

# IAC SURVIVAL GUIDE

## Detecting, Avoiding and Addressing Ineffective Assistance of Counsel Claims

The Lodestar:

Strickland v. Washington, 466 U. S. 668 (1984)

A criminal defendant has a Sixth Amendment right to “reasonably effective” legal assistance of counsel: A defendant claiming ineffective assistance of counsel must show (1) that counsel’s representation “fell below an objective standard of reasonableness,” and (2) actual prejudice resulting from counsel’s deficient performance—“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

### I. Initial Client Contact

A. The Initial Client Interview as a Precursor to Later Client Testimony

B. Be Alert to the Land Mines:

1. Nix v. Whiteside, 475 U.S. 157 (1986) (duty of counsel to prevent frauds upon the court)

2. **ABA Model Rules of Professional Responsibility (Advocate)  
Rule 3.3 Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

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(3) offer 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.

## II. Pretrial Motions vs. Plea Negotiations

- A. Premo v. Moore, 562 U.S. \_\_\_\_ (2011) (balancing pretrial motions vs. plea negotiations)

## III. Plea Negotiations

### a. Advice and Choices

1. Missouri v. Frye, 566 U.S. \_\_\_\_ (2012) (communicating plea offers)
2. Lafler v. Cooper, 566 U.S. \_\_\_\_ (2012) (advising trial vs. plea)

### b. Immigration Consequences

1. Padilla v. Kentucky, 559 U.S. \_\_\_\_ (2010)
2. Padilla v. Kentucky, Immigration Consequences of Criminal Convictions (DOJ Reference Guide) (Revised Nov. 8, 2010)

### c. Waivers of Appeal and Post-Conviction Relief

1. United States v. Timothy John Vanderwerff, No. 12-cr-00069 (D. Col. June 28, 2012) (Kane, J.) (rejecting proposed plea agreement including waiver of appeal)
2. Florida Bar, Proposed Advisory Ethics Opinion 12-1 (June 22, 2012) (Ethical propriety of plea agreement including waivers of ineffective assistance of counsel and prosecutorial misconduct)
3. Innocence Project Report: “Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among

the First 255 DNA Exoneration Cases,” Prepared by Dr. Emily M. West, Director of Research Innocence Project (Sept. 2010)

IV. The Fool’s Client - Issues in Self-Representation

- A. Faretta v. California, 422 U.S. 806 (1975) (right to self-representation)
- B. Martinez v. Court of Appeal, California, 528 U.S. 152 (2000) (Faretta does not extend to self-representation on appeal)

V. Trial

A. Jury Selection

- 1. Batson v. Kentucky, 476 U.S. 79 (1986)
- 2. “Appellate Issues in Jury Selection,” prepared by Bonnie Phillips-Williams (June 2012)

B. Preservation of Error and Procedural Default

- 1. Cullen v. Pinholster, 563 U.S. \_\_\_\_ (2011) (later collateral review issues limited by what was raised and preserved at trial and on appeal)
- 2. O’Sullivan v. Boerckel, 526 U.S. 838 (1999) (to satisfy the exhaustion requirement, state prisoner must present claims to a state supreme court in a petition for discretionary review when that review is part of the State’s ordinary appellate review procedure)

VI. Motion for New Trial

A. Timeliness of Motion

- 1. Carlisle v. United States, 517 U.S. 416 (1996) (time limit for Rule 33(b) motion for new trial is jurisdictional; extension of time must be sought within time limit – current rule is 14 days including

weekends and holidays)

## VII. Sentencing

### A. Post-Sentencing Rehabilitation

1. Tapia v. United States, 564 U.S. \_\_\_\_ (2011) (post-sentence rehabilitation is not a permissible basis to increase sentence)

## VIII. Appeals and Certiorari

### A. Filing Notice of Appeal

1. Roe v. Flores-Ortega, 528 U.S. 470 (2000) (duty to consult about filing appeal)

### B. Frivolous appeals - Duties of Counsel

1. Anders v. California, 386 U.S. 738 (1967) (briefing appeal)
2. Penson v. Ohio, 488 U. S. 75 (1988) (claim that counsel in effect did not represent defendant on appeal)
3. Smith v. Robbins, 528 U.S. 259 (2000) (claim that counsel neglected to file a merits brief on appeal)
4. Smith v. Murray, 477 U. S. 527(1986) (claim that counsel failed to make a particular argument on appeal)
5. United States v. Gomez Perez, 215 F.3d 315 (2nd Cir. 2000) (not filing response to government motion to dismiss based on appellate waiver)

### C. Disputes with Client Over Issues

1. Compare Martinez v. Court of Appeal, California, 528 U.S. 152 (2000)(no right to self-representation on appeal) to ABA Model

Rules of Professional Responsibility (Client-Lawyer Relationship)

**2. Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**

- (a) Subject to paragraphs (c) and (d), 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 may take such action on behalf of the client as is impliedly authorized to carry out the representation. 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.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

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[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

D. Duty to File Petition for Writ of Certiorari

1. United States v. Austin, 513 U.S. 5 (1994) (per curiam) (no duty to file a frivolous cert petition)

IX. Post-Conviction Issues

A. Equitable Excuses Forgiving Procedural Defaults - "Cause and Prejudice"

1. Holland v. Florida, 560 U.S. \_\_\_\_ (2010) (lying to client)
2. Maples v. Thomas, 566 U.S. \_\_\_\_ (2012) (big firm musical chairs plus "addressee unknown")

B. Resources for Successful Cases on Point

1. Summaries of Successful Ineffective Assistance of Counsel Claims, prepared by Teresa Norris, Blume Weyble & Norris, LLC, available at <http://www.capdefnet.org>

X.. Attorney as the Accused - Now What?

A. Client's Privilege Remains Intact

1. American Bar Association Formal Opinion 10-456 (July 14, 2010) "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim"

B. Duration of Privilege

1. Swidler & Berlin v United States, 524 U.S. 399 (1998) (til death and after)