (2d Cir. 2003) (no violation where counsel had represented potential witness who was under investigation and did not testify, but counsel likely did not call witness for reasons other than conflict);
People v. Miller, 19 A.D.3d 237 (1st Dept. 2005), *lv denied* 5 N.Y.3d 808 (no violation where victim, who knew defendant's family and was reluctant to testify, briefly consulted Legal Aid lawyer regarding subpoena, but defendant did not establish conflict or that Legal Aid lawyer was constrained in any way);
People v. Suarez, 13 A.D.3d 320 (1st Dept. 2004), *rev'd on other grounds* 6 N.Y.3d 202 (no right to counsel violation where counsel had represented prosecution rebuttal witness and failed to impeach witness with drug conviction, but conflict-free lawyer reasonably could have concluded that there was no need to belabor point after prosecutor brought out conviction);
People v. Graham, 283 A.D.2d 885 (3rd Dept. 2001), *lv denied* 96 N.Y.2d 940 (although Public Defender's Office also had represented 2 prosecution witnesses who testified pursuant to plea agreements, defense counsel impeached the witnesses) and
People v. Griffin, 249 A.D.2d 244 (1st Dept. 1998), *lv denied* 92 N.Y.2d 898 (no violation of right to counsel where counsel vigorously presented defendant's claim that former Legal Aid client was the perpetrator; counsel did not represent the former client or possess any confidential information).

When the issue on appeal is whether the trial court erred in relieving defense counsel over the accused's objection, or when the trial court is considering a motion to disqualify defense counsel, the accused's right to choose counsel and the risk that the accused will be denied the effective assistance of counsel must be weighed, and courts may be more inclined to act upon an appearance of impropriety and/or a risk that confidential information will leak out.
People v. Watson, 26 N.Y.3d 620 (2016) (defense counsel properly relieved where New York County Defender Services colleague had represented potential witness in related case; although there is general rule that knowledge of large public defense organization's clients is not imputed to each attorney employed by organization, counsel became aware of conflict before trial, representation of witness arose from same incident, counsel's supervisors restricted counsel's ability to call or challenge witness, and, although defendant was willing to waive conflict, he also said that he wanted former client to be called as witness);
People v. Addimando, 197 A.D.3d 106 (2d Dept. 2021) (Public Defender office properly disqualified where attorney from office previously represented potential witness and

advised witness that he was not obligated to speak to prosecution's investigator regarding defendant's case, and defendant had alleged that witness abused her and witness could have been called by People to refute defense of battered women's syndrome; court had authority to decline to accept waiver);
People v. Curtis, 74 Misc.3d 1 (App. Term, 2d Dept., 2021) (divided court finds no error in disqualification of Legal Aid defense counsel before presentation of any evidence at trial where complainant had been represented by two other Legal Aid attorneys in 1995 and 2005 on unrelated matters and defense counsel denied having any information about prior cases);
People v. McLaughlin, 174 Misc.2d 181 (Sup. Ct., N.Y. Co., 1997) (Legal Aid Society disqualified where defense was planning to attempt to implicate former client in the alleged crimes and there was potential for disclosing confidences, and court received no information as to whether any attorneys who appeared on behalf of former client were still employed by Legal Aid).

Arguably, a court should assign substantial weight to defense counsel's decision to seek disqualification. *See United States v. Oberoi*, 331 F.3d 44.

Regarding the court's discretion to accept or reject a waiver of a conflict:
see People v. Watson, 26 N.Y.3d 620 (defendant's waiver properly rejected where counsel's supervisors restricted counsel's ability to call or challenge witness, and defendant said he wanted former client to be called as witness);
United States v. Leslie, 103 F.3d 1093 (2d Cir. 1997) (no error where witness waived attorney-client privilege that might hinder cross-examination);
People v. Jenkins, 256 A.D.2d 735 (3rd Dept. 1998), *lv denied* 93 N.Y.2d 854 (1999) (no error where witness waived right to confidentiality and defense counsel cross-examined witness regarding information);
People v. McLean, 243 A.D.2d 756 (3rd Dept. 1997), *lv denied* 91 N.Y.2d 927 (1998) (no error where defendant indicated on record that she wanted counsel to continue, counsel rigorously cross-examined witness, and defendant failed to show that prior representation affected conduct of defense).

Accusations/Threats Made By Client Against Defense Counsel

See Christeson v. Roper, 574 U.S. 373 (2015) (where defense attorneys missed habeas statute of limitations and characterized potential arguments in favor of equitable tolling as "ludicrous" and asserted that they had "a legal basis and rationale for the erroneous calculation of the filing date," attorneys' contentions were contrary to client's interest and served their own professional and reputational interests);
People v. Mitchell, 21 N.Y.3d 964 (2013) (when counsel takes position that is adverse to defendant's claim that counsel coerced plea, conflict of interest arises and court must assign new attorney to represent defendant on motion to vacate plea);
People v. Hardy, 159 A.D.3d 1485 (4th Dept. 2018) (reversible error where court made no inquiry after defense counsel stated that defendant had filed grievance against him);
People v. Garcia, 71 A.D.3d 555 (1st Dept. 2010), *aff'd* 16 N.Y.3d 93 (no violation of defendant's right to conflict-free representation where counsel stated that defendant

appeared to be making claims of ineffective assistance and improper pressure to take plea but did not provide details, and defendant made only generalized claim of being "forced" to take plea; while defendant argued that conflict prevented counsel from providing details, counsel could have revealed, in camera if necessary, what client was alleging without admitting or denying anything);
United States v. Findley, 272 F.3d 116 (2d Cir. 2001) (Second Circuit upholds trial court's refusal to disqualify counsel, who feared for his and his family's safety, while noting, inter alia, that trial court concluded that defendant would act in same manner with another attorney and that there was not a total lack of communication; that counsel carried out his duties competently; that a finding that defendant's threats created a conflict could encourage defendants to take such action in the hopes of obtaining a reversal of a conviction; and that defendant created most, if not all, of the problems);
United States v. Davis, 239 F.3d 283 (2d Cir. 2001) (actual conflict existed where defendant alleged that counsel threatened not to investigate case and not file motions if defendant did not accept plea);
Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995) (defendant was prejudiced at sentencing by conflict which resulted from defendant's allegations that defense counsel had coerced him into pleading guilty);
People v. Caccavale, 305 A.D.2d 695 (2d Dept. 2003) (new counsel should have been assigned when defendant moved to withdraw plea while alleging that counsel had told him he was going "to blow trial" because he did not have money for counsel);
People v. Jones, 180 A.D.2d 427 (1st Dept. 1992) (no error where trial court refused to relieve defense counsel, who had alleged that defendant threatened him, since there was no proof that defense counsel and defendant had irreconcilable differences or that counsel was less than competent);
Matter of Malik L., 22 Misc.3d 1130(A) (Fam. Ct., Queens Co., 2009) (court denied Legal Aid Society's mid-trial motion to be relieved where respondent's mother was dissatisfied with performance of attorney and alleged that attorney and another Legal Aid employee had "threatened her son," but respondent denied claim regarding threats and indicated that he wanted attorney to continue representing him; in absence of demonstrable conflict between attorney and respondent, mother had no standing to seek removal of attorney).

Ineffective Assistance Claim On Appeal

In *People v. Hardin*, 840 N.E.2d 1205 (Ill. 2005), the Illinois Supreme Court held that no per se conflict exists when one public defender argues that another public defender in the same office was ineffective, and that the court hearing the post-conviction proceeding is not required to conduct an inquiry into a possible conflict of interest. The defendant must raise the conflict before the court has a duty to investigate. However, the defendant's burden is not heavy. The defendant need only sketch, in limited detail, a picture of how the working relationship between the two public defenders creates an appearance of impropriety. Relevant factors include the two public defenders were trial partners in the defendant's case, whether one supervised the other, and whether the size, structure, and organization of the particular public defender's office affected the closeness of any supervision.

PREPARATION AND EXAMINATION OF WITNESSES

A good backdrop is this statement by United States Supreme Court Justice White:
Defense counsel must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth). *United States v. Wade*, 388 U.S. 218, 256-258 (1967) (White, J., dissenting in part, concurring in part).

In contrast, a prosecutor should not use cross-examination to discredit or undermine a witness's testimony if the prosecutor knows the testimony to be truthful and accurate. *ABA Prosecution Standards*, 3-6.7(b).

It is not appropriate to ask questions that imply the existence of a factual predicate for which a good faith belief is lacking. *ABA Prosecution Standards*, 3-6.7(d); *ABA Defense Standards*, 4-7.7(d).

The Interviewing Process

It is clear that defense counsel is in a position to help the accused develop testimony designed to enhance the presentation of a defense. An attorney might want to describe the version of events that would be most helpful, or at least make suggestions identifying the "better" scenarios, before the accused says anything about the relevant events. However, there are ethical limits on this type of coaching.
ABA Formal Opinion 508: The Ethics of Witness Preparation (8/5/23) (discusses, inter alia: (1) what preparatory conduct is ethical; (2) unethical pre-testimony coaching; (3) unethical conduct during witness testimony; (4) misconduct in remote settings; (5) systemic precautions for addressing such misconduct);
see also Rules of Professional Conduct, Rule 3.4(a)(5) (lawyer shall not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false");
ABA Defense Standards, 4-3.3(d) ("When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce

the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance");
State v. Firmin, 637 So.2d 1143 (La. Ct. App., 4th Cir., 1994) (witness may read his prior testimony before trial to refresh memory, and, prior to trial, there may be communications or discussions of the circumstances of a case or the reading of prior testimony between witnesses; but "Professional ethics require that lawyers exercise restraint and prevent the witnesses from tailoring of their testimony or instructions to eliminate inconsistencies. Witnesses are expected to testify truthfully and without shaping the testimony to match that given by other witnesses at trial").

Still, the use of leading questions during an interview will often be necessary. 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.

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. *Nassau Bar Ethics Opinion 1994-6*,
https://www.nassaubar.org/Ethics%20Opinions/Archive/Opinion1994-6.aspx
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." *Id.* 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.

Use Of Perjured Testimony

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");
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");
ABA Defense Standards, 4-7.6(b) ("Defense counsel should not knowingly offer false evidence for its truth, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of material falsity in evidence offered by the defense, unless the court or specific authority in the jurisdiction otherwise permits");
People v. Bournes, 60 A.D.3d 687 (2d Dept. 2009), *lv denied* 12 N.Y.3d 913 (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 (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.

In New York, 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. Other New York Rules send mixed signals. *Compare* 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") with *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").

Other authorities have gone in different directions regarding this issue, with the New York State Court of Appeals preferring some type of disclosure to withdrawal by counsel.
Compare People v. Andrades, 4 N.Y.3d 355 (2005) (no error where counsel told court that ethical dilemma concerned defendant's right to testify, but never stated that defendant intended to commit perjury or otherwise disclosed client secrets, and court inferred defendant's perjurious intent);
People v. DePallo, 96 N.Y.2d 437 (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, and 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) and
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 intent to testify falsely, or accused may be less candid with new attorney and keep perjurious intent to himself and thereby facilitate presentation of false testimony or find unethical attorney who would knowingly present and exploit false testimony)
with 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. Darrett, 2 A.D.3d 16 (1st Dept. 2003) (counsel was ineffective and defendant was denied due process when counsel advised court at Huntley hearing that she expected defendant to falsely claim either self-defense or alibi, but that she did not believe defendant had perjured himself regarding claim that he was coerced into giving statements he made to police, since disclosures were unnecessary and especially harmful given that court was finder of fact at hearing; generally, counsel should make reasonable effort to limit information conveyed to judge and judge should discourage attorneys from disclosing more information than necessary);
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) and
State Bar Ethics Opinion 681, 1996 WL 421808 (lawyer who requests disqualification must do so without revealing secret or confidence; lawyer permitted to reveal “secret” if ordered by court to reveal reason, and, if lawyer believes information is confidence protected by attorney-client privilege, lawyer has duty to follow court order to disclose but may be obligated to attempt to appeal order).

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, 96 N.Y.2d 437;
Commonwealth v. Mitchell, 781 N.E.2d 1237 (Mass. 2003);
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);
People v. Wesley, 134 A.D.3d 964 (2d Dept. 2015) (where defense counsel asked to elicit defendant’s testimony in narrative form, court not required to make record of counsel’s reasons to believe defendant would commit perjury, and counsel’s advice to defendant regarding intention to commit perjury or consequences of that course of action, since there would be too great a risk that counsel would be forced to reveal client confidences; defendant may challenge counsel’s judgment in motion to vacate judgment of conviction);
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);
United States v. Bruce, 89 F.3d 886;
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); *see also*
People v. Tyler, 245 A.D.2d 1100 (4th Dept. 1997), *lv denied* 91 N.Y.2d 978 (1998) (no ineffective assistance of counsel where defense counsel refused to conduct direct and defendant, upon taking stand, refused to give narrative account);
Rules of Professional Conduct, 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").

When 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. But it may suffice to simply withdraw the evidence. *See Rules of Professional Conduct, 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…. 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");
see also 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);
People v. Berroa, 99 N.Y.2d 134 (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).

With respect to counsel's duties when he/she learns that evidence is false after the conclusion of the proceeding: *see Formal Opinion 2013-2*, 2013 WL 2997051 (Association of the Bar of the City of New York Committee on Professional Ethics, 2013) ("[w]hen counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take 'reasonable remedial measures,' which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment").

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, or even a well-reasoned opinion, regarding the perjurious nature of the accused's testimony before any ethical duty arises. 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?
See McCoy v. Louisiana, 584 U.S. 414 (2018) (court, noting that in *Nix v. Whiteside*, 475 U.S. 157, the defendant told his lawyer he intended to commit perjury, finds no "such avowed perjury" where counsel harbored no doubt that defendant believed what he was saying and counsel simply disbelieved defendant's account in view of the prosecution's evidence);
State v. McDowell, 681 N.W.2d 500 (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 (counsel may disclose belief that defendant will testify falsely when counsel has a firm basis in fact for such belief);
People v. Colon, 176 A.D.3d 419 (1st Dept. 2019), *lv denied* 34 N.Y.3d 1077 (due to extent of text exchanges between defendant and victim, prosecutor suspected victim had

not been candid about relationship with defendant, but prosecutor did not know or have sufficient reason to know of perjury);
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*
Rules of Professional Conduct, 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");
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).

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(g) that "[i]t is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent 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.

Short of improperly providing legal "advice" (*Rules of Professional Conduct*, Rule 4.3), it is not improper, for defense counsel to inform a prosecution witness of the potential for self-incrimination. Defense counsel's special responsibility to zealously defend the accused should permit counsel to make reference to self-incrimination issues even if counsel's hope is that the witness will have second thoughts about testifying. But, according to the ABA, neither a prosecutor, nor defense counsel, may discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony or change the witness's decision about whether to provide information.
ABA Prosecution Standards, 3-3.4(g);

ABA Defense Standards, 4-4.3(g);
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).

Interference With Adversary's Contact With Witness

It would be improper for defense counsel to encourage a witness not to testify or provide information to the prosecutor or otherwise give the witness legal "advice." *Rules of Professional Conduct*, Rule 4.3. The *ABA Defense Standards* state in section 4-4.3(h) that "[d]efense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules," and that "[d]efense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give"[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 also should advise the accused not to engage in improper communications. *ABA Defense Standards*, 4-5.1(g).

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 or present testimony by a witness.
See ABA Prosecution Standards, 3-3.4(h);
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. Fox. 491 N.W.2d 527 (Iowa 1992) (prosecutor acted improperly in offering plea to co-defendant that involved agreeing not to testify for defendant);
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. Henricksen, 564 F.2d 197 (5th Cir. 1977) (reversible error found where co-defendant, whose testimony would have tended to exonerate defendant, agreed not to testify regarding defendant as part of plea bargain, and violation of that provision would void plea agreement and subject co-defendant to prosecution on all counts of indictment);
United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976) (prosecutor violated defendant's due process rights by repeatedly warning prospective defense witness about possibility

of federal perjury charge if she testified falsely, and causing witness not to give favorable testimony after she had agreed to do so);
United States v. Causey, 2006 WL 44073 (S.D. Tex., 2006) (to reassure potential witnesses and their attorneys, court issues order stating, inter alia, that should witness provide information or assistance to defense counsel, government shall not view witness's decision as lack of cooperation with government and shall not use such cooperation as basis for decisions regarding prosecution);
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).

There are constraints on the judge as well. *See Webb v. Texas*, 409 U.S. 95 (1972) (defendant denied due process where judge gratuitously and unnecessarily singled out defendant's only witness for lengthy admonition on dangers of perjury, and witness refused to testify and judge excused him).

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 a witness 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. "Defense counsel may… fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication." *ABA Defense Standards*, 4-4.3(h). Along those lines, defense counsel also 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 (9th 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). And, 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. *See also People v. Wisdom*, 164 A.D.3d 928 (2d Dept. 2018), *lv denied* 32 N.Y.3d 1211 (court erred in conditioning defendant's ability to interview prosecution witness upon interview occurring in presence of prosecutor or detective).

Sanctions 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, 804 F.2d 599 (no error where court ordered that government witnesses be deposed);
United States v. Peter Kiewit Sons' Co., 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 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).

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 People v. Ortiz, 26 N.Y.3d 430 (2015) (court erred when it permitted People to introduce statement made by counsel at arraignment that was damaging to defendant but allegedly was mistaken, but then denied counsel's request to withdraw; court was required to grant counsel's motion to withdraw or declare mistrial);

People v. Caquias, 127 A.D.3d 487 (1st Dept. 2015), *lv denied* 26 N.Y.3d 1143 (no violation of right to conflict-free representation where prosecutor used defense counsel's notes of interview of father; counsel did not effectively become witness against client);
Nestor Cassini v. County of Nassau, 2023 WL 6958795 (EDNY 2023) (where there had been limited discovery and extent to which attorney's testimony might be necessary or prejudicial was not clear, motion to disqualify was premature; rule addresses only counsel's participation at trial, and does not bar counsel's participation in pre-trial proceedings);
Rules of Professional Conduct, Comment, 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 (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).

Statements By Prosecution Witnesses To Defense Counsel

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. 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 People v. Lawrence, 156 A.D.3d 652 (2d Dept. 2017) (defense counsel should have been disqualified where counsel was only person who could testify to witness's recantation; counsel agreed to forgo cross-examination of witness regarding recantation; and independent counsel was appointed to advise defendant, who indicated that he wanted his attorney to continue to represent him but refused to waive counsel's conflict);
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 (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).

There are ways to avoid such a problem. The best solution is to interview witnesses in the presence of another person who can testify about prior inconsistent statements.
See ABA Defense Standards, 4-4.3(f) ("Defense counsel should avoid the prospect of having to testify personally about the contents of a witness interview…when the need for corroboration of an interview is reasonable anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses");
People v. DeVecchio, 17 Misc.3d 1114(A) (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 (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.

Also, when interviewing a prosecution witness, it helps to obtain a statement written and/or signed by the witness.

Statements By Defense Witnesses To Defense Counsel

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 may be advisable to conduct the interview in the presence of another person.

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 (1973).

Common law limitations on the ability to impeach a party's own witness can be overcome. 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). Defense counsel must keep in mind that the prior statements of defense witnesses are subject to disclosure to the prosecution pursuant to FCA § 331.4.

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, one solution is to bring a companion to the scene, or arrange for another person to review the scene independently; the latter option protects against a prosecution argument that by calling a witness to testify about observations made while counsel was present, counsel becomes an unsworn witness. The taking of photographs, either by the attorney or another person, will further reduce the chances that an advocate-witness rule problem will arise. If counsel merely needs to 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. 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 People v. Skinner*, 52 N.Y.2d 24 (1980)], but the police deny receiving such a call, an advocate-witness rule problem exists.
See People v. Amato, 173 A.D.2d 714 (2d Dept. 1991), *lv denied* 78 N.Y.2d 961, *cert denied* 502 U.S. 1058 (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);
People v. Brand, 13 A.D.3d 820 (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, People called defense counsel because the officer's testimony contradicted counsel's notes, and 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 (2d Dept. 2003) (court should have allowed defense counsel to testify regarding suggestiveness at lineup).

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*, 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);
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*, 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*, 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 (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 (1st Dept. 1991), *lv denied* 79 N.Y.2d 866 (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 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 (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*, 54 N.Y.2d at 302.
See also People v. Dais, 180 A.D.3d 417 (1st Dept. 2020), *lv denied* 35 N.Y.3d 993 (prosecutor effectively became unsworn witness when, after issue arose as to whether prosecutor had informed victim about statutory immunity, prosecutor repeatedly asked victim if he remembered discussing importance of “telling the truth”);
People v. Ferrer, 154 A.D.3d 519 (1st Dept. 2017), *lv denied* 30 N.Y.3d 1104 (no error where prosecutor’s investigative role was not material issue at trial, where defendant argued that statement was coerced by detectives outside prosecutor’s presence);
People v. Rowley, 127 A.D.3d 884 (2d Dept. 2015) (prosecutor functioned as unsworn witness where she cross-examined defendant regarding closing time of restaurant in Brooklyn and implied that District Attorney’s office had called restaurant to ascertain hours of operation);
People v. Ramashwar, 299 A.D.2d 496 (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 (4th Dept. 1991), *lv denied* 78 N.Y.2d 1011. 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 (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 (1st Dept. 1994) (defendant failed to establish likelihood of prejudice resulting from testimony of 3 prosecutors);
People v. Strawder, 106 A.D.2d 672 (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*, 3-3.4(f) ("A prosecutor should avoid the prospect of having to testify personally

about the contents of a witness interview…when the need for corroboration of an interview is reasonable anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses").

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.

Stipulations

An advocate-witness rule problem might be neutralized if the defense obtains a stipulation from the prosecution with respect to what counsel's testimony would be and counsel's credibility will not be an issue.
See People v. Ortiz, 26 N.Y.3d 430 (2015), *rev'g* 114 A.D.3d 430 (1st Dept. 2014) (First Department found no advocate-witness problem where defense counsel claimed she would have to testify on defendant's behalf to correct counsel's misstatement of what defendant had said, but there was stipulation to counsel's testimony; Court of Appeals holds that counsel's request to be relieved should have been granted).
People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. Ct. App., 2009), *cert denied* 2009 WL 2713996 (Colo. 2009) ("uncontested issue" exception contemplates that facts about which attorney would testify are undisputed, and that facts go to issue that is undisputed).

The "Substantial Hardship" Exception

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 extensive 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. *See B.B. v. E.E.*, 69 Misc.3d 796 (Fam. Ct., West. Co., 2020) (invocation of substantial hardship exception rejected where family offense respondent cited attorney's unique knowledge of intersection of family law and mental health issues, and time and expense required to get another attorney sufficiently familiar with proceedings, but counsel became witness at very first

appearance, and case law is clear that adverse financial consequences do not justify denial of disqualification).

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 Deans v. Aranbayev*, 28 Misc.3d 1220(A) (Sup. Ct., Queens Co., 2010) (motion for disqualification denied where counsel had been involved in more than ten related matters and in four appeals).

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 (1980).

COMMUNICATIONS WITH REPRESENTED PARTIES

Rules of Professional Conduct, Rule 4.2 states as follows:

> (a) 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.

Elsewhere in Rule 4.2, there are references to a represented “person” rather than a “party”. Rule 4.2 has been applied before the commencement of litigation.
See State Bar Ethics Opinion 735, 2001 WL 670914;
State Bar Ethics Opinion 607, 1990 WL 304225 (word “party” has expansive definition that includes person who is potential litigant).

Attorney Communications

The rule applies to criminal prosecutions.
Rules of Professional Conduct, Comment, Rule 4.2 (“When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused”);
State v. Clark, 738 N.W.2d 316 (Minn. 2007) (in light of rule prohibiting lawyer, including government lawyer, from communicating with represented person, state may not communicate with represented criminal defendant about subject of representation unless defense counsel consents, communication is “authorized by law,” or state obtains court order authorizing communication, and providing defense counsel with notice and opportunity to be present is insufficient; police who had post-arraignment contacts with defendant treated as prosecutor’s “agents”).

With respect to investigative activities by prosecutors after a suspect has counsel but before the filing of an accusatory instrument, *Rules of Professional Conduct, Comment*, Rule 4.2, states: “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.”
See United States v. Balter, 91 F.3d 427 (3d Cir. 1996) (rule not applicable to pre-indictment investigations);
United States v. Ryans, 903 F.2d 731 (10th Cir. 1990), *cert denied* 498 U.S. 855 (1990) (rule not applicable before indictment);
United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (contacts usually will fall within authorized by law exemption, but some contacts may be improper);
but see United States v. Koerber, 966 F.Supp.2d 1207 (D. Utah 2013) (interview of target by law enforcement without notifying attorney not authorized by law).

Since Rule 4.2(a) precludes contact only when the attorney "knows" a person is represented, it has been noted that an attorney without such knowledge may engage in communications.
See ABA Formal Opinion 95-396 (1995) (although knowledge may be inferred from the circumstances, counsel has no duty to inquire);
State Bar Ethics Opinion 663, 1994 WL 592956 (lawyer who wishes to communicate with adverse party may contact the lawyer who may be representing the adverse party and state that it will be assumed that the lawyer is not representing the party if no response is received);
McHugh v. Fitzgerald, 280 A.D.2d 771 (3rd Dept. 2001) (commencement of litigation, by itself, does not activate rule);
State Bar Ethics Opinion 607, 1990 WL 304225 (lawyer required to inform person that, in the event person is represented, documents should be referred to counsel).

Obviously, Rule 4.2(a) precludes defense counsel from speaking with a co-respondent who is represented.
See United States v. Nickerson, 556 F.3d 1014 (9th Cir., 2009) (violation of rule does not constitute ineffective assistance of counsel per se); *United States v. Dennis*, 843 F.2d 652 (2d Cir. 1988) (if defense counsel acted unethically, sanction would be disciplinary action, not suppression of evidence or limitation of cross-examination).

Generally speaking, defense counsel is not obliged to notify the prosecutor prior to engaging in contacts with a prosecution witness, including a complainant, since the prosecutor does not "represent" a witness.
See State v. Hofstetter, 878 P.2d 474 (Wash. Ct. App., Div. 2, 1994);
United States v. Medina, 992 F.2d 573 (6th Cir. 1993);
United States v. Pinto, 755 F.2d 150 (10th Cir. 1985);
United States v. Grasso, 552 F.2d 46 (2d Cir. 1977);
People v. Eanes, 43 A.D.2d 744 (2d Dept. 1973);
People v. Marino, 87 Misc.2d 542 (County Ct., Monroe Co., 1976);

New York County Lawyers' Ethics Opinion 711, 1996 WL 592651.

Even when a witness is represented by counsel in connection with the proceeding at hand, it can be argued that defense counsel can freely communicate since the person is not a “party” or a person with a “legal” interest in the case. *See People v. Kabir*, 13 Misc.3d 920 (Sup. Ct., Bronx Co., 2006).

Rule 4.2 usually will not apply when the witness is represented by counsel, but not in the instant matter. However, when there is a possibility that a witness’ legal rights will be affected by what he or she says to defense counsel, it can be argued that Rule 4.2 should apply.
Opinion #216: Prosecutor’s Communications with an Alleged Crime Victim Who is Represented by Counsel (Maine Professional Ethics Commission, 4/5/17) (under Maine Rule of Professional Conduct 4.2, prosecutor may not communicate with alleged crime victim prosecutor knows to be represented by counsel in the criminal matter, or closely related civil matter arising from same incident or conduct, without consent of counsel, except as communication is expressly authorized by law or court order; participation in criminal matter can have consequences in closely related civil litigation, and counsel can provide advice regarding preservation of position in civil litigation);
ABA Formal Opinion 95-396 (if communicating lawyer represents client with respect to crime B and wishes to contact person regarding that crime, representation of that person by counsel with respect to unrelated crime A does not bar communications about crime B; however, in other contexts a lawyer "may, intentionally or otherwise, take advantage of unsophisticated persons who are represented by counsel and thereby circumvent the client-lawyer relationship");
New York County Lawyers' Ethics Opinion, Question 676, 1990 WL 677018 (criminal defense counsel may not interview non-party potential witness who is represented by counsel in non-related criminal proceeding without consent of witness's attorney, since "disclosures made by the defendant to another lawyer without the knowledge and consent of the defendant's own lawyer may have a significant effect on the legal rights of the defendant");
but see People v. Santiago, 925 N.E.2d 1122 (Ill. 2010) (prosecutors did not violate no contact rule when they interviewed defendant after arrest for child endangerment and assignment of attorney in child protection proceeding, since attorney did not represent her in criminal matter);
Grievance Committee For Southern District Of New York v. Simels, 48 F.3d 640 (2d Cir. 1995) (no violation of rule where counsel interviewed witness who was potential co-defendant in another case).

Although there appears to be no ethics rule requiring it, it may be prudent for counsel to contact in advance the parent of any infant witness counsel plans to interview in order to avoid alienating the parent. Because of CPLR § 309(a), proper service of a subpoena upon an infant includes service upon a parent, or guardian or legal custodian.

Client Communications

Rule 4.2(b) states: “Notwithstanding the prohibitions of paragraph (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);

Initiation Of Contact By Represented Person

According to *ABA Formal Opinion 95-396*, there is no waiver of protection by a represented person who initiates contact with an attorney for an adverse party. *But see ABA Informal Ethics Opinion 905* (1966) (no ethical problem for attorney approached by client in civil matter where client is represented by another attorney in criminal matter; but “it might be courteous” for civil attorney to inform criminal attorney of representation).

Attorney Communications With Unrepresented Person

Under Rules of Professional 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."

Accordingly, while defense counsel does not need the prosecutor's consent before contacting a witness to discuss dropping the charges, *see New York County Lawyers' Ethics Opinion 711*, counsel cannot give "legal advice" to the witness.
See also Rules of Professional Conduct, Comment, 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");
ABA Formal Opinion 486: Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor Offenses (2019) (Committee notes that collateral consequences of misdemeanor conviction have expanded; that prosecutor may not make plea offer or seek waiver of apparent right to counsel before making reasonable efforts to assure that accused has been advised of right and procedure for obtaining counsel and has been given reasonable opportunity to exercise right; that prosecutor may not advise or induce acceptance of plea or waiver of right to counsel when unrepresented accused is deciding whether to waive, and may not offer legal advice other than to seek counsel when accused does not understand consequences of waiving counsel; and that prosecutor may not make omit details such as collateral consequences);
Board of Overseers of the Bar v. Banda (Maine Board of Overseers of the Bar, 2016) (public admonition given to criminal defense attorney who telephoned and spoke with complainant in domestic violence case shortly after she had met with Assistant District Attorney; discussion regarding ways in which case might be resolved, including results and ramifications of not testifying and likely dismissal if she was not subpoenaed and did not appear, was proper, attorney improperly gave "legal advice" to unrepresented person who had legal interests adverse to client when he explained complainant's Fifth Amendment rights and stated "that (because) she did not have a good faith basis to invoke her right to remain silent, she would have a legal obligation to appear and answer questions truthfully if she were in fact subpoenaed to testify," and that from his analysis

he did not think she could avoid testifying by invoking her Fifth Amendment rights);
State Bar 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, 2010 WL 8265845 (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, 2009 WL 399765 (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 lawyer'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).

Also, Rule 8.4(c) of the *Rules of Professional Conduct* states that "[a] lawyer or law firm shall not: ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
See People v. Perez, 37 Misc.3d 272 (Sup. Ct., Queens Co., 2012) (ADA's "preamble" prior to issuance of Miranda warnings misled defendant into believing that prosecutor was there to help him and suggested that speaking to prosecutor would benefit him because prosecution would investigate defendant's side of story, and violated Rule 8.4[c]; court precludes People from using defendant's statement on direct case);
see also Disciplinary Counsel v. Brockler, 48 N.E.3d 557 (Ohio 2016) (prosecutor acted unethically when he used fictitious Facebook identity to chat with alibi witnesses; no "prosecutorial investigation deception" exception to ethics rules prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation).

MID-TESTIMONY CONTACT WITH WITNESSES

There appear to be no formal ethical rules prohibiting an attorney from discussing his or her witness' testimony with the witness during breaks in the testimony.
Opinion: 15-157, 2015 WL 10911515 (Advisory Committee on Judicial Ethics, 9/10/15) (absent court directive or ethics rule requiring attorneys to refrain from speaking to non-party witness during recess following witness' direct examination and before cross-examination, court attorney referee not required to take action on learning that attorney briefly spoke to witness about subpoenaed materials during recess).

But there appears to be a tacit understanding that an attorney should not engage in such discussions with a witness. Judges often issue formal directives, or cautionary "reminders," to that effect, and the Court of Appeals has suggested that this is the preferred practice in any event.
People v. Branch, 83 N.Y.2d 663 (1994) ("There can be no question that once a witness takes the stand the truth-seeking function of a trial will most often be best served by requiring that the witness undergo direct questioning and cross-examination without interruption for counseling");
see also 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");
People v. McConville, 55 Misc.3d 501 (Sup. Ct., Bronx Co., 2017) (prosecutor acted improperly in reviewing grand jury testimony and other information with witness in middle of defense cross even though court had not ordered prosecutor not to do so, but motion to strike witness's testimony denied where court could consider significance of any coaching and defendant chose not to develop record with respect to degree of coaching, People had reviewed minutes with witness at least twice before witness initially took stand, witness acknowledged making statements to grand jury about which defense asked him, and no prejudice to defendant shown).

Courts may allow such contacts as a matter of discretion. But while a prosecutor may in some cases have a legitimate reason to speak to a witness, 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 (no error where court allowed prosecutor to question witness during recess to determine whether witness had been intimidated by defendant's family);
People v. Beckham, 142 A.D.3d 556 (2d Dept. 2016), *lv denied* 28 N.Y.3d 1123 (no error in court's denial of motion to strike complainant's testimony after prosecutor spoke to complainant regarding authentication of 911 recording);
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 (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 (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 (1st Dept. 2000), *lv denied* 95 N.Y.2d 872 (no sanction where defendant was able to exploit prosecutor's contact with witness when cross-examination resumed) *with*
People v. Robinson, 190 A.D.2d 697 (2d Dept. 1993) (officer was "prepped" during recess, and changed testimony the next day).

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, a ban is permissible if it covers a brief recess, but overnight bans, especially when they effectively cover several days, usually are improper.
See Geders v. United States, 425 U.S. 80 (1976);
People v. Joseph, 84 N.Y.2d 995 (1994);
United States v. Triumph Capital Group, 487 F.3d 124 (2d Cir. 2007).

With respect to whether allowing a witness to view a transcript of his or her testimony, without coaching or discussing the case with the witness. See In re Issiah C., 187 A.D.3d 401 (1st Dept. 2020), lv denied 36 N.Y.3d 905 (no error where victim's direct testimony was interrupted by six-week continuance, and court directed victim not to discuss testimony with presentment agency counsel or anyone else during recess, but permitted her to read transcript of her testimony before direct examination resumed, and there was no evidence of communication between counsel and victim about testimony).

DECISION-MAKING BY ATTORNEY AND CLIENT

Types Of Decisions Made By Attorney

Generally speaking, decisions concerning legal arguments, the choice of witnesses, cross-examination of prosecution witnesses, investigation priorities, and other matters that come under the heading of litigation strategy and legal analysis, are made by the attorney.
See Rules of Professional Conduct, Rule 1.2(e) ("A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client");
Puglisi v. State, 112 So.3d 1196 (Fla. 2013) (defense counsel has ultimate authority to decide whether to present witnesses at trial);
People v. Colville, 20 N.Y.3d 20 (2012) (decision whether to seek jury charge on lesser-included offenses is matter of strategy and tactics which rests with defense counsel);
People v. Ferguson, 67 N.Y.2d 383 (1986) (whether mistrial is in defendant's best interest is for lawyer to decide);
People v. Sheard, 145 A.D.3d 476 (1st Dept. 2016), *lv denied* 29 N.Y.3d 952 (whether to call witness is strategic decision to be made by defense counsel);

United States v. Robinson, 67 F.4th 742 (5th Cir. 2023) (defense counsel has power to seek continuance without first informing client or obtaining client's consent) and *United States v. Gates*, 709 F.3d 58 (1st Cir. 2013), *cert denied* 134 S.Ct. 264 (lawyer may seek continuance and waive defendant's rights under Speedy Trial Act without first obtaining defendant's personal consent; court notes well-settled principle that consent by counsel is controlling with respect to scheduling and trial management matters).

Counsel could later be accused of providing ineffective assistance if it appears that he or she unreasonably deferred to the client's preferences.
People v. Diaz, 163 A.D.3d 110 (3d Dept. 2018), *lv denied* 32 N.Y.3d 1110 (statement that counsel granted defendant "great deference" when he refrained from seeking mistrial after consulting with defendant did not demonstrate that counsel ceded decision-making authority to defendant);
People v. Rivera, 12 Misc.3d 1158(A) (Sup. Ct., Bronx Co., 2006) (defense counsel called witness against better judgment, which was decision counsel improperly ceded to defendant's family without adequate discussion).

In any event, the attorney should consult with the client, and keep the client informed, with respect to litigation decisions and strategies and the overall progress of the case.
ABA Defense Standards, 4-5.1(b);
Rules of Professional Conduct, Rule 1.4;
United States v. Zackson, 6 F.3d 911 (2d Cir. 1993) (defense counsel was required to inform defendant of, and discuss with defendant, decision to oppose court's offer to sever charges);
Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968) (counsel improperly waived hearing in connection with transfer from juvenile to criminal court without consulting with client);
People v. Radcliffe, 25 Misc.3d 1245(A) (Sup. Ct., Bronx Co., 2009) (counsel should have consulted with defendant regarding decision to rest on testimony elicited at suppression and on stipulations of fact; however, decision was part of reasonable trial strategy and did not prejudice defendant).

Types Of Decisions Made By Client

According to *Rules of Professional Conduct*, Rule 1.2(a): "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."
See also Rules of Professional Conduct, Comment, Rule 1.2 ("lawyers usually defer to their clients regarding such questions as… concern for third persons who might be adversely affected," and, "[a]t the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation"; "[i]n a case in which the client appears to be suffering diminished capacity, the lawyer's duty to

abide by the client's decisions is to be guided by reference to Rule 1.4," but "if the lawyer intends to act contrary to the client's instructions, "the lawyer must consult with the client"); *ABA Defense Standards*, 4-5.2(b) (accused decides, inter alia, whether to cooperate with or provide substantial assistance to government, whether to speak at sentencing, and whether to appeal);

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983), the Supreme Court noted that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal [citations omitted]." 463 U.S. at 751.
See also N.Y.S. Bar Ass'n Comm. on Prof'l Ethics, Op. 1175, 2019 WL 5784702 (2019) (once lawyer has explained material risks and chances of success, lawyer must follow client's decision to withdraw plea);
People v. Mason, 263 A.D.2d 73 (1st Dept. 2000) (defendant denied effective assistance where counsel convinced judge that he was responsible for deciding whether defendant would testify, and objected when defendant testified);
Brown v. Artuz, 124 F.3d 73 (2d Cir. 1997) (decision whether or not to testify belongs to defendant, and effective assistance of counsel includes the burden of ensuring that defendant is informed of the nature and existence of the right to testify);
but see People v. Hogan, 26 N.Y.3d 779 (2016) (decision as to whether defendant would testify before grand jury was for counsel).

The case law suggests that the client's objection to counsel's plan to interpose a psychiatric defense governs, but it also appears that counsel may make a strategic decision that such a defense is simply not viable or is counterproductive.
Compare People v. Petrovich, 87 N.Y.2d 961 (1996) (decision not to request submission of affirmative defense of extreme emotional disturbance fell to defendant);
United States v. Read, 918 F.3d 712 (9th Cir. 2019) (defendant had right to demand that counsel not present insanity defense, which is tantamount to concession of guilt; defendant may wish to avoid stigma of insanity and prefer remote chance of exoneration to prospect of indefinite commitment to state institution);
People v. Harding, 161 A.D.3d 613 (1st Dept. 2018) (defendant decides whether to raise insanity defense) and
People v. Colletta, 106 A.D.3d 927 (2d Dept. 2013), *lv denied* 21 N.Y.3d 1072 (defendant found competent to stand trial had ultimate authority to reject use of insanity defense) with *People v. Diaz*, 163 A.D.3d 110 (3d Dept. 2018), *lv denied* 32 N.Y.3d 1110 (counsel fully investigated possible defense and, having done so, made calculated trial strategy to fashion different defense).

Although it may be appropriate to solicit the opinion of the client's parent and involve the parent in the decision-making process as long as the client does not object, disputes between the client and parent should be resolved in favor of the client. *State Bar Ethics Opinion 648*, 1993 WL 560288 ("If the attorney discerns that the infant's best interests conflict with the actions or views of the parent, the attorney should, nevertheless, act in the child's best interest").

Concession Of Guilt Or Element Of Crime

Counsel's concession of overall guilt, or of specific elements of the prosecution's case, may trespass upon a non-consenting accused's decision-making realm.
Compare McCoy v. Louisiana, 584 U.S. 414 (2018) (defendant has right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers defendant best chance to avoid death penalty; with individual liberty at stake, it is defendant's prerogative, not counsel's, to decide on objective of defense, and violation of defendant's Sixth Amendment-secured autonomy is "structural" error not subject to harmless-error review);
State v. McAllister, 847 S.E.2d 711 (N.C. 2020) (per se violation of right to effective assistance of counsel occurs where counsel impliedly, rather than expressly, admits defendant's guilt) and
State v. Humphries, 336 P.3d 1121 (Wash. 2014) (counsel may not stipulate to element of crime over defendant's express objection)
with Florida v. Nixon, 543 U.S. 175 (2004) (no ineffective assistance where counsel conceded guilt at capital trial after defendant failed to respond upon discussion with counsel);
State v. Huisman, 944 N.W.2d 464 (Minn. 2020) (no error where defense counsel made concessions as to ages of sex crime complainants and defendant's age, and as to venue; unconsented-to concession on any single element is not necessarily concession of guilt, and a contrary rule would be a disincentive for parties to focus on issues in dispute and would prevent defense counsel from making what may be appropriate tactical concessions);
People v. Campbell, 802 N.E.2d 1205 (Ill. 2003) (defendant's right of confrontation not violated when defense counsel stipulated to witness's testimony in absence of waiver by defendant; defense counsel may waive right of confrontation if defendant does not object and decision is matter of trial tactics and strategy, and stipulation does not establish guilt);
People v. Quiles, 217 A.D.3d 635 (1st Dept. 2023) (no error where defense counsel conceded that defendant "ended up with" weapon, but asked jury to acquit while asserting that he had acted in self-defense and had disarmed one assailant);
People v. Alvarez, 205 A.D.3d 577 (1st Dept. 2022), *lv denied* 38 N.Y.3d 1131, *cert denied* 143 S.Ct. 813 (defendant, who asserted innocence of all charges, did not establish that he expressly objected to concession of partial guilt, and counsel was not obligated to obtain defendant's express consent);
Kellogg-Roe v. Gerry, 19 F.4th 21 (1st Cir. 2021) (no right to counsel violation where, despite defendant's instructions not to present defense, counsel took certain actions to do so; presentation of active defense over client's objection does not subvert client's desire to maintain innocence);
United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020), *cert denied* 141 S.Ct. 1057 (counsel had authority to concede in summation, over defendant's objection, element of crime - that defendant had hired individuals to shoot victim - while arguing that government had failed to prove intent to kill) and
People v. Maynard, 176 A.D.3d 512 (1st Dept. 2019), *lv denied* 34 N.Y.3d 1079 (no error where defense counsel focused on persuading jury that there was reasonable doubt as to whether robbery occurred in dwelling, and did not concede defendant was perpetrator;

right to counsel not violated when lawyer advocates for defendant's claim of complete innocence with what defendant might consider insufficient zeal).