ETHICAL DUTIES OF APPELLATE COUNSEL TOWARD CLIENTS

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INTRODUCTION

Appellate counsel appointed to represent a criminal defendant is required to act as a competent advocate. A criminal defendant has a right not only to counsel on appeal, but to *competent* counsel on appeal. (*Evitts v. Lucey* (1985) 469 U.S. 387; *People v. Harris* (1993) 19 Cal.App.4th 709, 713-714.) In order to meet this obligation, there are some specific duties which appointed counsel must fulfill. (*People v. Scott* (1998) 64 Cal.App.4th 550, 564.) The purpose of this segment of the materials is to identify those duties which *must* be fulfilled to be considered competent, as well as some which, although technically speaking are optional, SDAP wishes to encourage and support.

I.

PERFECTING THE APPEAL

A. Is There A Proper Notice Of Appeal?

The required components of an operational notice of appeal are set forth in California Rules of Court, rule 8.304 and Penal Code section 1237. Make sure the notice of appeal complies with these sections by correctly specifying whether the appeal is from a final judgment of conviction (Penal Code section 1237, subd. (a)); from an order made after judgment, affecting the substantial rights of the party (Penal Code section 1237, subd. (b); Cal. Rules of Court, rule 8.304(a)); or from a guilty or nolo contendere plea. (Penal Code

section 1237.5; Cal. Rules of Court, rule 8.304(b).) The notice of appeal must be filed within 60 days of sentencing or entry of the order being appealed. (Cal. Rules of Court, rule 8.308(a).)

It is surprising how many defective notices of appeal are discovered by either the courts or by SDAP staff, necessitating the filing of amended notices of appeal. Hopefully, by the time a panel attorney receives the record, any defect in the notice of appeal will have been corrected. However, it is good practice to check.

B. Do You Need To Apply For A Certificate Of Probable Cause?

If the appeal is from a guilty or nolo contendere plea and it challenges the validity of that plea, a certificate of probable cause must be obtained from the Superior Court. (Penal Code section 1237.5; Cal. Rules of Court, rule 8.304(b).) Failure to comply with this rule will render the appeal inoperative. (Cal. Rules of Court, rule 8.304(b)(3).) Like a notice of appeal, an application for a certificate of probable cause must be filed in the Superior Court no more than 60 days after sentencing. If your client moved to withdraw his or her plea in Superior Court, you should seek a certificate of probable cause immediately, unless you are able to determine that the motion to withdraw was not meritorious.

If you will be seeking a certificate of probable cause, be sure to do it within the 60 day time limit. Relief from default for the failure to obtain one is not available. (*In re Chavez* (2003) 30 Cal.4th 643.) Counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with filing an application for a certificate of probable

cause. (*People v. Ribero* (1971) 4 Cal.3d 55, 66; *People v. Santos* (1976) 60 Cal.App.3d 372, 378.)

II.

PERFECTING THE RECORD

An attorney appointed to represent a client on appeal has a duty to ensure a proper record is prepared. (*People v. Barton* (1978) 21 Cal.3d 513, 519-520; *People v. Acosta* (1996) 48 Cal.App.4th 411, 426; *People v. Harris* (1993) 19 Cal.App.4th 709.) The contents of the normal record on appeal are set forth in California Rules of Court, rule 8.320.

A. Correcting The Record

If any normal part of the record is omitted, a letter should be sent to the clerk of the Superior Court who may copy and certify the missing documents and send them to all the parties. (California Rules of Court, rule 8.340(b).) Of course, this cannot be done until the record has been filed.

B. Augmenting The Record

If you need some materials in the possession of the Superior Court that are *not* part of the normal record on appeal, you must nevertheless attempt to obtain those materials and have them made part of the record. This may be done pursuant to California Rules of Court, rules 8.155; 8.340(c). It may be done at any time (Cal. Rules of Court, rule 8.155(a)(1)); however, among the factors the reviewing court may consider in ruling on the motion is whether the motion is made within a reasonable time and is not for the purpose of delay. For

this reason, it is best to make any motion to augment the record as soon as practicable.

III.

PRESENTING YOUR CLIENT'S CLAIMS

A. Adverse Consequences And Abandonment Of The Appeal

Appellate counsel has a duty to identify potential adverse consequences and to advise the client of their existence and possible effects. (See *People v. Harris* (1993) 19 Cal.App.4th 709, 714-715.) A decision to abandon can only be made by the client, and it must be made knowingly and intelligently. (See *In re Anderson* (1971) 6 Cal.3d 288, 298.) Although a notice of abandonment may be signed by counsel only, it is advisable to send the client a form to sign so that there can be no question that he or she opted to abandon. The abandonment may be filed at any time before the record is filed in the Court of Appeal. (Cal. Rules of Court, rule 8.244(b)(1).) If the client elects to abandon the appeal *after* the record has been filed in the Court of Appeal, you should file a request for dismissal of the appeal. (Cal. Rules of court, rule 8.244(c)(1).)

B. Duties Related To The Opening Brief

Appellate counsel has a duty to prepare a legal brief which sets forth all material facts. (*Acosta*, *supra*, 48 Cal.App.4th at p. 427; California Rules of Court, rule 8.204(a)(2)(C).) The brief must set forth all arguable issues, and contain citations to the appellate record as well as appropriate authority. (*People v. Barton* (1978) 21 Cal.3d 513, 519; *Harris*, *supra*, 19 Cal.App.4th at p. 714.) Counsel has a duty to refrain from arguing against the client's

interests (*Barton*, *ibid.*), and to refrain from advancing frivolous arguments. (Business & Professions Code section 6068, subd. (c); *In re Smith* (1970) 3 Cal.3d 192, 198.)

The format of the brief must comport with California Rules of Court, rule 8.204. Each argument must be stated under a separate heading or subheading summarizing the point. (Cal. Rules of Court, rule 8.204(a)(1)(B).) The Court of Appeal has no duty to address an argument presented in violation of a court rule. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1661.) A client's entitlement to competent representation by counsel on appeal entails the timely filing of a brief. In criminal and juvenile delinquency cases, a brief is timely filed if filed within 40 days of the filing of the record. (Cal. Rules of Court, rules 8.360(c)(1), 8.412(b)(1).) Failure to timely file the brief may result in dismissal of the appeal. (Cal. Rules of Court, rule 8.220(a)(1).)

C. Reply Brief

Although appellants have the opportunity to file a reply brief, it is not required. (Cal. Rules of Court, rule 8.200(a)(3).) If a reply brief is filed, it must be filed within 20 days after the respondent's brief is filed. (Cal. Rules of Court, rule 8.212(a)(3).) A claim of error may not be raised for the first time in the reply brief; doing so results in waiver of that claim. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 335, fn. 8; see also *People v. Robinson* (2002) 104 Cal.App.4th 902, 905; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055.)

Although the filing of a reply brief is not necessarily a *duty*, insofar as it is not

mandatory within the meaning of the Rules of Court, the failure to file one has been looked upon with disfavor by at least one court. (See *People v. Taylor* (1974) 39 Cal.App.3d 495, 496.) It is SDAP's policy that a reply brief should generally be filed as this is counsel's opportunity to controvert the arguments made by the respondent, the goal being to demonstrate that the respondent has no good answer to the arguments which will lead to relief for the client.

D. Oral Argument

Oral argument, like the reply brief, is not a mandatory duty. However, the client has the right to have oral argument on the merits of his or her appeal. (*People v. Brigham* (1979) 25 Cal.3d 283, 285-289; see *People v. Pena* (2004) 32 Cal.4th 389, 397-399.) The utility of oral argument is the subject of debate. Justice Stanley Mosk believed that oral argument was invaluable for three main reasons: (1) it serves the public interest by enabling the client to have his point of view presented out in the open to the reviewing court; (2) skillful interrogation of counsel from the bench may reveal how a proposed legislative or judicial rule will actually perform in day-to-day practice; and (3) oral argument frequently develops a new issue overlooked or not adequately briefed, giving the court an opportunity to instruct counsel to prepare supplemental briefing. (Mosk, *In Defense of Oral Argument* (1999) 1 J. App. Prac. & Process 25, 26-27.) Other commentators have stated the opinion that oral argument is an essential component of the decision making process as it can isolate and clarify the core issues, provide the attorney with his or her only opportunity to face and speak directly to the

judges about the case and the contentions; convey the sense of urgency under which a party may be operating that cannot be conveyed through the cold, printed word; and give the appellate judge an opportunity to test ideas. (Bright, *The Power of the Spoken Word: In Defense Of Oral Argument* (1986) 72 Iowa L. Rev. 35, 36-38.) On the other hand, oral argument has been criticized as overly time consuming; having little impact on the final decision as opposed to the briefs; and generally not particularly well presented by appellate attorneys who must answer questions with little or no time to reflect as opposed to being able to study and reflect the issues while writing a brief, thus rendering oral argument a highly unreliable means of communicating about the case. (Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom* (1986) 72 Iowa L. Rev. 1, 20-24.)

In the Sixth District, the current Presiding Justice favors oral argument. Nevertheless, this does not mean it should be requested in every case. In deciding whether to do so, consider such factors as your skills as an oral advocate, whether you feel you have a clear advantage at the close of briefing, and the need to discuss important new authority issued since the close of briefing. You should very seriously consider requesting oral argument if your issue is one of first impression. On the other hand, if a speedy resolution is vital, waiver may be appropriate because requesting oral argument usually entails some delay in the submission of the case. It is of course not advisable to have a blanket policy to always request oral argument. Many issues are adequately covered by the briefing. Requesting oral argument in such cases serves no real purpose for the clients and merely irritates the Court.

Nevertheless, the decision to orally argue is the attorney's to make. SDAP encourages oral argument in appropriate cases. If you have questions about whether or not to request oral argument, please communicate with the SDAP staff attorney responsible for your case.

E. Post-Opinion Petitions

1. Petitions for Rehearing

There is no absolute duty to file a petition for rehearing. However, it should be filed: (1) where there has been a material factual error or omission in the court's opinion; (2) where an issue has either not been addressed or has only been superficially addressed; (3) where critical new authority has come to light which has gone unmentioned in the opinion; or (4) where the court has decided the case on a point which was not raised by the parties. (See Gov. Code sec. 68081.) The petition for rehearing must be filed within 15 days of the issuance of the decision. (Cal. Rules of Court, rule 8.268(b)(1).)

If the Court of Appeal omitted or misstated an issue or material fact in its opinion, a petition for rehearing must be sought before the California Supreme Court will consider it. (Cal. Rules of Court, rule 8.500(c)(2).) Therefore, if for some reason you do not intend to seek a petition for rehearing or review, you must notify the client of that fact as well as the deadlines for filing these petitions in case he or she wishes to file them.

If you review the opinion and are unsure whether to file a petition for rehearing, contact the SDAP staff attorney who has been assisting or monitoring the case. The staff attorney will have reviewed the opinion and will be prepared to discuss whether a petition for

rehearing should be filed.

2. Petitions for Review

Like the petition for rehearing, appellate counsel has no affirmative duty to file a petition for review. (Cal. Rules of Court, rule 8.500(a)(1).) However, upon receiving the Court of Appeal's opinion, appellate counsel does have a duty to inform the client as to whether and why a petition for review should be filed, and if so, the date by which it must be filed if counsel does not intend to do it.

SDAP strongly encourages panel attorneys to file petitions for review for their clients in the following situations:

a. the Court of Appeal's opinion was published;

b. the Court of Appeal's opinion rejects a published case;

c. a good faith argument an be made for a change in existing precedent; and

d. an issue must be preserved for federal review.

The petition for review must be filed within 10 days after the Court of Appeal's decision is final in that court, which is 30 days after the opinion is filed. (Cal. Rules of Court, rules 8.500(e)(1), 8.264(b)(1).) The date of the finality of the Court of Appeal opinion in the Court of Appeal **is not extended if the thirtieth day falls on a weekend or holiday.** (Cal. Rules of Court, rule 8.500(e)(1).) However, if the tenth day after finalty in the Court of Appal falls on a weekend or holiday, the petition may be filed on the next court day. (Cal. Rules of Court, rule 8.60(a), referencing the Code of Civil Procedure as governing computation of time

to do any act required by the Rules of Court.)

If you have filed a petition for review in one of the above situations, and review is denied, you should immediately inform the client of his or her remaining options: (1) a petition for writ of certiorari in the United States Supreme Court, and (2) a petition for writ of habeas corpus in federal district court. Counsel does not have a duty to pursue these remedies; however, at the very least, you must inform the client of the existence of these options and the deadlines by which they must be filed.

IV.

HABEAS CORPUS PETITIONS

In noncapital appeals, appointed counsel has no obligation to investigate possible bases for collateral attack on a judgment and no duty to file or prosecute an extraordinary writ believed to be desirable or appropriate by the client. (*People v. Clark* (1993) 5 Cal.4th 750, 783, fn. 20; *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1356.) However, if in the course of the representation counsel learns of facts outside the record which would support a petition for a writ of habeas corpus, he or she has an ethical obligation to advise the client of the course to follow to obtain relief. (*Clark*, *supra*, 5 Cal.4th at p. 784, fn. 20.)

Appellate counsel should consider filing a habeas petition whenever direct appeal is either not an available remedy, will not provide relief soon enough (*In re Newbern* (1960) 53 Cal.2d 786, 789-790); or when there are facts outside the record which would establish the evidentiary basis for a claim of ineffective assistance of trial counsel (*People v. Pope* (1979)

23 Cal.3d 412, 426-427.)

There is no statutory time limit regarding the filing of a habeas petition. Rather, the determination whether a petition has been timely filed lies within the court's discretion. Thus, it should be filed "as promptly as the circumstances of the case allow." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397, fn. 1.) SDAP encourages the filing of habeas petitions no later than the filing of the reply brief.

As there is no duty to file habeas petitions, why should appointed counsel even consider it? First, many panel attorneys as well as staff attorneys have had some astounding successes resulting in extraordinary relief for the clients that was simply unavailable through direct appeal. Second, assuming appellate counsel recognizes that there is or may be a habeas issue and so advises the client, the chances that the client is going to be able to put together a coherent, persuasive petition are almost nonexistent. Many are simply intellectually incapable of it. Others suffer from physical or mental illness making it just too daunting of a task. Many feel so hopeless and depressed that it is unlikely they will have the energy and determination to file a petition. Finally, those clients who manage to file a petition are probably not going to get the consideration they might otherwise get if an attorney prepared and filed the petition. For all of these reasons, SDAP strongly encourages panel attorneys to investigate and pursue habeas petitions when there are issues to be raised in that manner. We will endeavor to give you as much assistance as possible.

V.

CLIENT COMMUNICATION

In appellate practice, just as in litigation and every other area of law, it is vital to do your best to establish and maintain good communications with the client. Appellate counsel have several clearly defined duties relevant to client communication.

A. **Duty To Give The Client An Honest Evaluation**

Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal and advised on the probable outcome of a challenge to the conviction or sentence. (ABA Stds. for Crim. Justice, standards 4-8.3(b), 21-3.2(b)(i).) Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal and should refrain from making any frivolous argument. (*Ibid.*)

Fulfilling this duty of course often means giving the client news he or she does not want to hear. Many times, it also means being blamed for not doing enough to help the client. Sometimes, it even results in accusations of being a "dump truck" or lazy. At times like these, it is best to remember that your clients are often in a fairly desperate situation and have no one else at whom to lash out.

B. **Duty To Keep The Client Informed of Progress In The Case**

Attorneys have a duty to keep clients reasonably informed of significant developments and material proceedings in the case. (Bus. & Prof. Code section 6068, subd. (m); ABA Stds. for Crim. Justice, standard 4-3.8(a); *People v. Jimenez* (1995) 38 Cal.App.4th 795, 802-803.) Counsel should explain developments in the case to the extent reasonably necessary to permit

the client to make informed decisions regarding the representation. (ABA Stds. for Crim. Justice, standard 4-3.8(b).)

In practice, this means making sure that copies of all briefs and other motions or pleadings as well as all orders and decisions of the Court are timely served on the client so that he or she can see what is being done in the case. It means sending cover letters with motions or other pleadings whether filed by you or by the Attorney General explaining what they mean and when a ruling can be expected. It means when a case is lagging - whether it is because of problems with the record, whether you or the Attorney General are having difficulty expediting the case, whether you are waiting for the Court's notice that it has read the briefs, or whether you are awaiting a decision - a short cover letter to the client explaining why nothing is happening should be written. This will reassure the client that you are still on the case, and that you have not forgotten about him or her.

C. **Duty To Respond To Inquiries**

Appellate counsel, like other counsel, have a duty to promptly comply with a client's reasonable requests for information. (Bus. & Prof. Code sec. 6068, subd. (m); ABA Stds. for Crim. Justice, standard 4-3.8(a).) This duty includes advising clients of the existence of adverse consequences or any other information necessary to permit the client to make informed decisions regarding the case. (ABA Stds. for Crim. Justice, standard 4-3.8(b).)

D. Always Know Where To Find Your Client

Obviously, in order to maintain effective communications it is necessary to know where the client is located. Unfortunately, most of our clients are in the custody of the Department of Corrections. Typically, they are first sent to a reception center and then housed in a different facility after they have undergone a classification process. Your initial letter to your client should impress upon him or her the importance of letting you know of any transfers. However, more often than not, this will not happen. It is incumbent on you to stay abreast of where he or she is housed. This can be easily done by calling the prison locator at **(916) 445-6713**. If you are representing a juvenile client housed in the Division of Juvenile Justice (formerly known as the California Youth Authority), you may call **(916) 262-1514**. In either case you should know your client's CDC or DJJ number. If you do not, you must at the very least be able to give prison or youth facility personnel your client's name and date of birth.

If your client has been paroled and has neglected to call you with his or her new mailing address, you must try to find out where he or she can be contacted. First check the record. The probation officer's report may have the client's address, or an emergency address or telephone number. This is often a family member who might be able to put you in touch with the client. Court minute orders also often have the client's address typed at the top. If you cannot find any information in the record, call trial counsel. He or she may have a phone number or address for the client or for a friend or family member.

VI.

CONCLUSION

A central dimension of the attorney-client relationship is the attorney's duty of "entire devotion to the interest of the client. [Citations.]" (*Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 960.) A vital part of that devotion is open and honest communication with your clients, regardless of how difficult, demanding, or unpleasant he or she may be. It requires helping your client deal with and overcome the anger, anxiety, and suspicion he or she may very well be feeling by the time you have your first contact with him or her. Many times, the relationships we forge with our clients through our ability and willingness to at least listen to them during what is often a very agonizing time in their lives leave us with a feeling of accomplishment even when the result of the appeal is not as favorable as we would hope.