AVOIDING COMMON PITFALLS IN APPELLATE PRACTICE

By Michael Kresser and Paul Couenhoven

1. Referring to factual material outside the record on appeal.

One of the most fundamental rules of appellate review is that it is restricted to material which is included in the record on appeal. See California Rules of Court, rule 8.204 (a)(2)(C): an appellant's opening brief must "provide a summary of the significant facts limited to matters in the record." See also *People v. St. Martin* (1970) 1 Cal.3d 524, 537-538: "[o]rdinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal."

Violation of this rule by an appellate advocate may lead the court to unfavorable inferences: (a) counsel is ignorant of a very basic rule of appellate practice, or (b) counsel feels it is necessary to resort to facts outside the record because a convincing case for reversal cannot otherwise be made.

As with all rules there are exceptions, though they are limited. Counsel may make a motion for the court to take judicial notice. (Evid. Code, § 459.) This is most frequently done in conjunction with issues of statutory construction, in which counsel asks the court to take judicial notice of legislative materials which shed light on the intent of the legislature. (*People v. Ansell* (2001) 25 Cal.4th 868, 881.) Avoid the common pitfall of asking court to take judicial notice of court records for purpose of proving existence of facts alleged in documents within the court file. (Jefferson, California Evidence Benchbook (4th ed.), vol. 2, § 49.10, at p. 1147.)

Also, Code of Civil Procedure section 909 permits a reviewing court to take additional evidence in cases in which trial by jury is not a matter of right or the right has been waived. (See Cal. Const., art. VI, § 11, subd. (c).) This section is most frequently invoked in dependency litigation, though the California Supreme Court has stated that ordinarily an appellate court should not take additional evidence, while recognizing that in a rare and compelling case it should. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, citing general rule that "'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' (*In re James V.* (1979) 90 Cal.App. 3d 300, 304.)"

2. Citing unpublished, depublished, reversed or disapproved case law.

It is embarrassing, to say the least, to discover when reading the opponent's brief that caselaw authority you cited was reversed or disapproved by a higher court or was depublished by order of the Supreme Court or by grant of review before you filed your brief. You must check the current validity of your caselaw authority before filing a brief.

California Rules of Court, rule 8.1115(a) states that an opinion of a California Court of Appeal or Superior Court Appellate Division that is not certified for publication or ordered published "must not be cited or relied on by a court or a party in any other action," with two exceptions: (1) when the opinion is relevant under the doctrine of law of the case, res judicata or collateral estoppel, or (2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action. These are very narrow exceptions. Despite the clear and mandatory nature of the rule, some advocates will cite unpublished or depublished cases, under a variety of rationales that do not even arguably come within the narrow exceptions. Once again, the appellate court may infer counsel's ignorance or inability to make a case within the rules.

Note that the rule applies only to California Court of Appeal and Appellate Division decisions. Unpublished opinions of the courts of other states or of federal courts may be cited and relied upon. However, rule 8.1115(c) provides that if an opinion of any court that is available only in a computer-based source of decisional law is cited, a copy of the opinion must be furnished to the court and all parties by attaching it to the document in which it is cited.

3. Personal attacks on judges, opposing counsel or parties.

Sometimes, in an excess of zeal for a client's cause, or in frustration with an opponent's tactics, an appellate advocate is tempted to take personal shots at a trial judge, an opposing party, an attorney in the proceeding below, or opposing counsel in the appeal. Perhaps the greatest temptation arises when the appellate court has issued an opinion in the case which the advocate

believes is based on factual errors, a failure to address the appellate contention actually made, or a long standing tendency by the members of the panel to rule for the prosecution. Whatever the provocation, which at times can be very great, the advocate must keep emotions in check and refrain from attacks on the integrity or motives of others involved in the case. In other words, you may vigorously attack a trial judge's ruling , the conduct of counsel in the trial court, an opponent's appellate argument or an opinion in a petition for rehearing or review. However, the attack should be on the ruling, conduct, argument, or opinion, not the integrity or motivation of those involved.

There are many reasons to avoid personal attacks in appellate advocacy, both ethical and practical. "It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law." (*People v. Chong* (1999) 76 Cal.App.4th 232, 243.) "Indeed, unwarranted personal attacks on the character or motives of the opposing party, counsel or witnesses are inappropriate and may constitute misconduct." (*In re S.C.* (2006) 138 Cal.App.4th 396, 412, citing *Chong* and *Stone v. Foster* (1980) 106 Cal.App.3d 334, 355.) "Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing into such dangerous territory because it is contemptuous for an attorney to make the unsupported assertion that the judge was 'acting out of bias toward a party.' (*In re White* (2004) 121 Cal.App.4th 1453, 1478.)" (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 422.)

There are also compelling practical reasons for avoiding the use of personal attacks in appellate advocacy. Use of such tactics implies lack of confidence about the legal merits of the issue. It bespeaks a certain desperation, as if victory was seen as possible only by abandoning legal argumentation and ramping up the invective. It is counterproductive because it deeply offends many of the people you are trying to persuade, i.e., the appellate court judges. Almost all state appellate court judges have been trial judges and understand the difficulties of the job and the tendency of losing parties and their attorneys to blame their losses on a perceived bias or lack of integrity on the part of the judge, rather than any defect in the case or its presentation. Insinuations of bias or lack of integrity on the part of trial judges, based on little more than the fact that rulings adverse to the client were made, will tend to promote a feeling of identification and solidarity with the trial judge, a feeling not helpful when you are seeking a reversal.

Personal attacks and invective are a luxury the appellate attorney cannot afford, either ethically or practically. An appellate advocate has a finite amount of energy and a finite amount of attention from the appellate court. The advocate's energy should not be wasted on personal attacks, which will only serve to make persuasion more difficult.

Generally, if you perceive the need to ask a colleague for a "tone check," you know you have crossed the line or are very close to doing so. Rewrite the passage in question to make it abundantly clear that you are arguing legal issues, not personalities.

You will ultimately regret any resort to intemperate language or unfounded personal attack, because after the emotions subside you will realize that you have diminished your stature as a conscientious and ethical advocate. On the other hand, you will never regret having taken the high road by focusing on the merits of the legal issues in the case.

4. Backing out of oral argument at last minute or not appearing.

Every so often, an attorney who is on the court's oral argument calender calls us or the court, usually the day before, to say that he or she is unable to appear. Reasons vary, but frequently the reason is that the attorney is scheduled to appear in another court. In a recent such occurrence, the attorney called the court and spoke to a deputy clerk, informing the clerk that the attorney would not be appearing for argument the next afternoon because a juvenile court commissioner had scheduled a conflicting hearing. The deputy clerk did not clarify whether the attorney was waiving argument or requesting that it be continued to a future date. Calls from the clerk's office later in the day to resolve that question did not reach the attorney, who did not answer and whose message box was full. The clerk called me. I emailed the attorney, asking that the attorney call the clerk's office to clarify whether argument was being waived, and stressing the need for the court and opposing counsel to know. At 10:15 the next morning, the attorney called the clerk's office and waived. Opposing counsel was then notified by the court they need not appear.

Apparently the attorney in question was not aware that numerous other people, including the appellate judges, their staffs and opposing counsel, had already devoted substantial time to preparing for the argument and that absent

a waiver opposing counsel would be required to appear. Had the attorney not, however belatedly, waived the argument, the attorney would be risking a finding of contempt for failure to appear at oral argument. (Cf. *In re Aguilar* (2004) 34 Cal.4th 386, finding two attorneys in contempt and fining them for wilful failure to appear at oral argument in the California Supreme Court.)

"Presentation of oral argument on appeal is an important responsibility for an attorney in any case, not only in light of the duty owed to the client but also because of the attorney's professional obligations to the appellate court." (*In re Aguilar, supra,* 34 Cal.4th at p. 390.) Anytime oral argument is requested, there should be a firm commitment to attending the argument as scheduled.

Sometimes there are good reasons for seeking a continuance of oral argument, like a serious illness or a prepaid vacation. Counsel should be aware that the Internal Operating Practices and Procedures of the Sixth District state: "Because of the considerable investment of court time and resources necessary to prepare a case for oral argument, continuances are disfavored and will be granted only on a showing of good cause. Oral argument will not be continued by stipulation of counsel absent a showing of good cause."

In order to seek a continuance of oral argument, a written motion, served on the opposing party, must be filed. Continuances are not granted based on oral representations made in phone calls to the clerk's office. A continuance should be sought at the earliest possible time to minimize the impact of rescheduling on the court and opposing counsel.

In short, trying to back out of oral argument at the last minute, or not appearing at all, displays a cavalier and unprofessional attitude toward the court and opposing counsel.

5. Filing a joint petition for review from appellate affirmance and habeas denial.

In the Sixth District, when an attorney files a petition for writ of habeas corpus related to a pending appeal, the court issues the following standard order: "The petition for writ of habeas corpus will be considered with petitioner's appeal in case No. _____." What that order does not say is that the proceedings are consolidated. That has consequences because of rule 8.500(d), which states: "If the Court of Appeal decides an appeal and

denies a related petition for writ of habeas corpus without issuing an order to show cause and without formally consolidating the two proceedings, a party seeking review of both decisions must file a separate petition for review in each proceeding."

In our experience, the Supreme Court has treated a joint petition as being timely filed as to both the appeal and the habeas, but has required counsel to submit a separate petition challenging the habeas denial, so at least there is no loss of the right to seek review as a result of violating Rule 8.500(d). However, additional work is necessary and additional costs are incurred, so its good to be aware of this rule and do it right the first time.

6. Omnibus or blind joinders in arguments of coappellants or failure to argue prejudice as to your client when joining in a coappellant's argument.

Rule 8.200(a)(5) provides: "Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal." In an appropriate case, joinder can be helpful. If a coappellant has persuasively briefed an issue, a joinder may permit counsel to concentrate on other issues and thus reduce the length of the brief. Counsel for coappellants in lengthy trials may agree to a division of labor as to certain common issues to speed the briefing process.

However, we sometimes see a joinder that reads: "Appellant joins in the brief of coappellant X as to any issues that may apply to appellant." Or, if counsel is first to file a multi-appellant case, we may see: "counsel joins in any issues raised by coappellants that may apply to appellant."

This is not a good practice. It is not up to the court to decide which of numerous issues raised by coappellants may apply to your client. That's your job. If you are the first to file, wait until the coappellants' briefs are filed, determine which issues raised are applicable to your client and then file a notice of joinder specifying the issues in which you join. If you are last to file, review the coappellants briefs and specify the issues which you are joining.

When joining in an argument of a coappellant, counsel may see the opportunity to strengthen the argument by additional analysis or citation of authority, and should not hesitate to do so.

Counsel should also ascertain whether or not the prejudice argument made by the coappellant applies equally to counsel's client. In some cases, a separate prejudice argument is necessary because of differences in the degree of harm caused by the error or differences in the strength of the prosecution case as to each appellant.

7. No Thesis Statement Near the Beginning of Each Argument

A thesis statement is an essential component of all expository writing, including an argument in an appellate brief. A thesis statement consists of a few sentences that express the main points of your argument. It offers your readers a quick and easy to follow summary of what the argument will be.

Every argument should begin with a brief introduction which describes the context of the issue followed by your thesis statement.

You can't write your thesis statement until you have finished your research and have an outline of your argument. Ask yourself these questions as you write your thesis:

- What is the crux of my argument?
- Should I categorize my argument into different parts and if so, how?
- In what order should I present the different parts of my argument?

Examples of Thesis Statements Contained in a Short Introduction

- Evidentiary Error:

> Despite the absence of a gang enhancement and the lack of any gang overtones in the fight and the stabbing, the court permitted extensive evidence about gangs and the testimony of a gang expert, ostensibly to prove motive and intent. The trial court erred. Identity was not disputed and the stabbing was not related to gang rivalries, gang retaliation, gang territory or gang motivations. Absent such factors, the gang evidence only proved appellant, because he was a gang member, was predisposed to react violently and more likely to pull out a knife in a fist fight he was losing. Since gang evidence is not

admissible to prove a defendant's character or predisposition it should have been excluded.

The extensive gang evidence was prejudicial. It played a central role in the trial and was a crucial component of the prosecutor's closing argument. The admission of extensive gang evidence resulted in an unfair trial. Appellant's murder conviction therefore must be reversed.

- Jury Instruction Refused:

Defense counsel asked the court to modify instructions concerning consciousness of guilt. The defense wanted those instructions, concerning flight and hiding evidence, modified to make clear "Consciousness of guilt may not be considered in determining the degree of defendant's guilt." The court refused the defense request stating, "Areas that you raise with respect to these special instructions would be covered within the ambit of CALCRIM."

The trial court erred. Contrary to the court's assertion, the requested modification was not covered by the instructions given. The failure to give the requested instruction was prejudicial error since without it the jury would infer evidence showing appellant had a guilty conscience proved he was guilty of murder. Since that inference was unreasonable, the failure to give the requested instruction violated Cardenas's constitutional right to due process. (U.S. Const., Amend. XIV; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.)

Your argument may change as you write, so you may need to revise your thesis statement to reflect exactly what you have discussed in the paper.

8. Failing to Federalize Whenever Possible

A. *Introduction*

The odds of winning on appeal in state court are abysmally low. Therefore, whenever possible you should include a claim the alleged error violated the defendant's federal constitutional rights. This will provide the appellant a second chance at reversal by pursuing the issue in federal court.

It will also provide you with a more favorable prejudice standard than that applicable to state law errors.

If you fail to federalize an issue which could be characterized as a violation of federal constitutional rights, you hamper your client's ability to pursue his or her case in federal court. The rule is that you cannot raise an issue in federal court unless it is exhausted in state court. This means you must raise in state court the federal legal theory on which a claim is based. (*Duncan v. Henry* (1995) 513 U.S. 364, 365-66.)

- In *Duncan v. Henry*, *supra*, 513 U.S. 364 the Supreme Court summarily reversed a Ninth Circuit's grant of habeas relief. The due process challenge to "other offenses" evidence was not exhausted where the argument in the California courts was framed only as a violation of Evidence Code section 352 and a "miscarriage of justice" under the California Constitution.

- In *Baldwin v. Reese* (2004) 541 U.S. 27 the Supreme Court reversed a Ninth Circuit grant of habeas relief where appellant raised a claim of IAC on appeal, but did not say counsel's ineffective assistance violated federal law.

B. *You Must Fairly Present the Federal Claim*

A federal court will only consider a federal claim which has been "exhausted" or "fairly presented" in state court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 389.) This means you must alert the state court to the federal nature of your claim. Cite the federal constitutional right involved in your claim and cite federal cases, preferably Supreme Court cases, in support of your claim. Common examples are:

- Insufficient evidence: A conviction based on insufficient evidence violates federal due process. (*Jackson* v. *Virginia* (1979) 443 U.S. 307.) Don't merely cite *People v. Johnson* (1980) 26 Cal.3d 557, 578.
- Ineffective assistance: Ineffective assistance of counsel violates the defendant's Sixth Amendment rights. (*Strickland v. Washington* (1984) 466 U.S. 668.) Don't just cite People v. *Pope* (1979) 23 Cal.3d 412 or other state cases.

- The erroneous admission of irrelevant and prejudicial evidence violated defendant's federal due process rights by making his trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70;

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378.) Don't merely cite to Evidence Code section 350 or 352.

- The erroneous exclusion of material defense evidence violated appellant's Sixth Amendment right to present a defense and federal due process. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872-873; *Washington v. Texas* (1967) 388 U.S. 14, 19;19; *Chambers v. Mississippi* (1948) 410 U.S. 284, 294.) Make this claim in addition to citing California cases on the admissibility of defense evidence.

- Prosecutorial misconduct was so egregious it resulted in a denial of federal due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Make this claim in addition to citing California cases on prosecutorial misconduct.

If at all possible, cite a United States Supreme Court case in defense of your federal claim. This is important because under AEDPA rules, you must convince the federal court the state court's rejection of your claim was contrary to, or an unreasonable application of, controlling United States Supreme Court precedent.

C. *You Must Fairly Present Federal Claim at All Appellate Levels*

It is not enough to fairly present your federal claim in the court of appeal. A person raising a constitutional claim in federal court "must 'fairly present' his claim in each appropriate state court (*including a state supreme court with powers of discretionary review*)." (*Baldwin v. Reese*, *supra*, at p. 29, italics added; see *O'Sullivan v. Boerckel*, *supra*, 526 U.S. 838.) Therefore, whenever you take the time to federalize a claim on appeal, you must file a review petition.

Similarly, you cannot belatedly federalize an issue in the review petition if you did not federalize the issue in the court of appeal. (*Castille v. Peoples* (1989) 489 U.S. 346, 351.)

D. *Include Your Federal Claim in Your Heading, or at Least in a Subheading*

No federal court has found a state claim of federal error was not

exhausted on the basis the federal claim was not in the heading of the argument. However, it is a good habit to always include the federal claim in your heading or at least in a subheading.

Having a federal claim in your heading or subheading protects the claim from judicial caprice. Rule 8.204(a)(1)(B), California Rules of Court, states each brief must "State each point under a separate heading or subheading summarizing the point." In *People v. Cabrera* (2010) 191 Cal.App.4th 276, 283 [review granted], the court refused to consider a federal Confrontation Clause claim because "This issue was not properly briefed, lacking its own separate heading as required by California Rules of Court, rule 8.204(a)(1)(B)." If Mr. Cabrera wants to pursue his case in federal court, he will have problems raising the Confrontation Clause claim because it was procedurally defaulted by the state court. This is not typical of California appellate courts, but it is better to not take any chances.

Developing a practice of including your federal claim in a heading or subheading will also help you remember to exhaust the claim when you file a petition for review. You will be less likely to forget the federal aspect of a claim if it is contained in one of your headings.

9. Failing to Address Forfeiture

A. *Introduction*

One component of establishing a case for appellate relief is a showing appellate review is appropriate. As a general rule, an appellate court will not consider matters not raised below. (*People v. Gams* (1997) 52 Cal.App.4th 147, 155.) "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method." (*People v. Saunders* (1993) 5 Cal.4th 580, 590-591.) It is "unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." (*Id*. at p. 591.)

Appellate courts frequently reject claims raised on appeal because they were forfeited in the trial court:

- "Defendant complains the prosecutor's cross-examination and closing argument violated *Doyle* . . . as well as his rights under the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution. Defendant forfeited the objection by failing to object." (*People v. Collins* (2010) 49 Cal.4th 175, 202.)

- "Defendant forfeited his claim of coerced testimony because of his failure to object at trial." (*People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

Therefore, the possibility of forfeiture should be considered for every issue, and addressed in the opening brief.

B . *Questions to Ask in Considering Forfeiture*

- Did counsel object? If so, state the objection in the introduction to your argument.

- If counsel objected, was the objection on the exact same basis as your argument on appeal? For example, if counsel objected on relevance grounds, and your argument on appeal is that the evidence was more prejudicial than probative (Evid. Code § 352), you have a problem. Evidence Code section 353 "applies equally to any claim on appeal that the evidence was erroneously admitted, *other than the stated ground for the objection at trial*." (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 612.)

- If there was no objection, can you argue objection would have been futile? (See *People* v. *Welch* (1993) 5 Cal.4th 228, 237; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 and fn. 27; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692.)

    - The most common situation is where counsel objects a few times, and is overruled. When the prosecutor continues asking questions about the same topic, or continues to make similar arguments to the jury, further objection would be futile. (*People v. Thornton* (2007) 41 Cal.4th 391, 460 [where counsel's objection to prosecutor's remark was overruled, it would have been futile for counsel to object to a second similar remark]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1126 ["Any objection would have been futile because the trial court had previously overruled his objection on the same ground"].)

- Or, if a co-defendant's objection is immediately overruled, it would be futile for your client's attorney to also object after the ruling has already been made. (*People v. Gamache* (2010) 48 Cal.4th 347, 373.)

- There is no duty to object when the existing state of the law would render an objection futile. (*City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 785, citing *People v. Chavez* (1980) 26 Cal.3d 324, 350, fn. 5.) "The Court of Appeal must follow, and has no authority to overrule, the decisions of [the Supreme] Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the issue now presented could not have been decided below, it is properly before us in the first instance." (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

- If the law changed after the trial ended, you can raise an appellate challenge based on the new law even though no objection was made below. (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1479 [appellate argument based on *Cunningham v. California* (2007) 549 U.S. 270 addressed on appeal despite the lack of an objection below because *Cunningham* was not decided until after defendant was sentenced].) You may have a problem with the retroactive application of the newly decided case, but the failure to raise the issue below will be excused.

- If there was no objection, does the alleged error involve a sua sponte duty of the court? The most common example is jury instructions. The general rule is that the appellate court can address challenges to jury instructions given, refused or modified "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) Another example involves questions about a defendant's competence based on his behavior in the courtroom. "'A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1111, citation omitted.)

- If there was no objection, is the alleged error one that is preserved for

appeal even if no objection was made? "[A] purely legal issue . . . is not subject to the waiver rule." (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179.) Unauthorized sentences can always be challenged on appeal even if no objection was made below. (*People v. Dotson* (1997) 16 Cal.4th 547.)

- This principle has been applied to arguments probation conditions are constitutionally vague and overbroad, for example, because they lack a knowledge requirement. (*In re Sheena K.* (2007) 40 Cal.4th 875, 879.) The issue will be addressed on appeal despite the lack of an objection in the trial court if it can be resolved as a pure question of law, without any consideration of the specific facts of the case. Don't argue factual nuances, or the issue will be deemed forfeited for failing to object.

- Appellate claims that the sentencing court violated the plea bargain are not subject to the forfeiture rule, unless the defendant was advised of his right to withdraw his plea if his sentence exceeds the terms of the plea bargain. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025.)

- You can argue on appeal an evidentiary ruling rendered the trial fundamentally unfair, and therefore violated due process, even if no Due Process objection was made in the trial court. In *People v. Partida* (2005) 37 Cal.4th 428 the court held that even in the absence of a federal due process objection at trial, on appeal a defendant still could "argue that the asserted error in overruling [his section 352] trial objection had the legal consequence of violating due process." (*Id*. at 431.) "[W]hether that error violated due process is a question of law for the reviewing court[.]" (*Id.* at 437.)

C. *As a General Rule, Address the Potential for Forfeiture in Your Opening Brief in Every Instance You Believe Forfeiture Could Be Found.*

In your section on the procedural posture of your issue, describe the specific objection made by trial counsel. If no objection was made, either argue the issue is one which can be raised despite the lack of an objection, or

allege counsel provided ineffective assistance by failing to fully preserve the issue you are arguing on appeal.

You generally have nothing to lose by including an ineffective assistance of counsel (IAC) claim in the opening brief if there is a possible forfeiture because counsel failed to object, or failed to object on the same basis you are arguing on appeal. An IAC claim will usually persuade the court to consider the merits of the issue argued, and will provide the client with a potential constitutional claim to pursue in federal court.

If you decide to raise an IAC claim for failing to object, mention it in your thesis statement near the beginning of your argument, and include a separate subheading raising the IAC claim.

Never relegate your IAC backup to a footnote. The court can refuse to address an issue when the merits of the issue are not developed in the brief. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196, fn. 12 ["Because defendant has not developed the merits of such a claim, we do not address it"].)

Never raise a claim of IAC for failing to object for the first time in a reply brief. The court will usually refuse to consider the issue when raised in that manner. (*People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055 ["For the first time on appeal, defendant asserts in a footnote in his reply brief that he was deprived of effective assistance of counsel by his trial attorney's failure to make a Wheeler motion after Nevarez was excused. The contention is untimely"].)

If you are caught by surprise by a forfeiture argument in respondent's brief, seek leave to file a supplemental opening brief raising an IAC claim for failing to properly object, or prepare a habeas corpus petition supported by a declaration of counsel.

D. *Consider Whether to File a Habeas Corpus Petition to Address the Possibility of Forfeiture.*

When making an IAC claim on direct appeal, you must convince the court there simply could be no satisfactory explanation for counsel's failure to act. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The possibility counsel had a tactical reason for not objecting is a frequent basis for rejecting a claim of IAC on direct appeal:

- The record does not reveal the extent of the research conducted by defense counsel on the subjects of these motions, and we cannot draw the conclusion that counsel failed to research the law adequately. Nor can we conclude on the present record that no reasonable counsel would have chosen to proceed without obtaining pretrial rulings. "[T]he means of providing effective assistance are many and . . . as a consequence counsel has wide discretion in choosing which to use." [Citation.] (*People v. Ledesma* (2006) 39 Cal.4th 641, 747.)

- We cannot say there could be no satisfactory explanation for a failure to object. (*People v. Mays* (2009) 174 Cal.App.4th 156, 171, fn. 9.)

If counsel did object, but not for the right reason, you have a strong basis to argue there was no possible tactical reason for failing to make the best objection. As the court stated in *People v. Asbury* (1985) 173 Cal.App.3d 362, 366 "If counsel objected on the grounds of insufficient evidence, there is no reason why he should not have done so on the grounds of collateral estoppel--except for failing to realize that such an objection was available."

If it is difficult to argue there is no possible tactical reason for failing to object, you should discuss the matter with trial counsel and consider the viability of filing a companion habeas petition in conjunction with the appeal. Sometimes counsel will admit having no tactical reason for failing to properly raise the issue you are arguing on appeal. If so, you should obtain a declaration from trial counsel and prepare a habeas petition so that the appellate court cannot avoid the merits of your issue by speculating about possible tactical reasons for counsel's omission.

10. Failing to Make a Compelling Prejudice Argument

A. *Introduction*

It makes no difference how thoroughly you demonstrate the trial court erred if you cannot persuade the court it would have made a difference in the result. Appellate courts frequently reject arguments without considering the merits, finding the error harmless.

- We need not determine the merits of this contention since it is clear that

any error in admitting the evidence was harmless. (*People v. Boyde* (1988) 46 Cal.3d 212, 242.)

- We need not address the merits [] here, however, for our review of the record reveals that any error [] was harmless beyond a reasonable doubt." (*People v. Hunter* (1989) 49 Cal.3d 957, 970.)

Therefore, after establishing error, take the time to craft a compelling argument the error was prejudicial. You must persuade the reader that an injustice occurred at trial or sentencing grave enough to require reversal.

B. *Determine the Applicable Standard*

- If your argument alleges a violation of federal constitutional rights the test of prejudice is set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Under that standard, "The question [] is not whether the legally admitted evidence was sufficient to support the [verdict], . . . but, rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-59; see also, *Arizona v. Fulminante* (1991) 499 U.S. 279, 294-295.)
- If your argument alleges a violation of state rules, the standard for prejudice is whether it is reasonably probable the result would have been different in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original.)

- If your argument is that an evidentiary or instructional error or prosecutorial misconduct violated federal due process, prejudice is inherent since part of the argument is that the error resulted in a trial that was fundamentally unfair.

- A few errors are reversible per se, but these are rare. They include the denial of counsel altogether, the denial of conflict-free counsel, the denial of a jury trial and improper discrimination in the selection of the jury. (*People v. Cahill* (1993) 5 Cal.4th 478, 493.)

C. *Some Factors Which Can Be Cited to Argue Error Was Prejudicial*

1. Hotly Disputed Case, Or, Lack of Overwhelming Evidence

If possible, argue guilt was hotly disputed, with conflicting evidence, and that the prosecutor's evidence, while perhaps strong, was not overwhelming. Discuss the weaknesses of the prosecution case and the plausibility of the defense.

- Prejudice found where "The issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence." (*People v. Woodard* (1979) 23 Cal.3d 329, 341.)

- Applying *Chapman* standard Sixth District found instruction on torture special circumstance prejudicial because "the evidence that defendant intended to torture the victim [was not] so overwhelming as to convince us the error was harmless." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 684.)

- Where evidence was "fairly strong, but not overwhelming," Supreme Court reversed murder conviction under *Watson* standard based on erroneous admission of other crimes evidence. (*People* v. *Alcala* (1984) 36 Cal.3d 604, 635.)

2. Inherently Prejudicial Evidence

If evidence was admitted which courts have found to be inherently inflammatory, use this to argue the error must have been prejudicial.

- **Gang evidence** has a "highly inflammatory impact" on a jury. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) It is inherently prejudicial, risking the jury's condemnation of a defendant based on a predisposition to do violence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 945.)

- Evidence of **other crimes or misconduct** is also inherently prejudicial. "Inevitably, it tempts 'the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.'" (*People* v. *Alcala* (1984) 35 Cal.3d 604, 631, citation omitted.)

- Evidence of **involvement with narcotics** has also been described as inherently prejudicial. In *People v. Holt* (1984) 37 Cal.3d 436, 450, and in *People v. Cardenas* (1982) 31 Cal.3d 897, 907, the Supreme Court stressed that "[t]he impact of narcotics . . . evidence 'upon a jury of laymen [is] catastrophic. . . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.' [Citation.]"

- Other less common examples of inherent prejudice include the jury seeing a defendant in visible physical restraints (*Deck v. Missouri* (2005) 544 US. 622, 630), or dressed in jail clothes (*Estelle v. Williams* (1976) 425 U.S. 501, 504-505), the erroneous admission of a defendant's own confession (*Arizona v. Fulminante*, supra, 499 U.S. 279 ["'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'"], or the admission of a co-defendant's confession which implicates the defendant (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120-1121 [accusations from a co-defendant's confession are so inherently prejudicial cannot trust jury to ignore them even when instructed to do so].)

3. Erroneously Admitted Evidence or Prosecutorial Misconduct Was Extensive

If the record warrants it, describe how extensive the error was, permeating the trial with erroneously admitted evidence or repeated prosecutorial misconduct.

- Court considered "extent of comments made by witness" in evaluating prejudice caused by *Doyle* error. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1559.)

- Extensive prosecutorial misconduct cited in finding prejudice, where hundreds of pages would be required to list all the prosecutorial misconduct in the case. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 707.)

- Extensive improperly admitted evidence of association with a motorcycle club/gang cited in finding prejudice (*People v. Memory* (2010) 182 Cal.App.4th 835.) Extensive gang evidence also described

in *People v. Albarran* (2007) 149 Cal.App.4th 214 as basis for finding prejudice where evidence was improperly admitted.

4. Prosecutor's Argument Based on Error

The prosecutor's reliance on the error in closing argument helps establish prejudice.

- "The prosecutor made extensive use of [erroneously admitted evidence] in his argument to the jury." (*People v. Holt* (1984) 37 Cal.3d 436, 359.) Murder conviction reversed.

- Court found prejudice caused by improperly admitted hearsay letters from deceased accusing defendant of prior threats of violence in part because prosecutor referred to them repeatedly and argued extensively jury should consider them. (*People v. Coleman* (1985) 38 Cal.3d 69.) Murder conviction reversed.
- "The prosecutor exploited the erroneously admitted prior convictions during final arguments." (*People v. Woodard*, *supra*, 23 Cal.3d at p. 341.)

- "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor - and so presumably the jury - treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

5. A Prior Hung Jury

Another indication of a close case is where there has previously been a hung jury. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188.) This is especially significant of the error did not occur in the first trial. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.) If there was a prior trial, talk to trial counsel and move to augment the record with the transcripts of the prior trial if your learn the error did not occur in the first trial.

6. Was an Instructional Error Cured by Other Instructions or Arguments by Counsel

Courts will often find instructional error harmless if the arguments of counsel clarified misleading language or if other instructions addressed the point. If your error involves instructional error, argue it was not cured by any argument or other instructions.

- Instructional error found prejudicial in part because "The error was not cured by argument or other instruction." (*People v. Petznick* (2008) 114 Cal.App.4th 6663, 686.)

7. Lengthy Jury Deliberations

Lengthy deliberations in a relatively short trial is, by itself, an indication the error was prejudicial. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 ["jury deliberations of almost six hours are an indication that the issue of guilt is not 'open and shut' and strongly suggest that errors . . . are prejudicial"]; see also *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours of deliberation shows case was not clear cut which indicates errors were prejudicial]; *People v. Woodward* (1979) 23 Cal.3d 329, 341 [nearly six hours of deliberation shows case was not open and shut].)

8. Jury Questions and Requests for Readback

- "juror questions and requests to have testimony reread are indications the deliberations were close" (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.)

- "[R]equests to the court for further instructions or the rereading of particular testimony" are indications of jury disagreement." (*People v. Hernandez* (1988) 47 Cal.3d 315, 352-353; see also *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [jury's request for a readback of testimony is indicative of the closeness of the case].)

- If a jury request involves evidence admitted in error, prejudice is clear. (*People v. Williams* (1976) 16 Cal.3d 663, 669 [reversal ordered where the jury requested a rereading of an erroneously admitted statement and then quickly returned a guilty verdict]; see also *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [rereading of an erroneous instruction warrants reversal].)

9. Error Affected Heart of the Defense

An error which impacts the "heart of the defense" is generally prejudicial. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1077; see *Andrews v. City of San Francisco* (1988) 205 Cal.App.3d 938.) Identify the defense in your case (identity? self-defense? lack of intent?). If possible, argue the error you identified impacted the heart of the defense presented at trial.

Similarly, errors "'at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment.' [Citation.]" (*People v. Spearman* (1979) 25 Cal.3d 107, 119.) Prejudice will generally be established when the trial court excludes evidence bearing on the defendant's theory of the case. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852.) Also, "[t]he exclusion of the evidence bearing on the credibility of a prosecution witness where only the witness and defendant are percipient witnesses has been held to be prejudicial error. [Citations.]" (*People v. Randle* (1982) 130 Cal.App.3d 286, 293.)