Limitations on the Duty to Advise: Knowing When It's Time to Say More, Not Less

By Paul Bennett Marrow

When advising a client, it sometimes is important to consider not only what not to say, but how much you are required to say. Where is the line when it comes to the obligation to advise about *all* the consequences of your client's actions? This question can be troubling, and the answer you choose could possibly lead to a claim for malpractice.

A hypothetical: Suppose you're called upon to represent a criminal defendant, an American citizen, a licensed veterinarian who owns and operates a chain of animal hospitals located throughout the New York metropolitan area, and who has had an average income over the past 10 years of $450,000 annually. The client is charged with custodial interference in the first degree (N.Y. Penal Code § 135.50), a class E felony. You negotiate a plea of guilty to custodial interference in the second degree (Penal Code §,135.45), a class A misdemeanor with a penalty of probation (Penal Code § 65(3)(b)(i)).

Do you have a legal duty to advise the client as to *all* the consequences that might result from the plea? In particular, are you obligated to give advice concerning the possibility that your client's professional license will be the subject of sanctions by accepting the plea? And if you fail to provide adequate guidance, can you be held liable for malpractice?

It turns out that, at least in New York, these are tricky questions. This article is about the twists and turns that must be confronted before a satisfactory answer can be determined.

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Before There Is a Malpractice, There Must Be a Duty to Provide Advice

New York evaluates the validity of a guilty plea by determining if it was made voluntarily. A defendant must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel"[1] to ensure a full understanding of what he or she is doing and what the plea actually means. "Consequences," as used in this context, come in at least two flavors: (1) *direct*, which is to say they are meaningful and the defendant must be advised, and (2) *collateral*, in which case there is no requirement to give advice.[2]

> A plea of guilty has the same legal status as a conviction based on a finding of guilt by a jury or judge.

How do we determine which flavor is involved in a particular matter? If the consequence is one that "has a definite, immediate and largely automatic effect on the defendant's punishment,"[3] it is said to be direct and the failure to warn can support a motion for a hearing[4] to determine if the plea should be vacated on the grounds that the defendant was thereby prejudiced. A collateral consequence is one that has "a result peculiar to the individual and generally results from the actions taken by agencies the court does not control."[5] The obligation to advise/warn about a direct consequence is the same whether or not a defendant is represented by counsel,[6] which is to say that the court is obliged to give warning.[7]

The direct/collateral analysis applies to cases involving the failure to warn as distinguished from a claim that the guilty plea came about because of the defendant being misadvised. The latter situation calls for a different analysis. In *Strickland v. Washington*,[8] the Supreme Court established a two-pronged test to determine the impact of "deficient" representation: (1) that the representation was deficient, meaning that "counsel made errors so serious that counsel wasn't functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[9] and (2) that the representation prejudiced the outcome, which is to say the errors were so serious as to deny the defendant a fair trial and thereby render the outcome unreliable. If these elements are satisfied, the judgment can be vacated and a new trial ordered.[10]

In *People v. Ford*, a case involving an attorney's failure to advise about the possibility of deportation, the New York State Court of Appeals indicated approval of cases declaring the following consequences to be collateral: the loss of the right to vote or travel abroad, loss of a civil service job, loss of the right to possess a firearm and an undesirable discharge from the Armed Services. And, most significant, it also found that deportation of a fully documented legal alien after the entry of a guilty plea and conviction of a crime involving moral turpitude is collateral.[11]

Early in 2010 the U.S. Supreme Court weighed in, finding that in a case involving deportation there was no need to evaluate the consequence as being either direct or collateral. Instead, in *Padilla v. Kentucky*, the Court concluded that because deportation is "uniquely difficult" to classify as either direct or collateral, these standards are "ill-suited" for evaluating a claim that an attorney's advice was deficient, at least for purposes of determining if post-conviction relief is available.[12] In the opinion for the Court, Justice Stevens gave great emphasis to the "presumptively mandatory" nature of the removal statute,[13] "the close connection to the criminal process," and the straightforward, truly clear and certain consequences of a plea leading to the conclusion that Padilla was entitled to a hearing to determine if the advice he had received prejudiced his decision to plead guilty. In addition, the Court indicated that, for purposes of evaluating a claim where "but for" the faulty advice the defendant wouldn't have accepted the plea, a court should take into account the desire of a defendant to look beyond the criminal consequences because of a value judgment by the defendant. In *Padilla* the Court took note of the value a defendant might give to remaining in the United States when weighed against having a criminal record.

In sum, for matters involving a guilty plea, *Padilla* appears to create a first-tier standard for the evaluation of a claim for post-judgment relief based on constitutionally deficient legal advice. Where the consequence is found to be presumptively mandatory and closely connected to the criminal process, it can be said to be "uniquely difficult" to classify it as either *direct* or *collateral*, thereby rendering those standards "ill suited" for the task and *entitling* a defendant to a hearing to determine if deficient advice prejudiced the taking of a guilty plea.[14]

Padilla supersedes the *Ford* ruling that earlier found deportation to be a collateral consequence and in doing so makes clear that the "uniquely difficult" and "ill suited" rules are now incorporated into New York jurisprudence to the extent that the post-judgment procedures of the Criminal Procedure Law are in play. This means that from here on when a court considers a CPL § 440.10(1)(h) motion based on constitutionally deficient representation, it must first look to see if the *Padilla* rules apply and if not, then the court must turn to an analysis based on the direct/collateral standards.

What *Padilla* doesn't resolve is what other circumstances, if any, are likely to be deemed "uniquely difficult" so as to be sufficient to avoid the direct/collateral analysis. For example, does the consequence of a sanction

against a professional license rise to the level requiring a *Padilla* analysis? And if so, why?

Does a Sanction Against a Professional License Trigger the Application of the *Padilla* Rules?

Padilla seems to suggest that the determination concerning deportation involves four elements:

1. The law relative to the consequences must be succinct and clear.
2. There must be a presumption that the consequence is mandatory.
3. The consequences must have a close connection to the criminal process.
4. The defendant must be unable to divorce the consequence from the criminal process because of a value judgment of the defendant.

The hypothetical provided in the beginning of this article describes a successful professional, licensed and regulated by the State of New York. Is it fair to assume that if this individual agrees to plead guilty to a Class A misdemeanor, the state will automatically impose a sanction against the license? And if so, is this enough to invoke a *Padilla* analysis for the purpose of deciding if there is an obligation to warn?

The Office of the Professions at the New York State Education Department licenses and regulates 48 professions.[15] (Attorneys are regulated by the Appellate Divisions and physicians are licensed and regulated by the New York State Department of Health. Teachers are licensed and regulated by the Commissioner of Education in accordance with procedures that differ significantly from those prescribed for the other professions.) Veterinarians are included among the professions licensed and regulated by the Education Department.

Licensed professionals must adhere to the professional standards prescribed by the Board of Regents. Unprofessional conduct is broadly defined by N.Y. Education Law § 6509. Conviction for any act constituting a crime under New York law, federal law or the law of any other jurisdiction and which, if committed within New York would be a crime under New York law, constitutes unprofessional conduct and a professional license "shall be subject" to the penalties provided by Education Law § 6511.[16] A plea of guilty has the same legal status as a conviction based on a finding of guilt by a jury or judge.

Once convicted, the Education Department is notified and a hearing is required before the Regents Review Committee for the singular purpose of determining *what* penalty shall be imposed against the defendant's license. Education Law § 6510 provides that the Regents Review Committee *must* make a recommendation "as to the measure to be imposed." The Board of Regents has the last word because it can accept or reject the recommendation and impose any of the penalties prescribed in Education Law § 6511. But neither the Regents Review Committee nor the Board of Regents has the authority to waive the imposition of a penalty as prescribed by law.

In other words, while imposing a penalty is mandatory, which penalty is to be imposed is generally within the discretion of the Board of Regents.

Courts can upset a determination if it is clear that there was no rational basis for the action under review. When applied to decisions involving punishment or discipline, courts look to see if the penalty imposed is "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness."[17]

Perhaps it's too early for the courts to directly address whether automatic sanctions against a professional license rise to a level requiring that the direct/collateral standards be set aside. The arguments in favor of a *Padilla* analysis leading to the exclusion of the rules in *People v. Ford* seem clear:

- The Education Law is clear and succinct as to the requirement of a sanction.
- The imposition of a sanction against a professional license is mandatory.
- While a court has no control over which penalty will be imposed, the court is required to take judicial notice that upon the acceptance of a guilty plea, some penalty will be imposed by the Board of Regents.
- The imposition of a sanction against a professional license is hard to divorce from the criminal process.
- The imposition of a sanction against a professional license could have severe economic consequences resulting in a willingness of many professionals to accept a criminal record.

What isn't clear is whether the imposition of a mandatory sanction without more is enough to trigger a *Padilla* analysis. It seems we will have to just wait and see.

Is *Padilla* the End of the Line?

If we assume a *Padilla* analysis isn't required, does the inquiry end there or is a *Ford* analysis required? And if a *Ford* analysis is required, is the certainty of *some* sanction against a professional's license a *direct* or *collateral* consequence?

This question was recently considered within the context of whether suspension or revocation of a teaching license is a "severe collateral consequence" within the meaning of the Judicial Diversion Program provided for in CPL Article 216. *People v. Duffy*,[18] the case at issue, was decided in June 2010 by Supreme Court, Nassau County.

Duffy had a New York State teaching license granted by the Education Department. He was charged with drug possession (Penal Law § 220.09, a Class A felony) and an assortment of Vehicle and Traffic Law violations. He moved for admission to the Judicial Diversion Program *without* a guilty plea on the grounds that there would be

a "severe" collateral consequence, i.e., he "would suffer suspension or revocation" of his teacher's license and therefore his job.

In New York, teachers are subject to regulations issued by the Commissioner of Education. Unlike the disciplinary scheme applicable to most other professions, for teachers there is no certainty of punishment for improper conduct. The operative statute[19] provides that, prior to a final determination, a teacher "may" be suspended without pay in situations involving a guilty plea or conviction of the crime of criminal possession or sale of a controlled substance. After a hearing, the hearing officer is not required to but "may" impose one of a series of penalties. Such possible penalties include reprimand, fine, suspension or dismissal.[20] And unlike the disciplinary scheme applicable to other professions, a teacher can immediately seek judicial review pursuant to CPLR Article 78.

While the *Duffy* court acknowledged the *Padilla* decision, consideration of its impact was thought to be unnecessary because *Padilla* appeared limited to matters involving deportation. Instead, the court conducted a *Ford* analysis to determine if the loss of a professional license could be classified as either a direct or "severe" collateral consequence of a plea of guilty.

Noting that the case was one of first impression, the court adopted a modified version of the *Ford* definition of a direct consequence as its definition for the term severe collateral consequence as used in CPL § 216.05(4)(b). The court found that the factors to be considered are "(1) the nexus between the entry of the guilty plea and the consequence and (2) whether the consequence is likely to be presumptively mandatory or likely automatic by operation of law." The court also found no certainty that any penalty would be imposed and therefore the consequence was not a "severe" collateral consequence within the meaning of the statute.[21]

As discussed above, the statute governing the professional includes a mandate that *some* sanction must be imposed against a professional license if a matter involves a plea of guilty. Courts have authority to set aside the imposition of a penalty but not the selection of the appropriate penalty, which is left to the Board of Regents. The *Ford* rules speak to the certainty that some penalty will be imposed, not to which penalty is likely, so it follows that, when using a *Ford* analysis, courts should find sanctions against a professional's license to be a direct consequence requiring that either a court or counsel, or both, advise a defendant considering the entry of a guilty plea.[22]

The *Strickland* Requirements May Be Problematic

Strickland requires a hearing if the petitioner can show (1) deficient representation and (2) prejudice. Establishing "deficient representation" isn't easy. Doing so requires a showing that "in light of all of the circumstances, the identified acts or omissions [are] outside the wide range of professionally competent assistance." In addition, because of the intrinsic difficulties in making such a finding, courts are required to "indulge a strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance."[23] Proving "prejudice" is likely to be a formidable challenge as well. Demonstrating *prejudice* with respect to a decision to plead guilty requires the petitioner to show that there is a reasonable "probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[24] Within the context of a guilty plea this means there is a reasonable probability that, but for counsel's errors, the petitioner wouldn't have pleaded guilty and instead would have insisted on going to trial.[25]

But Is the Failure to Warn Malpractice?

Returning to the hypothetical set forth at the beginning of this article, let's assume your client pleaded guilty to the misdemeanor of Custodial Interference and that you failed to advise your client about sanctions against the professional license. As a result of the plea the license is suspended for a period of time and the client loses a substantial amount of income. Is this client likely to be successful in suing you for malpractice? In New York the answer is, "It depends."

Criminal malpractice, as distinguished from civil malpractice, is a complicated subject, most of which is beyond the scope of this article. For our purposes, the discussion is about the failure to give advice and situations involving a vacated plea.

Given the lines of reasoning reviewed up to now, it might seem reasonable to conclude that the malpractice analysis should turn on whether damages are a direct consequence, indirect consequence or severe collateral consequence of the plea. Instead, the pivotal issue is whether the client can prove *actual innocence* of the crime he or she pled guilty to. Strange as it may seem, an attorney may fail to offer advice but unless and until the client can prove that he or she did not commit any crime at all, a claim for malpractice will not lie.

The Actual Innocence Rule

Criminal malpractice necessarily involves a finding of guilt and an inquiry about how that finding came to pass. Was it the criminality of the defendant or was it the malpractice of the lawyer? In cases involving a plea, until it is established that "but for" the advice of counsel the defendant would have elected to plead not guilty and face trial, the proximate cause for the defendant's difficulty is unquestionably his or her own admitted criminality.

With this in mind, New York embraces the "actual innocence" rule: If a criminal defendant can establish actual innocence, it can be said that this showing eliminates the defendant's conduct as the proximate cause of a conviction. Thus, in order to state a cause of action in

criminal malpractice, in addition to the traditional elements – (1) failure by an attorney to exercise care and skill common to the legal community, (2) proximate cause and (3) "but for" the negligence things would have turned out differently[26] – the plaintiff must allege his or her innocence and that the conviction was vacated or otherwise upset.[27]

Other states require proof of "legal innocence," that is, a plaintiff need not show that he or she didn't commit the crime, only that the conviction was or will in all likelihood be vacated on appeal and that "but for" the lawyer's negligence, the plaintiff wouldn't have been convicted in the first place.[28] To be clear, in an actual innocence jurisdiction, showing that a guilty plea was vacated and that the charges were dropped or dismissed for any reason other than an acquittal the former defendant must now establish that "but for" the negligence of the attorney, the first conviction would never have occurred and must plead and prove facts to establish that he or she didn't commit the crime that was charged.

The actual innocence rule is harsh and it has been the subject of a lot of criticism by some courts[29] and many in the academic community.[30] In a civil case, the rule shifts to the former defendant the burden of proving innocence, which is to say that in such a civil matter the former defendant is presumed guilty until proven innocent. This may seem bizarre because (1) such a presumption isn't allowed under any circumstances in the very forum where the malpractice occurred, and (2) no other tort recognized in New York imposes as an element a burden of this kind. The criticisms notwithstanding, the rule has many supporters who claim that there are any number of claimed "public policy" and practical reasons justifying the rule.[31] But in the final analysis it all comes down to courts having little sympathy for anyone who is convicted of a crime for whatever reason, including an attorney's malpractice.

The Actual Innocence Rule and Pleas of Guilty

Assuming that your client succeeds in obtaining an order vacating the plea, the client will still have to face whatever the prosecutor has to throw at him or her. An order to vacate on the grounds that a constitutional right was denied is not the same thing as an acquittal. As Judge Richard Posner properly explained: "Criminal law entitles a criminal defendant to competent counsel, but the consequence if counsel is incompetent and conviction results is a new trial, not an acquittal."[32]

At this stage the possibilities are very limited. Your client can face a jury. If guilty, there would not appear to be any claim for malpractice because the verdict makes it impossible for the client to show actual innocence. This result is perhaps unfair because the malpractice runs to the need for a § 440 Petition, not the ultimate finding of guilt. This cuts the defendant off from compensatory damages directly attributable to the malpractice, damages the client wouldn't have sustained "but for" the negligence of counsel. While it is true that these costs would appear to be a reasonable measure of actual damages, courts just don't hold a lot of sympathy for a guilty defendant/plaintiff.[33]

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But what would happen if the client is found to be innocent? In this case the actual innocence requirement would be met and the client could now proceed with the malpractice claim, showing that "but for" the negligence of the attorney he or she wouldn't have agreed to the plea in the first instance. But what would the measure of damages be? Most likely the client would be entitled to recover the costs associated with the § 440 Petition as well as lost income for the period between the entry of the plea and the entry of the vacancy order. But what about the client's expenses for the trial and the loss of income while the trial was going on? These items would have been the client's had he or she not pled guilty in the first place, so in all likelihood they wouldn't be recoverable as part of the malpractice claim.

Suppose that the plea resulted in your client having to spend time in prison. Would the client be able to claim damages over and above those previously discussed, i.e., could a jury reasonably find a per diem value for the actual incarceration itself? At least one court has held that the calculation for such damages is "more than perplexing."[34] Further complicating matters, New York limits damages in a legal malpractice action to pecuniary damages, meaning the "economic consequences of the injury, such as medical expenses (and) lost earning."[35] Your client's stay behind bars came to pass by virtue of his or her own actions and all that the order of vacancy established is that those actions weren't voluntary. While it isn't entirely clear, in all likelihood the claim for such damages would not be permitted in New York.

There are three additional possibilities. Faced with having to go to trial your client might assert a technical defense that could lead to the prosecution having to drop charges. An example would be a motion to dismiss based on the statute of limitations. In the alternative, a court might order dismissal on such grounds. And the last possibility is that the prosecution, having been confronted with the order to vacate, might just drop the charges. In all three situations, strange as it may seem, the former defendant would in all likelihood have to bear the burden of having to plead and prove facts sufficient to establish

actual innocence as a condition for the recovery of damages for an alleged malpractice.

Conclusion

Whether it involves deportation or the loss of a professional license or any other matter on the outer limits of one's knowledge, no one reading this article wants to intentionally provide misadvice or omit to give advice that a client might require. As a practical matter all attorneys are required to practice defensively so it's not a surprise that they are often reluctant to say anything more than they believe to be absolutely necessary. When does this tension leave the practitioner on the horns of a dilemma, and what is the best way out? In his concurring opinion in *Padilla*, Justice Alito wisely observed that no lawyer should be expected to know it all, but an ethical lawyer should know enough to be able to let the client know about such limits, in addition to advising the client that it's time for them to seek advice elsewhere:

> By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'"[36] ■

1. *People v. Gravino*, 14 N.Y.3d 546, 554 (2010) (quoting *People v. Ford*, 86 N.Y.2d 397 (1995)).

2. CPL § 216.05(4)(b) creates a third flavor, *a severe collateral consequence*. In a case of first impression, *People v. Duffy*, 28 Misc. 3d 718, 722 (Sup. Ct., Nassau Co. 2010) (Jaeger, J.), the court offers the following definition: "In order to determine whether this defendant will be subject to "severe collateral consequences" as a result of a plea of guilty, the following factors should be considered: (1) the nexus between the entry of the guilty plea and the consequence and (2) whether the consequence is likely to be presumptively mandatory or likely automatic by operation of law (citing *Ford*, 86 N.Y.2d 397; *People v. Patrick*, 24 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co. 2009)). Once the court determines whether the consequence is presumptively mandatory, the Court must consider whether the resulting consequence is more punitive or policy driven and whether the prejudice to the defendant outweighs the public policy considerations." *Duffy*, 28 Misc. 3d at 722.

3. *Ford*, 86 N.Y.2d at 403.

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

5. *Ford*, 86 N.Y.2d at 403.

6. *Compare Gravino*, 14 N.Y.3d 546, *with Ford*, 86 N.Y.2d 397.

7. *See* CPL § 220.50(7).

8. 466 U.S. 668, 687 (1984).

9. *Id.* at 687.

10. The *Strickland* rule has application in situations involving a plea of guilt. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

11. 8 U.S.C. § 1227. In *People v. Becker*, 9 Misc. 3d 720 (Crim. Ct., Queens Co. 2005), a case involving faulty advice about the consequences of the loss of housing, the court found such misadvice met the first-prong test of the *Strickland* rule and ordered a hearing on the merits.

12. *See supra* note 10.

13. 8 U.S.C. § 1227(a)(2)(B)(i).

14. Padilla claimed that he wasn't advised of the certainty of deportation and that his attorney advised that he "did not have to worry about immigration status because he had been in the country so long." *Padilla*, 130 S. Ct. at 1478.

15. Office of the Professions, New York State Education Department, www.op.nysed.gov (last visited Feb. 4, 2011).

16. There are eight penalties to choose from: (1) censure and reprimand, (2) suspension of license, (a) wholly, for a fixed period of time; (b) partially, until the licensee successfully completes a course of retraining in the area to which the suspension applies; (c) wholly, until the licensee successfully completes a course of therapy or treatment prescribed by the regents; (3) revocation of license, (4) annulment of license or registration, (5) limitation on registration or issuance of any further license, (6) a fine not to exceed $10,000, upon each specification of charges of which the respondent is determined to be guilty, (7) a requirement that a licensee pursue a course of education or training, and (8) a requirement that a licensee perform up to 100 hours of public service, in a manner and at a time and place as directed by the board.

17. *Stolz v. Bd. of Regents*, 4 A.D.2d 361 (3d Dep't 1957). In *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 234–35 (1974), the Court noted: "Of course, terminology like 'shocking to one's sense of fairness' reflects a purely subjective response to the situation presented and is hardly satisfactory. Yet its usage has persisted for many years and through many cases. Obviously, such language reflects difficulty in articulating an objective standard. But this is not unusual in the common-law process until, by the impact of sufficient instances, a more analytical and articulated standard evolves. The process must in any event be evolutionary. At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved. Thus, for a single illustrative contrast, habitual lateness or carelessness, resulting in substantial monetary loss, by a lesser employee, will not be as seriously treated as an offense as morally grave as larceny, bribery, sabotage, and the like, although only small sums of money may be involved."

18. 28 Misc. 3d 718, 722 (Sup. Ct., Nassau Co. 2010); *see supra* note 2.

19. Educ. Law § 3020-a.

20. Educ. Law § 3020(4)(a).

21. *Id*.

22. In *People v. Mourad*, 13 A.D.3d 558 (2d Dep't 2004), a case involving misinformation about the consequences of a guilty plea and a dental license, the court, employing a *Strickland* analysis, concluded that the possibility of such misinformation did not support a claim of insufficient assistance of counsel.

23. *Strickland v. Washington*, 466 U.S. 668, 689–90 (1984). *See also People v. McDonald*, 1 N.Y.3d 109 (2003).

24. *Strickland*, 466 U.S. at 694.

25. *Diunov v. U.S.*, 2010 U.S. Dist. LEXIS 59723, 24-25.

26. *Cummings v. Donovan*, 36 A.D.3d 648 (2d Dep't 2007).

27. *Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987); *Claudio v. Heller*, 119 Misc. 2d 432 (Sup. Ct., Queens Co. 1983) (Buschmann, J.).

28. Kevin Bonnardo, *Note, A Defense Bar: The "Proof of Innocence Requirement in Criminal Malpractice Claims*, 5 Ohio St. J. Crim. L. 341 (2007) (citing Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel – Reflections on "Criminal Malpractice,"* 21 U.C.L.A. L. Rev. 1191, n.2 (1974)).

29. *See, e.g.*, *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977).

30. *See* Bonnardo, *supra* note 28; Meredith Duncan, "*Criminal Malpractice: A Lawyer's Holiday*," 37 Ga. L. Rev. 1251 (2003).

31. *See* Duncan *supra* note 30.

32. *Levine v. King*, 123 F. 3d 580, 583 (7th Cir. 1997).

33. *Wilson v. City of N.Y.*, 294 A.D.2d 290 (1st Dep't 2002); *Gibson v. Trant*, 58 S.W.3d 103 (Tenn. 2001).

34. *Wiley v. Cnty. of San Diego*, 19 Cal. 4th 532, 545 (1998).

35. *Wilson*, 294 A.D.2d 290.

36. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1492–93 (2010).