



## **Instructions Regarding Model CPL 440.10 (1) (h) Ineffective Assistance of Counsel Materials:**

**These instructions apply to all sample motions, templates, and other materials for drafting Motion to Vacate Judgment of Conviction on the ground of ineffective assistance of counsel.**

### **I. What Is a CPL 440.10 Motion to Vacate Judgment on the Ground of Ineffective Assistance of Counsel?**

Wrongful convictions are prevalent and involve both factually innocent people and those whose constitutional rights have been violated. In New York, over 320 people have had their convictions vacated and dismissed since 1989, which has collectively resulted in over 3,000 years of life lost to wrongful conviction. At least one quarter of New York’s wrongful conviction exoneration cases involved ineffective assistance of counsel.<sup>1</sup>

CPL 440.10 motions seek post-conviction relief in New York State courts by challenging the legality of the conviction. 440.10 motions generally must be used to present facts outside of the record. If a court grants a 440.10 motion, it will vacate the conviction, and the defendant will usually be placed back into a pre-trial or pre-pleading position with all pre-trial charges reinstated. Subsequently, the defendant may seek dismissal of the charges, may be offered a plea deal from the prosecution, or may proceed to trial. If the court denies a 440.10 motion, the defendant may seek leave to appeal to the intermediate appellate court.<sup>2</sup>

There are potential risks to filing 440.10 motions. As post-conviction counsel, you will need to have a thorough discussion with your client about any risks particular to your client’s case. One potential risk if the motion is granted is a worse criminal resolution, especially if your client pleaded guilty or if your client was convicted after trial but

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<sup>1</sup> See National Registry of Exonerations, available at [National Registry of Exonerations—New York Exonerations](http://www.nationalregistryofexonerations.org).

<sup>2</sup> If you would like more information or a case consultation on seeking leave to appeal after the denial of a 440.10 motion, please contact ILS’s Statewide Appellate Support Center at [SASC@ils.ny.gov](mailto:SASC@ils.ny.gov). Note that there may be an extremely limited amount of time to seek leave to appeal on a 440.10 denial. You can determine the time limit and manner in which the application must be made by researching “the rules of the appellate division of the department in which such intermediate appellate court is located” (CPL 460.15 [2]).

some charges were dismissed for trial purposes and could be reinstated upon a 440-motion grant. Another potential downside may be a delay in obtaining relief caused by filing a 440 motion prior to perfecting the direct appeal.

Furthermore, there may be significant risks to your client if your client is not a United States citizen. For non-US citizen 440 cases, you should seek assistance from an immigration attorney.<sup>3</sup>

440.10 motions may be made at any time after judgment.<sup>4</sup> However, they are not substitutes for direct appeals. Direct appeals are limited to the facts presented in the proceedings below and contained within the record on appeal, while 440 motions will contain information and evidence that is outside of the record.

There is no statute of limitations on filing 440.10 motions. Furthermore, CPL 440.10 was recently modified so that courts may no longer deny 440.10 motions raising ineffective assistance of counsel where: the appeal is not perfected or is pending, and sufficient facts appear in the record to raise the issue; or, the appeal is over, and sufficient facts appeared in the record to raise the issue, but it was not raised (CPL 440.10 [2] [b], [c]).

In most instances, claims of ineffective assistance of counsel (including conflict of interest) must be brought by way of a 440.10 motion. The defendant has the ultimate burden of showing the absence of trial counsel's strategic or legitimate reasons for their decisions or failures in the proceedings below. Thus, in a 440.10 motion, the defendant should include an affirmation from trial counsel with counsel's explanations for trial decisions and strategies or an affirmation from post-conviction counsel relaying any of your own conversations with trial counsel.<sup>5</sup> When ineffective

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<sup>3</sup> These instructions and model materials do not specifically address or assess the risks of filing CPL 440 motions for non-US citizen clients. Attorneys working with non-US citizen clients must determine whether immigration proceedings are pending and how the appeal or 440 motion could impact the client's immigration status. Counsel must investigate and pursue any viable issues relating to immigration consequences and should consult an expert. Regional Immigration Assistance Centers throughout New York State work with defense counsel to fulfill their obligation under *Padilla v. Kentucky*, 599 US 386 [2010] [holding that the Sixth Amendment requires criminal defense counsel to advise non-citizen clients about the immigration consequences that could arise from the decision to plead guilty or go to trial]. More information can be found here: [ILS RIAC General Information \(ny.gov\)](#). In addition, Immigrant Defense Project provides resources on its website to support post-conviction attorneys pursuing *Padilla* post-conviction relief litigation: [IDP Padilla PCR Resources](#).

<sup>4</sup> 440.10 motions are not the same as CPL 330.30 motions to set aside a verdict. 330.30 motions must be made presentence (and thus, prejudgment), and may only be made on limited grounds.

<sup>5</sup> See *People v. McCray*, 187 AD3d 679 [1st Dept 2020] [reversing CPL 440.10 denial and remanding for a hearing because the motion court erred by failing to grant 440.10 hearing where defendant's motion was supported by post-conviction counsel's "affirmation detailing his conversation with trial

assistance is raised on direct appeal, appellate courts often conclude that, without such an explanation from trial counsel, the record is insufficient to support the defendant's burden.

There is no prescribed limit to the number of 440.10 motions that may be made. Significantly though, subsequent 440.10 motions are disfavored by courts unless the defendant has a strong reason for not having included a particular issue in the initial motion. The court may deny a 440.10 motion, including a motion raising ineffective assistance of counsel, where the defendant previously filed a 440.10 motion and could have “raise[d] the ground or issue underlying the present motion but did not do so” (CPL 440.10 [3] [c]; *see also* CPL 440.30 [1] [a]).

Thus, as post-conviction counsel, you may wish to advise your client to hold off on filing any pro se 440 motions prior to your investigation of the case. Furthermore, if you choose to represent your client in a 440 proceeding, you must first conduct a thorough factual investigation, perform appropriate legal research, and include all viable 440 claims in the motion.

440.10 motions may be made under several different grounds. The relevant ground for ineffective assistance of counsel claims is the ground that authorizes vacatur of convictions obtained in violation of either state or federal constitutional rights—CPL 440.10.10 (1) (h). To prevail on a claim of ineffective assistance of counsel, the defendant must establish:<sup>6</sup>

- Under the federal standard—that defense counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that without counsel's errors the result of the proceeding would have been different (*see Strickland v. Washington*, 466 US 668, 686 [1984]; US Const Amends VI; XIV).
- Under the state standard—that defense counsel's performance viewed in totality did not amount to meaningful representation (*see People v. Turner*, 5 NY3d 476, 480 [2005]; NY Const art I, § 6).

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counsel, which raised serious questions about counsel's performance as to several matters,” and post-conviction counsel “averred that trial counsel ultimately refused to submit an affirmation in support of the motion”]; *see also People v. Fernandez*, 185 AD3d 527, 527 [1st Dept 2020] [remanding for a CPL 440.10 hearing under similar circumstances].

<sup>6</sup> For more detail on the legal standards, refer to the Sample CPL 440.10 (1) (h) Ineffective Assistance of Counsel Memorandum of Law.

## II. Why Should Appellate Counsel Investigate and File CPL 440.10 Motions on Ineffective Assistance and Other Grounds?

Assigned appellate attorneys are uniquely situated to explore issues outside of the record after gathering information from the record and from their clients and other sources. New York's post-conviction statute allows defense counsel to bring 440.10 motions to vacate judgments at any time after judgment, including prior to the filing of the direct appeal. Thus, appellate attorneys have the first opportunity to bring viable 440.10 claims, which could ultimately save their clients from years of wrongful incarceration.

Significantly, during the pendency of the appeal, assigned appellate counsel are now authorized by statute to investigate and, if warranted, file 440 motions, and to be compensated for such work (*see* County Law § 722).

There can be significant benefits to clients when assigned appellate counsel file 440.10 motions prior to perfecting direct appeals. Indeed, appellate counsel should undertake reasonable efforts to investigate credible 440 claims, and, if warranted, file motions or attempt to secure other representation for clients to pursue valid claims (*see* NYSBA Standards for Providing Mandated Representation, I-10 [j]).

First, wrongfully convicted individuals suffer profound injustices when they must wait years for relief. Appellate attorneys have the first opportunity to review cases for unjust errors that may involve information outside of the record. By routinely investigating 440 issues prior to the appeal, appellate attorneys provide holistic and competent representation. Second, where 440 motions are denied, appellate attorneys can file applications for leave to appeal to the intermediate appellate courts requesting to consolidate 440 issues with issues on direct appeal. Courts are more likely to grant leave where they can determine the 440 issues along with the direct appeal issues in one proceeding. Third, due to the nature of ineffective assistance of counsel claims, CPL 440 issues often cannot be reassigned to the original trial attorney. Furthermore, finding replacement counsel can be difficult and cause significant delay.

However, if appellate counsel is unable to properly investigate and file a motion on a credible 440 claim, counsel should attempt to secure other representation for the client to pursue the claim and must stay in contact and cooperate with post-conviction counsel.<sup>7</sup>

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<sup>7</sup> Pursuant to County Law § 722, assignment of counsel on a 440 investigation and motion “includes authorization for representation by appellate counsel, or an attorney selected at the request of appellate counsel by the administrator of the plan.”

### III. What Is the Process for Investigating, Drafting, and Filing 440.10 Motions for Ineffective Assistance of Counsel?

#### Investigating an Ineffective Assistance of Counsel Claim

A CPL 440.10 investigation into ineffective assistance of counsel and other grounds should be guided by your client's account of what happened, discussions with witnesses, discussions with trial counsel, and a review of the files from the underlying criminal case. You will need to conduct a thorough investigation of the facts surrounding the conviction that you are seeking to vacate as well as perform independent legal research to support your case-specific claims.<sup>8</sup>

- Gather records. Records include but are not limited to: the court file; the presentence report; the transcripts of the proceedings below; any expert reports; all trial exhibits; and the trial attorney's file. If your client has perfected their appeal or filed prior 440 motions, records also include all appellate briefs, motions, hearing transcripts, and post-hearing briefs.
- Interview your client. You should speak with your client as soon as possible about their experiences with trial counsel. The discussion should include but not be limited to: your client's communications with trial counsel; your client's understanding of trial counsel's defense theory and agreement or disagreement with defense decisions; any investigatory steps your client requested that trial counsel take and whether trial counsel took those steps; and names and contact information of family members, friends, or witnesses who observed trial counsel or any of the alleged errors and could corroborate any facts presented by your client.
- Gather supporting documentation, including witness affidavits. You can strengthen your client's motion by gathering affidavits from witnesses who personally observed trial counsel and/or the proceedings below and can corroborate your client's account. You should interview the witnesses asking specific and relevant questions and draft their statements in affidavit form. You should submit any helpful witness affidavits with the 440 motion.

Depending on the claim, you may also wish to consult with an expert and determine whether an affidavit from an expert could bolster your client's motion. As an illustration, if you are raising the claim that counsel was ineffective for failing to investigate your client's mental health background and

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<sup>8</sup> You should determine during your factual investigation whether there are any other 440 claims that should be included in the 440 motion. Because the court may deny a subsequent 440 motion where the defendant could have "raise[d] the ground or issue underlying the present motion but did not do so" (CPL 440.10 [3] [c]), it is essential to raise all viable 440 claims in the initial motion.

argue that your client was mentally impaired during a custodial interrogation, you may wish to retain an expert to review your client's medical and mental health records and interview and assess your client.

- Contact trial counsel, retrieve trial counsel's file, and attempt to get an affirmation. One of the most important components of a 440 motion claiming ineffective assistance of counsel is the explanation by trial counsel of the decisions made in the proceedings below.

You must try to get an affirmation from trial counsel that explains these decisions. You will need to locate and contact the attorney. A conversation with trial counsel can be conducted in person or over the phone and can sometimes feel difficult or awkward. You should already have a sense of the mistakes you believe counsel made but should be open to revising your theory based on counsel's recollections of the case. In general, you should ask case-specific questions and avoid using a judgmental tone. If counsel does not recall specific instances, it may be helpful to ask about counsel's general practices during the relevant period.

If counsel is not willing to provide a signed affirmation, you must document your conversations with counsel and relay any helpful statements in your 440 Affirmation in Support of Motion in the section discussing the claims being raised in the motion. *See* Sample 440 Affirmation in Support of Motion to Vacate the Judgment. You should explain in the 440 affirmation that trial counsel refused to submit an affirmation in support of the motion. Similarly, if you are unable to locate or speak with trial counsel, you must document all the efforts that you made to attempt to do so in the affirmation.

It is essential to obtain a copy of trial counsel's file. You may need to remind trial counsel that the file belongs to the client, and counsel has an ethical and legal obligation to provide it promptly upon request.<sup>9</sup> Furthermore, trial counsel has an ethical duty to cooperate with post-conviction investigations into trial and plea proceedings, as well as a continuing duty of loyalty that extends into the post-conviction phase, even where an ineffective assistance of counsel claim is being made.<sup>10</sup>

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<sup>9</sup> *Sage Realty v Proskauer*, 91 NY2d 30 [1997] [affirming general right of client to the contents of the attorney's file upon termination of the attorney-client relationship]; NYSBA, Comm on Prof'l Ethics, Opn 766 [2003]; NYSBA Rules of Prof'l Conduct, Opn 970 [2012]; NYRPC 1.15 [c] [4], 1.16 [e].

<sup>10</sup> NYRPC 1.6, 1.9, 1.16; ABA Standards for Criminal Justice: The Defense Function, Standard 4-1.3.

## Drafting and Filing the Ineffective Assistance of Counsel 440.10 Motion

The 440.10 motion should contain the following documents,<sup>11</sup> which are provided as part of the set of Model CPL 440.10 (1) (h) Ineffective Assistance of Counsel Materials:

- Notice of Motion to Vacate Judgment
  - The notice of motion tells the court and the prosecution the relief sought, the return date, and the time for service of answering papers.
  - PRACTICE TIP: CPLR 2214 (b) governs how much time before the court date the prosecution’s papers must be given to the defense. The amount of time that the prosecution has to answer the defense papers depends on the return date that is chosen. If you want to have more time to review and reply to the prosecution’s response papers, you should give “CPLR 2214 (b) notice” and choose a court date that is further away. *See* Sample 440 Notice of Motion.
- Affirmation in Support of Motion to Vacate Judgment
  - A sample post-conviction counsel affirmation is included in the Sample 440 Affirmation in Support of Motion to Vacate Judgment.
  - Note that your affirmation will likely be longer and more complicated than the sample affirmation. However, while still including all relevant facts, it is important to keep the affirmation well-organized and as concise as possible.
- Memorandum of Law
  - A statement of law on the federal and state standards for ineffective assistance of counsel is included in the Sample and the Template 440 Memorandum of Law.<sup>12</sup>
  - You should first cite to authority that is binding in your jurisdiction. Begin with NY Court of Appeals precedent and then the appropriate intermediate appellate precedent. You may also wish to cite to case law from other jurisdictions as persuasive authority.
  - PRACTICE TIP: Habeas Assistance and Training offers a remarkable resource for practitioners researching ineffective assistance of counsel claims called [“Summaries of Published Successful Ineffective Assistance of Counsel Claims Post-Wiggins v. Smith,”](#) which is organized by topic and includes summaries of federal, New York, and other state case law.
- Affirmation in Support of Motion from prior counsel
- Affidavits from witnesses (if relevant and helpful)

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<sup>11</sup> An affirmation of service should accompany all filings.

<sup>12</sup> Center for Appellate Litigation’s Appellate Impact Litigation Series #1, “Attacking the Unconstitutional ‘Meaningful Representation’ Standard,” October 2022, by Matthew Bova offers deeper insight into the incongruities between the federal and state ineffective assistance of counsel standards (see [CAL Appellate Impact Litigation Series](#)).

- Affidavits from experts (if relevant and helpful)
- Any other relevant and helpful supporting documents

Prior to filing your 440.10 motion, you may consider approaching the county's District Attorney's Office, especially if the DA's Office has a Conviction Integrity Unit with a good reputation for overturning wrongful convictions. You may wish to present to the DA's Office your client's legal issues in letter format as well as a mitigation packet if your client's case presents strong equities. If the DA agrees with your arguments, the DA can join your motion to the court to vacate your client's conviction and either agree to dismiss the charges or offer a repleader.

The motion must be filed in the court where the judgment was entered. Once the motion is filed, it will generally be assigned to the judge who presided over the proceedings below, unless that judge is no longer on the bench.

### Litigating the 440.10 Motion after Filing

Once the court has received all papers, the court will decide the motion. The court must grant the motion without conducting a hearing if the motion alleges a valid legal basis and establishes sufficient facts that are supported by sworn allegations that the prosecution either concedes to be true or that are conclusively substantiated by unquestionable documentary proof (CPL 440.30 [3]). Although winning a 440 motion on the papers is rare, it is generally advisable to craft your legal argument to attempt to attain this outcome.

The court may deny the motion without a hearing if the facts and allegations are not supported by sworn statements (affidavits and affirmations) or other evidence or if an essential fact is shown to be false (CPL 440.30 [4]).

Finally, the court may order an evidentiary hearing to develop and resolve any factual disputes. At the hearing, the defendant, who has a right to be present, has the burden of proving by a preponderance of the evidence every fact essential to support the motion (CPL 440.30 [5]-[6]). After a 440 hearing, the court must set forth on the record findings of fact, conclusions of law, and the reasons for its determination (CPL 440.30 [7]).

If the 440 motion is denied, you must seek permission to appeal from such denial<sup>13</sup> and, if leave is granted, represent the client on appeal. You should also continue to represent your client where the 440 motion is successful and the prosecutor appeals.

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<sup>13</sup> "An application for such a certificate must be made in a manner determined by the rules of the appellate division of the department in which such intermediate appellate court is located" (CPL 460.15 [2]).