

Introduction

A BRIEF HISTORY OF THE PROFESSIONAL CODES¹

Until the early Twentieth Century, there was no coherent body of ethics law governing the relationship between attorney and client. Prior to that time, the question of disciplinary action was left to the local courts. In 1887, however, the State of Alabama adopted the first legal code of ethics. Interestingly, however, the code languished for some twelve years before it was officially published.

The American Bar Association (hereafter "ABA") took its first public stance on ethics when it adopted its Canons of Ethics in 1908. Though largely based on the Alabama Code of Ethics, by the latter half of the Twentieth Century, the Canons were universally viewed as unhelpful because of their lack of specificity.

As a result, in 1969, the ABA adopted a new ethical code, known as the ABA Model Code of Professional Responsibility (the "CPR" or "Model Code"). This code was so successful that it was eventually adopted, at least in part, by every jurisdiction in the United States. The CPR is divided up into various sections, including a Preamble, a Preliminary Statement, the Canons, Ethical Considerations, Disciplinary Rules, and Definitions. The Ethical Considerations are intended to provide guidance to lawyers and represent the ideals

¹ Information on this topic is based on a discussion in Professional Responsibility of the Criminal Lawyer (Second Ed. 1996 & 2005 Supp.), authored by John Wesley Hall, Jr.

toward which every attorney should strive. A violation of the Disciplinary Rules, however, constitutes misconduct for which a lawyer is subject to disciplinary proceedings.

The ABA Model Rules of Professional Conduct (“the Model Rules” or “RPC”) was first adopted in 1983 and has been amended several times since, most recently in 2002. These recent revisions were first adopted in 2000 by the “Ethics 2000 Commission.” The Model Rules have not enjoyed the same success as the Model Code, which was adopted almost verbatim in all the states and is still retained in several jurisdictions. However, the Model Rules have been adopted in about three-quarters of the states, although with varying degrees of modifications. While some of the rules are intended to provide guidance, violation of most of the rules would result in professional discipline. This code can be found at www.abanet.org/cpr/e2k-report_home.html.

Criminal lawyers under the aegis of the ABA developed their own code of conduct in 1971. The ABA Standards for Criminal Justice adopt or closely follow the RPC and CPR, but are intended to provide guidance and are not considered enforceable.

Dissatisfied with the ABA codes, the American Trial Lawyer’s Association presented the American Lawyer’s Code of Conduct (the “ALCC”) as an alternative in 1982. Written by trial lawyers for trial lawyers, it differs in important respects from the ABA codes in its interpretation of the rules governing client confidentiality and zealous advocacy on behalf of the client.

Another recent ethical code is the Restatement of the Law Governing Lawyers, first published by the American Law Institute in 2000. The Restatement is now being cited regularly by the courts and in law review articles.

In addition, all fifty states have adopted their own codes, most taking their lead from the ABA's CPR and RPC. These codes can all be found at www.abanet.org/cpr/links/html.

California's lawyers are heavily regulated by statute, most of which are found in the Business & Professions and Evidence Codes. (See, e.g., Bus. & Prof. Code, § 6068, outlining the duties of an attorney; Evid. Code, § 952, defining confidential communication between a client and lawyer.) In addition, as far back as 1927, the California Legislature authorized the Board of Governors of the State Bar to draw up rules of professional conduct with the approval of the California Supreme Court. The current version of the statute, enacted in 1939, authorizes the Board of Governors, with the approval of the state's high court, to "formulate and enforce rules of professional conduct."

**OPPOSING FORCES IN THE ADVERSARY SYSTEM:
BALANCING THE DUTY OF CANDOR TO THE TRIBUNAL
WITH THE DUTY TO ZEALOUSLY REPRESENT YOUR CLIENT
AND TO REFRAIN FROM ARGUING AGAINST
YOUR CLIENT'S POSITION**

"It is the essence of our adversary system that each litigant have the assistance of a lawyer who is prepared, if it be appropriate, to defy hell on his or her client's behalf. [¶] [¶] A lawyer is and must be the ultimate advocate. He speaks for and in the interest of his client.

He seizes every fair advantage available to his client. And when his client is on the ropes, his lawyer, standing alone if need be, is that one person who, in the interest of his client, skillfully defies the state, the opposing litigant, or whoever threatens. The lawyer is prepared to stand against the forces of hell though others see that as his client's just dessert. He assures all adversaries, in the vernacular of the streets, 'You may get my client but you've got to come through me first.' ¶¶ If the lawyer is to perform these vital functions, he must be unfettered, . . . even when he skates close to the edge.”

(Thornton v. Breland (1983) 441 So.2d 1348, 1350-1351.)

It may surprise many to know that these are the words of the Supreme Court of Mississippi, affirming a lower court's denial of a writ of prohibition which sought to remove a lawyer from a case on the eve of trial. The requested removal was based on the premise of the lawyer's anticipated violation of the state's Disciplinary Rules should he represent the client at trial.

One wonders if a California court would have demonstrated such a lofty and astute understanding of the role of the zealous advocate. As explained more fully below, the duty to zealously represent a client has been somewhat eroded in recent years. Thus, it is all the more important that as criminal defense lawyers, we balance the conflicting ethical obligations which sometimes arise as a result of the conflict between a lawyer's responsibilities to clients and to the legal system. As the Preamble to the Model Rules of Professional Conduct observes, “[s]uch issues must be resolved “through the exercise of

sensitive professional and moral judgment guided by the basic principles” underlying the various ethical codes.

FACTUAL SCENARIO

An individual who is committed to a state hospital under Penal Code section 1368 is not entitled to conduct and participation credits for the period of his hospital confinement.

Your client was declared incompetent to stand trial and committed to the state mental hospital for six months before competency was restored. At time of sentencing, the trial court failed to award all of the actual custody credits to which your client is entitled. On the other hand, the court erroneously gave your client conduct credits for the entire period of pre-sentence custody, including the period of state hospital confinement.

You intend to send the court a letter requesting recalculation of the actual custody credits. You owe the court a duty of candor. All the ethical codes state that you owe a duty of candor to the tribunal and prohibit a member from misleading the court with a false statement of law or fact. Of course, as appellate counsel, you also have a duty to refrain from arguing against your own client. You are also obligated to zealously defend your client’s interests.

With these ethical obligations in mind, what do you say in your letter to the sentencing court? Do you simply confine your remarks to the actual custody credit award and ignore the error in conduct credits? Or do you inform the court of the correct amount

of actual and conduct credits to which your client is entitled?

The Relevant Rules

All of the ethical codes impose a duty of candor to the tribunal. For example, pursuant to section 6068, subdivision (d) of the California Business & Professions Code, it is the duty of an attorney “[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek or mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

Rule 5-200 of the California State Bar’s Rules of Professional Conduct states that “[i]n presenting a matter to a tribunal, a member: ¶ (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth; ¶ [and] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.”

Similarly, the American Bar Association Model Rules of Professional Conduct, rule 3.3, provides that “[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; [or] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; . . .”

Standard 4-1.1(d) of the ABA’s Standards for Criminal Justice states that “[i]t is

unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court.” (1986 ed.)

On the other hand, it has generally been recognized that a lawyer has an ethical duty to zealously advocate on behalf of his or her client. Interestingly, however, the earlier ethics codes appear to place a greater emphasis on this duty. Moreover, commentators in recent years have begun to question the continuing viability of the adversarial system outlined by Professor Monroe H. Freeman’s 1966 law review article, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *Michigan Law Review* 1469.²

Canon 15 of the 1908 Canons, for example, framed the rule in very persuasive and “zealous”, if you will, terms. Canon 15 provided that the “lawyer owes ‘entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,’ to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.”

Not surprisingly, the 1992 the Preamble to the American Lawyer’s Code of Conduct,

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See, e.g., John S. Dzienkowski, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics: Lawyering in a Hybrid Adversary System* (1996) 38 *Wm and Mary L. Rev.* 45; Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice* (2002) 70 *Tenn. L. Rev.* 63.

written by trial lawyers, continues to adopt the zealous advocacy rule in the most partisan and definitive terms, stating: “It is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.”

Canon 7 of the ABA’s 1969 Model Code, also continued the zealous advocacy rule. It did so in simple, but eloquent language: “A lawyer should represent a client zealously within the bounds of the law.” (Capitalizations omitted.) The Model Code also formulated a rule against doing harm to one’s client. Disciplinary Rule 7-101(A)(3) states that a lawyer shall not intentionally “prejudice or damage his client during the course of the professional relationship” Ethical Considerations 7-9 provides that a lawyer “should always act in a manner consistent with the best interests of his client.” Interestingly, the Model Rules have no comparable provisions.

In addition, the Model Rules, as adopted in 1983, removed the duty of zealous representation from its national ethics code. As a result, some commentators have taken the position that the Model Rules have “reaffirmed explicitly a duty upon lawyer-advocates that overrides client interests when a client commits a fraud on the tribunal.”³ Under the current version of the Model Rules, the duty of zealous advocacy is relegated to the various

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Lawyering in a Hybrid Adversary System, supra; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, (2000) 28 Hofstra L. Rev. 925.

references in the Preamble and a comment to the rule requiring the lawyer to act with diligence. As noted above, this has clearly been seen by commentators as diluting the force of the zealous advocacy rule.⁴ The Preamble provides, inter alia, that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” The Preamble further states: that a lawyer should “zealously . . . protect and pursue a client’s legitimate interests, within the bounds of the law” A comment to Rule 1.3, which discusses the lawyer’s obligation to act with diligence, although with some reservations: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for the client. . . .”

Standard 4-1.1(b) of the 1986 edition of the ABA’s Standards for Criminal Justice, provides that a lawyer for the accused “is to serve as the accused’s counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to the law.”

Although California requires that an attorney act competently, as do other ethical canons, surprisingly, neither the California statutes governing ethical conduct nor the State

⁴ *Professional Responsibility of the Criminal Lawyer, supra*, § 9:3, pp. 282-283; *Lawyering in a Hybrid Adversary System, supra*.

Bar Rules of Professional Conduct impose a duty of zealous advocacy. Division Three of the Second Appellate District cited the rule in *People v. Cropper* (1979) 89 Cal.App.3d 716, 720, a case relying upon the old Model Code. However, it appears that no majority opinion of the California Supreme Court has explicitly adopted the zealous advocacy rule. Rather, the rule has been relegated to dissenting opinions in *People v. Wade* (1988) 44 Cal.3d 975, 1000-1001 [dis. opn. of Broussard, J.] and *People v. Perez* (1979) 24 Cal.3d 133, 148 (dis. opn. of Mosk, J.). In both of these cases, however, the dissenting justices find that zealous advocacy is, in fact, a component of constitutionally effective representation. (*Ibid.*)

California and federal courts agree, however, that it is not only unethical for an attorney to argue against his own client, but is also a violation of the client's right to competent representation under the Sixth Amendment. (See, e.g, *People v. Feggans* (1967) 67 Cal.2d 444, 447 [it is a Sixth Amendment violation for appellate counsel to argue the case against his client]; accord *People v. Lang* (1974) 11 Cal.3d 134, 139; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *Anders v. California* (1967) 386 U.S. 738, 744-745 [Sixth Amendment right to counsel requires that appellate attorney support his client's appeal to the best of his ability; counsel is required to act as an active advocate and refrain from arguing against his client]; *Evitts v. Lucey* (1985) 469 U.S. 387, 394 [appellate counsel "must play the role of an active advocate, rather than a mere friend of the court. . . ."])

Discussion

Returning to the hypothetical credits question, how should appellate counsel balance

these competing ethical duties? How does counsel ensure that his or her client receives the credit to which he is entitled but at the same time avoid arguing against one's own client or misleading the tribunal? Are you misleading the court if your written request for credits includes the erroneous conduct credits as part of the total credits to which your client is entitled? If you ignore the conduct credits in your calculations, could you be alerting the court that there is an issue about these credits? What cases should you cite in support of your credits request? For example, suppose you find several cases to support your claim that the defendant is entitled to actual credits for the period of his commitment, but these cases also discuss the fact that a defendant is not entitled to conduct credits? Will you be tipping off the court to the conduct credit problem if you cite these cases? Are you arguing against your client's position if you include citations to these authorities? Suppose you find older cases discussing only the question of actual credits? If you cite only these older cases, are you violating your duty of candor to the tribunal? What happens if, unlikely as it may seem, the trial court actually reads these older cases, researches the issue on its own, and finds out that you have omitted the most recent case law? Could you be accused intentionally misleading the tribunal?

On the other hand, suppose you candidly tell the court in your written motion that it erroneously imposed conduct credits? Would this be arguing against the position of your client and violating your duty of zealous advocacy, assuming that such a duty still exists in California? Finally, what if the court calendars a hearing on the motion? What if you

appear in court and opposing counsel concedes that your client is entitled to all of the credits -- the actual credits you have requested plus the conduct credits to which the client is not entitled? Do you have a duty to speak up? Are you misleading the court by remaining silent or submitting the issue? What if the court directly asks you about the conduct credits? What should your response be then?

Obviously, while the ethical codes provide general guidelines, more difficulties arise when lawyers are faced with specific problems for which none of the rules provide an answer. Like many specific scenarios that can arise, the hypothetical question at issue falls into that same gray category: the ethical rules provide guidelines, but clear-cut answers are not so easily discerned.

Nevertheless, here are some tentative answers, intended as suggestions and not necessarily as authoritative or definitive conclusions. Does one mislead the court by including the erroneous conduct credits as part of the total credits due? I would conclude that this crosses the line and would qualify as misleading the tribunal. Since counsel is aware that the defendant is not entitled to the total conduct credits awarded, it would be misleading to include such credits in one's calculations. In this situation, inclusion of the conduct credits in the total calculation would not be consistent with the duty to employ "such means only as are consistent with the truth." (Rules of Professional Conduct of the State Bar of California, rule 5-200(A); Bus. & Prof. Code, § 6068, subd. (d).) It would also violate the prohibition against misleading the court through an artifice or false statement of fact or

law. (Rules of Professional Conduct of the State Bar of California, rule 5-200(B); Bus. & Prof. Code, § 6068, subd. (d).)

What cases should be cited in the written request? On the one hand, avoiding case law which discusses the total picture – actual and conduct credits - while not an explicit misstatement of the law, could be viewed as misleading. Citing older cases which addressed only the question of actual credits could also be viewed as misleading. In both situations, one is making a conscious decision to avoid the most recent -- and adverse -- case law in the hope that the court will not become aware of the conduct credit problem. As noted by John Wesley Hall's treatise, *Professional Responsibility of the Criminal Lawyer, supra*, "[t]he test in every case should be . . . [m]ight the judge consider himself misled?"⁵ In one case, a court found an attorney committed misconduct by failing to disclose authority in the controlling jurisdiction which was known by the lawyer to be directly adverse to the position of the client and which was not disclosed by opposing counsel. (See, e.g., *In re Greenberg* (1954) 15 N.J. 132, 104 A.2d 46, citing ABA Op 280 (1949).) Thus, it appears that avoiding the controlling case law in this situation would cross the ethical line and qualify as an attempt to mislead the tribunal.

What about candidly informing the court that your client is not entitled to some of the conduct credits he has received? In my opinion, coughing up this information at the outset would violate both the rules which prohibit arguing against your own client as well as the

⁵ Citing ABA Op 280 (1949)

rule requiring zealous advocacy. In a formal ethics opinion in 1990, the National Association of Criminal Defense Lawyers found that a criminal defense lawyer has no duty to advise the court that it has committed plain error in favor of the defendant. (NACDL Op 90-4 (Dec. 1990).) Thus, in the current hypothetical, as long as the lawyer does nothing to mislead the court when the initial request for additional credits is made, he or she would not be required to inform the court of the credits error in the client's favor. For example, a letter to the court which simply requests recalculation of the **actual** credits, without referencing the conduct credits at all, would maintain the balance between candor to the court and the duties the lawyer owes to the client.

The answer changes, however, if the lawyer finds himself or herself inside a courtroom with the judge making a direct inquiry on the client's entitlement to the conduct credits. It seems quite clear that in this situation, the lawyer would be obligated to advise the court that the client is not entitled to conduct credits for the period of the client's commitment.

But what obligation does counsel have where at a hearing on the motion, the district attorney concedes the issue and informs the court your client is entitled not only to the actual credits, but also to the conduct credits for the period of his commitment? It is misleading for the lawyer to merely submit the issue without argument or comment? This scenario is somewhat murky. On the one hand, counsel does not have the duty of informing the court that it is committing error. On the other hand, counsel has the duty to alert the court to

adverse authority. Erring on the side of the duty of zealous advocacy, my inclination would be to conclude that as long as the court does not ask a direct question, and as long as counsel does not make any misleading statement or argument, silence in this situation is golden. Submit the matter without argument and hope that you have made the right ethical decision. Sometimes that is the best we can do.

COMPETING ETHICAL QUESTIONS: THE FRIVOLOUS OR NEAR-FRIVOLOUS ISSUE, ZEALOUS ADVOCACY, AND THE DUTY TO PROTECT YOUR CLIENT'S INTERESTS

If there's one thing we all have in common as appellate lawyers, it is the frustrating experience of running into the frivolous or near-frivolous issue. What do we do, however, when a persistent client threatens to take action harmful to his own cause if we refuse to raise such an issue?

FACTUAL SCENARIO #1

A. Your client has appealed a jury trial conviction resulting in a Three Strikes sentence of twenty-five years-to-life. The client is very involved in the appeal. He writes constantly and has very definite ideas about the issues he wants you to raise.

You have found several meritorious issues, some of which carry a sound basis for reversal of the judgment. However, your client is insisting that you raise two other issues you know to be completely frivolous. The client is threatening to do something contrary to his interests if you do not raise these issues.

You have a duty to refrain from arguing issues that are frivolous. You also have a duty to adequately protect your client's interests. What do you do?

FACTUAL SCENARIO #2

B. Take the same facts presented in 2-A above. In this case, however, the issues your client wants you to raise are not frivolous. However, they are weak and carry no

realistic chance of success. Since you have strong issues to raise, you believe that adding these weak issues will lessen your credibility with the court and weaken your chance of prevailing on the meritorious issues you have found. What do you do?

THE RELEVANT RULES⁶

“Frivolous” and “arguable” issues have been given various definitions through the years. In *People v. Johnson* (1981) 123 Cal.App.3d 106, 109, Justice Gardner defined an arguable issue as follows:

[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel’s professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment.

Taking a somewhat different turn, *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650, held that an issue is frivolous when it is “totally and completely devoid of merit..” In *People v. Craig* (1991) 234 Cal.App.3d 1066, 1068, the court defined a frivolous issue as one which is “unarguably not arguable.”

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The materials in this portion of the discussion are based in significant part on materials originally prepared by SDAP Executive Director Michael Kresser and Assistant Executive Director Dallas Sacher.

Case law and the ethics codes universally hold that an attorney has an ethical obligation to refrain from asserting a frivolous claim. Disciplinary Rule 7-102(A)(2) of the Model Code provides: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Rule 3.1 of the Model Rules reaffirms this position by restating the Model Code Disciplinary Rule verbatim. California law is in accord. Section 6068, subdivision (c) of the Business & Professions Code includes a duty to “maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.” California case law also holds that attorneys have an ethical obligation to refrain from arguing frivolous issues. (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 647.)

As noted by the Supreme Court in *Flaherty*, however, “[c]ounsel face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims. ‘[An] attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.’ [Citation.]” (*Ibid.*)

In recognition of this conflict, the *Flaherty* decision acknowledged that "[i]f the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court.' [Citation.]" (31 Cal.3d at p. 647.) The United States Supreme Court has also held that an attorney "must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client." (*McCoy v. Court of Appeals* (1988) 486 U.S. 429, 444.) Moreover, as noted in the previous section, appointed counsel must be "an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claims." (*Evitts v. Lucey, supra*, 469 U.S. 387, 394.)

DISCUSSION

What impact should a client's wishes have on counsel's obligation to make the best tactical decision about which issue or issues to brief? In every case, appellate counsel should solicit his client's opinion as to the nature of the issues to be raised on appeal. In so doing, counsel should proceed with an open mind and should engage in a meaningful dialogue with his client. However, following the period of consultation, it is counsel, not the client, who must make the ultimate decision as to which issues will be raised.

In this regard, it is first necessary to establish that there is a distinction between the constitutional role of counsel and his ethical role. Pursuant to *Jones v. Barnes* (1983) 463 U.S. 745, 746, it is settled that appellate counsel does not have a "constitutional duty to raise every nonfrivolous issue requested by the defendant." As indicated by the *Jones* decision,

the ABA's position on this question is not particularly clear. (*Id.* at p. 753, fn. 6.) The ABA Standards for Criminal Appeals seems to suggest that counsel should acquiesce to a client's insistence that a particular issue be raised on appeal. (ABA Standards for Criminal Justice 21-3.2, p. 21.42 (2d ed. 1980).) However, the ABA Defense Function Standards provide that with certain exceptions (such as the plea to be entered, whether to waive jury trial, and whether the client will testify) "strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client." (*Jones, supra*, at p. 753, fn. 6, citing the ABA Defense Function Standards, Standard 4-5.2.) Whatever the position of the ABA in this regard, as the *Jones* court noted, "the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." (*Jones, supra*, at p. 753, fn. 6.) Moreover, the ABA position, if it indeed does require counsel to accede to the client's choice of issues, does not withstand scrutiny under California law.

While the law is not crystal clear in terms of the resolution of these issues, it is the case that in California, counsel has the authority to make all of the tactical decisions in a case except for those "fundamental" choices which only the defendant can make. (*People v. Frierson* (1985) 39 Cal.3d 803, 813.) Importantly, with the exception of capital cases, counsel has the power to choose those defenses which will be raised at trial. (*Ibid.*) By analogy, the identical rule should apply to the issues to be raised on appeal.

Appellate issues must be carefully crafted to fit the facts of the case. Moreover, the experienced appellate attorney (like the veteran trial lawyer) is in a much better position to make a determination as to the likelihood that a particular claim will prevail. Given this indisputable truth, appellate counsel must have the freedom to determine the nature of the issues to be raised on appeal.

There is one strong voice in opposition to this view. According to Justice Brennan, it is counsel's role "to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." (*Jones v. Barnes, supra*, 463 U.S. 745, 763 (dis. opn. of Brennan, J.)) Thus, in the interests of ensuring a trusting relationship between attorney and client, it was Justice Brennan's opinion that the attorney should defer to the client's decision as to the issues to be raised. (*Id.* at pp. 761-762.)

I think we all would agree that counsel has a duty to treat his client and his opinions with great respect. At the same time, however, counsel's highest duty is to zealously strive for the best possible result for the client. Thus, it is unethical for counsel to act as a mere "mouthpiece for the client, . . ." (ABA Standards for Criminal Justice (2d ed. 1986 Supplement) Comment to Standard 4-1.1, p. 4-9.) Indeed, counsel best represents his client by relying on his own trained professional judgment.

"The lawyer's value to each client stems in large part from the lawyer's independent stance, as a professional representative rather than as an ordinary agent. What the lawyer can accomplish for any one client depends heavily on his or her reputation for professional

integrity. Court and opposing counsel will treat the lawyer with the respect that facilitates furthering the client's interests only if the lawyer maintains proper professional detachment and conduct in accord with accepted professional standards." (ABA Standards for Criminal Justice (2d ed. 1986 Supp.) Comment to Standard 4-1.1, p. 4-9.)

Returning to the first factual scenario discussed above, I would suggest that appellate counsel do whatever he or she can to establish a relationship of trust with the client so that the client can be convinced that it is not in his or her best interest to argue a frivolous issue on appeal. If such a relationship can be established, perhaps the client can be convinced that the inclusion of frivolous issues could jeopardize the meritorious claims which could result in a reversal. Write the client, arrange confidential phone calls, and if all else fails, contact the staff attorney at the appellate project to see if a personal visit can be authorized. Sometimes a face-to-face meeting with the client will convince him or her that the attorney is truly the client's ally. In this manner, the attorney may be able to resolve the ethical dilemmas posed by the first hypothetical.

Factual Scenario #2 poses a somewhat different situation since the issues the client wants raised are not wholly frivolous, but merely weak with no real chance of success. In such a situation, the risk of losing credibility with the court is not as strong. Thus, in such a situation, I would suggest that any nonfrivolous issue requested by the client be briefed. However, I also offer the following caveat. If it is counsel's professional judgment that addition of the issues would hurt the client's interest by undercutting a stronger argument,

or inordinately lengthening the opening brief, which itself could impact on counsel's credibility with the court, then I would switch back to the solution offered in scenario #1. Reach out to the client and try to convince him or her of your sincerity and your desire to zealously represent his or her interests. Hopefully, this approach will resolve the ethical conflict in a manner which most benefits the client.

THE ETHICS OF RAISING AN APPELLATE ISSUE WHICH WOULD BE MERITLESS IF THE RECORD ON APPEAL WERE COMPLETE.

One of the primary rules of appellate practice is that the reviewing court may not consider matters outside the record on appeal. (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397.) Thus, in the ordinary case, appellate counsel need not be concerned about matters which do not appear in the record. However, upon occasion, a situation will arise which creates ethical questions. In order to investigate this problem, the following hypothetical will be useful.

At trial, the defendant is charged with rape. In her testimony, the victim testifies that she did not consent to intercourse. At the same time, the victim testifies that she did not consent to intercourse. At the same time, the victim admits that she engaged in consensual kissing with the defendant, gave him a lengthy back rub in her bedroom, and did not unequivocally say she did not consent. Consistent with this evidence, the defendant testifies that he believed that the victim wished to have sexual intercourse with him.

As is readily apparent, the foregoing facts constitute substantial evidence in support of a *Mayberry* defense (i.e. the defendant reasonably believed that consent had been given). (*People v. Williams* (1992) 4 Cal.4th 354, 360-362; *People v. May* (1989) 213 Cal.App.3d 118, 127.) Nonetheless, the record reveals that the court did not instruct on the defense. Insofar as an instruction on the defense must be given by the court sua sponte (*May, supra*, 213 Cal.App.3d at p. 124), appellate counsel is in the admirable position of having a strong issue to raise.

Nonetheless, prior to briefing the issue, appellate counsel contacts trial counsel in order to discuss the case. During their conversation, appellate counsel notes that he will be raising the *Williams* issue. In consternation, trial counsel advises appellate counsel that he specifically told the judge during the instructional conference that he did not want a *Williams* instruction for the tactical reason that he wanted to rely solely on the defense of actual consent. Apparently, the parties neglected to place the instructional conference on the record.

Given this scenario, counsel is faced with a difficult problem. On the face of the record, a meritorious legal issue is available. However, had the instructional conference been made part of the record, the issue would vanish. (See *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; defense counsel is entitled to make the reasonable tactical choice that certain instructions not be given.) In light of these circumstances, the question is whether counsel may ethically brief the *Williams* issue.

In my view, the answer to this question turns on an analysis of whether it is “consistent with truth” to raise an appellate issue which would be meritless if the record on appeal was complete. (Business and Professions Code section 6068, subd. (d).) In this regard, it is essential to note that the concealment of material facts is ethically proscribed. (*Davidson v. State Bar, supra*, 17 Cal.3d 570, 574.)

Raising the issue might be viewed as akin to the presentation of evidence known to be false. The presentation of false evidence is strictly proscribed (*Nix v. Whiteside* (1986) 475 U.S. 157, 167-169; Rules of Professional Conduct of the State Bar of California, rule 5-200(A); counsel shall employ “such means only as are consistent with truth.”)

On the other hand, I would also note that the resolution of the issue is not starkly clear. In this regard, the following counterargument might be considered.

As is noted above, the appellate court and counsel are limited to the record on appeal. (*Merriam, supra*, 66 Cal.2d at pp. 396-397.) In addition, with respect to instructions which must be given by the court sua sponte, the defendant cannot be said to have waived the claim unless the record affirmatively shows “that counsel made a conscious, deliberate tactical choice between having the instruction and not having it.” (*Cooper, supra*, 53 Cal.3d at p. 831.)

Viewed from this perspective, it might be argued that counsel is entitled to raise the *Williams* issue since the record on appeal does not preclude the claim. In this regard, counsel

might defend his actions based on the analogy that a trial attorney has no duty to advise the government about an inculpatory witness who is known only to the defense.