ETHICAL DUTIES YOU NEED TO KNOW ABOUT IN COMMUNICATING WITH CLIENTS, THE COURT, AND OTHERS[1]

By Lori A. Quick and Jonathan Grossman

INTRODUCTION

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, 399-400; *People v. Harris* (1993) 19 Cal.App.4th 709, 713-714.) As the attorney representing the appellant, you have the duty to refrain from "intentionally, recklessly, or repeatedly fail[ing] to perform legal services with competence." (Rules Prof. Conduct, rule 3-110(A).) Competence is defined as applying the "diligence, learning and skill," and the "mental, emotional and physical ability reasonably necessary for the performance" of the legal service at issue. (Rule 3-110(B).)

"[C]ounsel owes the client a duty of loyalty, a duty to avoid conflicts of interest . . . the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. [Citation.] [¶] These basic duties neither exhaustively define the obligations of counsel nor form a checklist . . . " (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Id.*, at p. 691.) "Criminal defense attorneys have a duty to investigate carefully all defenses of fact and law that may be available to the defendant . . . Counsel should promptly advise his client of his rights and take all actions necessary to preserve them." (*People v. Pope* (1979) 23 Cal.3d 412, 425, internal quotation marks omitted.)

I. THE CLIENT - GENERALLY

A. Duty to Keep the Client Informed

"A member shall keep a client reasonably informed about significant developments

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[1]We would like to acknowledges that large parts of this material derive from other works: Ethical Duties of Trial Counsel to Former Clients and Appellate Counsel, by Vicki Firstman; Ethical Duties of Appellate Counsel Toward Clients. by Lori A. Quick; The Duty to Warn: When and to What Extent Does it Apply to California Criminal Defense Attorneys?, by Lori A. Quick; the Missing Client: What Are an Attorney's Responsibilities?, by By Lori A. Quick; (Some) Ethical Concerns for Appellate Juvenile Defenders, by Richard Braucher, FDAP Staff Attorney; and the SDAP Panel Manual.

relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." (Rules Prof. Conduct, rule 3-500.)

"It is the duty of an attorney to do all of the following: [¶] . . . [¶] [t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." (Bus & Prof. Code, § 6068, subd. (m); *People v. Jimenez* (1995) 38 Cal.App.4th 795, 802-803.)

A primary concern of SDAP is that there be clear and consistent communication with the client. When SDAP notifies the court of your appointment, the client also receives notice. Typically, the client is in prison and has limited access to the phone. The client therefore is largely dependent on you to initiate communication. If you do not communicate promptly, the client will begin to wonder about your competence and dedication to his cause. Prompt communication starts the attorney-client relationship on the right foot and minimizes future problems.

Counsel has a duty to take all reasonable steps to keep communications with clients confidential. It has come to our attention that some prison facilities are opening attorney mail unless counsel complies strictly with the regulations. Title 15, section 3141, subdivision (d) of the California Code of Regulations states that mail from counsel will not be opened outside the prisoner's presence if the envelope contains "the attorney's name, title, and return address . . . "

Immediately upon appointment, you should contact the client. In most cases, you will know little about the legal issues in the case at the time of your appointment. Nevertheless, your first communication serves to introduce yourself to the client and explain the appellate process. Many clients have never previously had an appeal and have no real idea of what is involved. Your first communication should therefore inform the client about the appellate process and reassure him that you are in control of his appeal.

You should write to the client at each important stage in the appeal. From the client's perspective, an appeal moves very slowly, if at all. The client may be unable to gauge the progress of the case unless you communicate at each important step in the appeal. It is good practice to send at least short letters when the record is received, when a motion to augment or an extension of time request is filed, when the opening brief is filed, when respondent's brief is received, when the reply brief is filed, when oral argument is set, after oral argument, and, of course, when an opinion is received. It is helpful to explain to the client exactly where the case is in the appellate process. When the opening brief is sent, it is helpful to

explain that we can expect the opposing brief within 30 to 60 days unless the Attorney General seeks further extensions of time. The important goal is to make sure the client understands that progress is being made.

In some cases, such as sex cases, it can be dangerous for the client for information about the case to be available to others in custody. You should explain to the client that you intend to send the material to him unless he directs you to send the material to someone else.

You should respond promptly to the client's queries. Most clients will ask questions. You should endeavor to answer them as fully and as promptly as possible. When the client asks a question that goes unanswered, the client frequently concludes that you do not care about the case or that you are incompetent. There are times, of course, when you cannot interrupt your other professional commitments to answer a client inquiry in detail. You can, however, at least pen a short note to the client explaining that those other commitments preclude you from answering the question at the moment but that you will answer it as soon as you can. Most clients understand that you have many other cases and will wait patiently for their questions to be answered--but only if you let them know that they are not being ignored.

You should use appropriate language. One purpose of communicating with the client is to exchange information. You have information to give the client, and the client might have information you need or may have questions for you to answer. To carry out the exchange of information, you need to communicate in terms the client can readily understand. Clients will vary in their abilities to give and receive information, and you must adjust your use of language accordingly. The language you use to communicate with a developmentally disabled client, for example, will differ from that used to communicate with a non-disabled client. But remember that with every client, you must use language that is different from the technical jargon you use to communicate with judges and lawyers. Even the most intelligent and educated layperson often finds legalese nearly impossible to understand. With every client, it is essential to use clear, non-technical language. Where a technical term or concept must be used, you should define it in clear, non-technical language.

You should convey the appropriate attitude. Your client probably lacks the ability to assess the quality of the representation you are rendering. The client will therefore make that assessment based largely on the attitude you convey. As a cardinal principle, an attorney should be honest with his client. If an appeal is likely to lose, counsel should not pretend otherwise. However, you want to avoid being unduly pessimistic. Your assessment on the merits may be that the appeal stands virtually no chance of success. If you tell the client that you are certain the appeal is a loser, the client will interpret that to mean that you are not trying to win. If on the other hand you tell the client that the issues you have raised

are difficult to win, but that they are important ones that you have argued as forcefully as possible, the client will still understand the weakness of his case but appreciate the effort you are making. Even in a losing case, the client can get some satisfaction from having his day in court with an attorney dedicated to trying to win.

An appeal lacking any reasonably arguable issues calls for the most careful client counseling. Such an appeal should not be treated as hopeless. The purpose of the brief required by *People v. Wende* (1979) 25 Cal.3d 436 is to enable the Court of Appeal to make an independent determination whether a reasonably arguable issue is present. When you have to file a *Wende* brief, you should explain to the client that you have researched stated issues, carefully considered them, and determined that you cannot ethically raise them. You should also explain that the Court of Appeal is obligated to review the case independently for possible error, and that by filing a *Wende* brief, you are assisting the court in its independent review. What you need to convey is that despite ethical limits on your advocacy, you are doing everything possible to see that the client's case is properly presented to the court.

If some attorneys are too pessimistic, others are sometimes overly optimistic. Avoid predicting results. In a strong case, you should share your considered professional opinion that the issues are strong ones, but also temper your enthusiasm with a dose of realism: the decision on appeal belongs to the justices alone -- and they may have a different opinion.

You must serve the client with all briefs and petitions unless the client states in writing that he does not want the pleadings. (Cal. Rules of Court, rule 8.360(d)(2).) The client is vitally interested in the appeal and wants to know what is going on. The easiest way to impart information about the progress of the case is to routinely serve the client with all motions, briefs, etc. Even the most unexciting pleading, such as a motion to extend time, will let the client know where his case presently stands.

You should be willing to accept a reasonable number of telephone calls, collect if necessary. For a variety of reasons, the telephone is sometimes the client's only reliable way of contacting you. Accordingly, SDAP expects its panel attorneys to have a phone system that makes communication via a collect call possible, and to accept a reasonable number of collect calls. This expense is reimbursable on your fee claim.

You should be willing to visit the client, if appropriate. In most cases, you can handle the client's appeal without ever meeting him or her. Sometimes, however, a visit to the client is necessary because the client is not able, for whatever reason, to communicate effectively in writing or by telephone. If you believe that you need to visit your client in prison, contact SDAP. In an appropriate case, we will authorize a prison visit. If SDAP does not

preauthorize the visit, your time and expenses may be deemed unnecessary and non-compensable.

B. Juvenile Client

There is a need to use age-appropriate language with juvenile clients One easy way to improve the likelihood we are using language our clients will understand is to check all letters with readability information statistics provided in standard word processing software. To determine readability, Microsoft Word uses the Flesch Reading Ease score and the Flesch-Kincaid Grade Level score. Both scores are designed to indicate comprehension difficulty when reading a passage of contemporary academic English.

The Flesch Reading Ease score rates text on a 100-point scale.[2] The higher the score, the easier it is to understand the document. For example, a score of 90.0–100.0 is easily understood by an average 11-year-old student; a score of 60.0–70.0 is easily understood by 13- to 15-year-old students; and a score of 0.0–30.0 is best understood by university graduates.

The Flesch-Kincaid Grade Level score rates text on a U.S. school grade level.[3] The lower the score, which translates to a grade level, the easier the text is to understand. For example, a score of 8.2 would indicate that the text is expected to be understood by an average student in 8th grade (between ages 12–14).

To obtain these readability scores in a Microsoft Word document, you will need first to check your settings. Click on the Tools menu, click "Spelling and Grammar," then click "Options." At "Options," check the box "Show readability statistics." Now you are ready to capture readability scores in your document. Return to the Tools menu, and click "Spelling and Grammar." Check the document for spelling and grammar until you are finished. When finished, a box will display both Flesch Reading Ease and Flesch-Kincaid Grade Level scores. It also displays how many passive sentences your letter contains, which

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[2]The formula for the Flesch Reading Ease score is: 206.835 – (1.015 x ASL) – (84.6 x ASW) where: ASL = average sentence length (the number of words divided by the number of sentences) and ASW = average number of syllables per word (the number of syllables divided by the number of words).

[3]The formula for the Flesch-Kincaid Grade Level score is: (.39 x ASL) + (11.8 x ASW) – 15.59 where: ASL = average sentence length (the number of words divided by the number of sentences) ASW = average number of syllables per word (the number of syllables divided by the number of words).

is also an indicator of readability: the more passive sentences your letter contains, the more difficult it is to read.

For most versions of Wordperfect, go to the Tools menu, click “Grammatik,” then “Options.” At “Options,” scroll down to “Analysis,” and click on “readability.” A graph will appear providing a Flesch-Kincaid Grade Level score, along with functions allowing a comparison of the instant document with a Hemingway short story, the Gettysburg Address, 1040EZ tax form, or any other document. Also provided are Flesch Reading Ease vocabulary and sentence complexity scores.

C. Non-English Speaking Clients

In a number of cases, our clients are not fluent in English. When you represent such a client, it is your responsibility to communicate with the client in his or her native language. In this regard, it is necessary to have letters translated into the client's language. Moreover, when complex matters are to be discussed, it may be necessary to retain an interpreter for the purpose of a client interview over the phone or in-person.

Importantly, the Sixth District has devised guidelines concerning the reimbursement of fees paid to a translator or interpreter. Those guidelines are as follows.

Category One: If the defendant received the services of a court appointed interpreter or translator in the trial court, counsel on appeal may employ an interpreter for either or both of two purposes: (1) to translate correspondence; and/or (2) to assist in an attorney-client interview. There is a $250 limit on this category. Counsel need not obtain a court order under this category. Thus, any expenditure under this category may simply be claimed in the expenses section of the standard claim form.

Category Two: Any use of an interpreter or translator which does not fall within the definition of Category One. Thus, the court's prior authorization is required in the following situations: (1) if the defendant did not have an interpreter or translator in the trial court; (2) if appointed counsel wishes to expend more than $250 on interpreter's or translator’s fees; or (3) if appointed counsel wishes to employ an interpreter or translator for purposes other than to translate correspondence or to assist in an interview.

In order to obtain the court's prior authorization under Category Two, counsel must make a formal ex parte application to the court under penalty of perjury. The application must set forth the reasons why an interpreter or translator is required. In addition, the application must state the exact sum requested. If the court authorizes the expenditure of fees, the amount expended may then be claimed in the expenses section of the standard claim

form.

D. Potential Adverse Consequences

Appellate counsel has a duty to advise the client of potential adverse consequences. (*United States v. Beltran-Moreno* (9th Cir. 2009) 556 F.3d 913, 915.)

The problem of adverse consequences is a complex one, and SDAP is available to provide guidance in this area. When you spot a possible adverse consequence, you need to counsel the client with care. Only the client can make the decision to assume the risk of an adverse consequence. Your duty is to impart sufficient information and legal advice to enable the client to make that decision. At a minimum, you need to inform the client of the nature of any adverse consequences, how likely it is that those consequences will arise if the appeal goes forward, and your professional recommendation about proceeding. In short, you need to advise and counsel the client so that the client, not you, makes an informed decision whether to proceed with the appeal. The client should understand that many potential adverse consequences can be corrected at any time. While abandoning an appeal might reduce the likelihood of the problem being detected, the client might suffer the consequence even if the appeal is dismissed.

Counsel cannot abandon an appeal without the client's consent. (*Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053.) It is good practice to obtain the client's consent in writing. There is a sample motion on the SDAP website which has a space for both the client and the attorney to sign so that there is no doubt as to the client's consent. (But see Cal. Rules of Court, rule 8.316(a) [abandonment may be signed by counsel alone].)

E. Confidentiality

"It is the duty of an attorney to do all of the following: [¶] . . . [¶] [t]o maintain inviolate the confidence, at every peril to himself or herself, to preserve the secrets, of his or her client." (Bus & Prof. Code, § 6068, subd. (e)(1).)

"A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . . " (Rules Prof. Conduct, rule 3-100(A).)

"[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.) " '[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that

relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.) " '[C]lient' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent." (Evid. Code, § 951.) "The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under . . . Section 954." (Evid. Code, § 955.)

This means you must not reveal information provided by the client without his or her permission. You may speak to others about the case, so long as the information discussed is publically available. Note that juvenile matters are confidential, and generally it is improper to publically discuss the facts of the case. (See Welf. & Inst. Code, § 827 et seq.) Even in criminal cases, there may be confidential information which cannot be shared, such as material in medical reports, psychological evaluations, probation reports, and *Marsden* hearings.

Parents, guardians, family members, and friends are often good advocates for the client, providing helpful information about your client and the case. Many have been involved from the inception of the case, and remember significant details, not apparent from the record. Having intimate knowledge of your client's life and development over the course of his life, family members may be able to share valuable insights to assist you with your case. They may also alert you to new developments in your client's case in juvenile court. Accordingly communicating and staying engaged with parents, guardians, and family members can be a vital component of zealous advocacy. (Rules Prof. Conduct, rule 3-110.)

However, such communication is not unlimited. Counsel generally should not discuss the case with a person whose interests are adverse to your client's, even if the person is a family member or guardian, except for investigating potential issues for the client's advantage. (Rules Prof. Conduct, rule 3-110.) Moreover, any communication must not involve disclosure of confidential information.

Please note that there is a special provision that applies to juvenile appeals and writs. To protect the anonymity of the juvenile, in "all documents filed by the parties in

proceedings under this chapter, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used." (Cal. Rules of Court, rule 8.401(a)(1).) Similarly, the full name of the juvenile's relatives may not be used if such use would defeat the "objective of anonymity." (Rule 8.401(a)(3).) In order to protect the juvenile's anonymity, it is appropriate to refer to relatives by only their first names or initials. (Rule 8.401(a)(3).) The minor's date of birth, address, and other identifying information should not be included. The same rule applies to victims who are minors and all victims of sex crimes, unless they are killed in the crime. (See Cal. Style Manual (4th ed. 2000) §§ 5.09, 5.10, pp. 179-181.)

F. Termination of Representation

"A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." (Rules Prof. Conduct, rule 3-700(A).) A member whose employment has terminated shall: [¶] (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and [¶] (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter." (Rules Prof. Conduct, rule 3-700(D).)

"Client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 2001-157, pp. 3-4.)

The most important stage of the appeal, as far as the client is concerned, is the final decision. Along with a copy of the decision, you should explain the effect it will have and also inform the client of any additional steps you plan to take. A sample letter is available at the SDAP website.

Once the appeal is concluded, the client must be advised of his remaining remedies. If a federal constitutional issue was exhausted in the California Supreme Court, the client must be told that he can seek relief by: (1) filing a petition for writ of certiorari in the United States Supreme Court, and (2) filing a petition for writ of habeas corpus in the federal district

court. The client should be provided with the applicable forms and advised of the filing deadlines. Finally, the record should be sent to the client unless the client has requested that the record be sent to someone else.

II. THE CLIENT - SPECIFIC SITUATIONS

A. No Issues on Appeal

In *People v. Wende, supra,* 25 Cal.3d 436, the California Supreme Court specified the nature of the brief which is to be filed when defense counsel is unable to find a non-frivolous issue to argue. As approved by the U.S. Supreme Court, counsel's duty is to file a brief:

> that summarizes the procedural and factual history of the case, with citations to the record. He also attests that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a pro se supplemental brief. He further requests that the court independently examine the record for arguable issues . . . [C]ounsel following *Wende* neither explicitly states that his review led him to conclude that an appeal would be frivolous . . . nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing. [Citation.]

(*Smith v. Robbins* (2000) 528 U.S. 259, 265.)

Deciding whether an issue is merely weak or wholly frivolous is not an easy task. Nonetheless, the courts have provided some guidance by which the merit of an issue is to be measured. As one court has observed:

> [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."

(*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

While reasonable lawyers will no doubt differ on the application of the cited test in

a particular case, the reality remains that it is probably as precise a measure as we are likely to obtain.

Before filing a *Wende* brief, appellate counsel should recall that there is an ethical duty to zealously represent the client and "resolve all doubts and ambiguous legal questions in favor of his or her client." (*McCoy v. Court of Appeals of Wisconsin* (1988) 486 U.S. 429, 444.) Thus, if a good faith, albeit weak, issue can be plausibly raised, a *Wende* brief is not appropriate. This is especially true if it can be maintained that existing law should be changed. (*People v. Feggans* (1967) 67 Cal.2d 444, 447 [attorneys have a duty to advocate for changes in the law].)

If you believe that a *Wende* brief is appropriate, you must first submit the record to SDAP for its independent review. A *Wende* brief may not be filed unless a SDAP staff attorney has authorized the filing of the brief.

In *Smith v. Robbins* (2000) 528 U.S. 259, the United States Supreme Court ruled that providing a factual and procedural summary and requesting that the court independently examine the record for arguable issues is sufficient to satisfy the federal constitution.

All briefs filed pursuant to *People v. Wende, supra,* 25 Cal.3d 436, *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Phoenix H.* (2009) 47 Cal.4th 835, and *People v. Serrano* (2012) 211 Cal.App.4th 496 must be filed electronically with the court with no paper copies submitted. The documents must be submitted in the following format: Documents must be a single, text-searchable PDF file, no more than 5 MB in size, and an exact duplicate of the paper copy. A text-searchable PDF file means the document cannot be scanned. Instead, counsel must use a computer program that converts the word processing file into a PDF file.

SDAP will accept electronic service of no-issue briefs. Service shall be made at sdapattorneys@sdap.org in PDF format. The subject header should include the case name, case number and the title of the document. The name of the buddy staff attorney should be in the e-mail.

The Attorney General must be electronically served all documents in either a PDF or Word format at Docketing6DCASFAWT@doj.ca.gov. The subject header should include the case name, case number and the title of the document.

A hard copy should be mailed to the client, the district attorney, the superior court, and any other parties. No other hard copies need to be produced.

The proof of service needs to reflect electronic service. (See Cal. Rules of Court, Rule 2.251(g).) Counsel is responsible for maintaining an unaltered copy of the documents that are electronically filed, delivered, or served. (Code Civ. Proc. § 1010.6; Cal. Rules of Court, Rules 2.250 et seq.) Additional information and the method for electronic filing and electronic delivery will be found on the court's website at http://www.courts.ca.gov/6dca.htm.

B. The Missing Client

"[A] court . . . has the power to dismiss [an] appeal of an appellant who is a fugitive from justice." (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 531 citing *People v. Clark* (1927) 201 Cal. 474, 477.) The fugitive disentitlement doctrine is equitable and discretionary in nature and "may be applied when the balance of the equitable concerns make it a proper sanction for a party's flight." (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 898, citing *U.S. v. Van Cauwenberghe* (9th Cir. 1991) 934 F.2d 1048, 1054.) "Various justifications have been advanced for [the doctrine's] application[, including]: (1) assuring the enforceability of any decision that may be rendered on or following the appeal; (2) imposing a penalty for flouting the judicial process; (3) discouraging flights from justice and promoting the efficient operation of the courts; and (4) avoiding prejudice to the other side caused by the defendant's escape." (*Puluc-Sique*, at p. 898, citations omitted.) However, the court shall permit the respondent to defend an appeal even if he or she has fled. (*Doe v. Superior Court (Polanski)* (1990) 222 Cal.3d 1406.) And the appeal may be reinstated if the defendant is later returned to custody. (*People v. Kang* (2003) 107 Cal.App.4th 43, 49-53.)

What do you do when your client vanishes during your representation and you cannot locate him?

First, try to find out if the client is in custody:

CDCR Inmate Locator: http://inmatelocator.cdcr.ca.gov

Bureau of Prisons Prisoner Locator:
http://www.bop.gov/iloc2/LocateInmate.jsp

Immigration and Customs Enforcement Detainee Locator: https://locator.ice.gov/odls/homePage.do

Division of Juvenile Justice (formerly known as the California Youth Authority), you may call (916) 262-1514.

Santa Clara County Jail: http://eservices.sccgov.org/ovr/find_inmate.do

Santa Cruz County Jail: http://inmatelocator.co.santa-cruz.ca.us

If the client is not in custody, check the probation report for relatives or other persons who may have information as to your client's whereabouts, and contact them. Try contacting trial counsel for information about his whereabouts. Counsel might know of alternate contact information, or the names and phone numbers of family or friends.

If the foregoing methods of locating your client fail, should you call your client's probation officer? No! Standard probation conditions require the probationer to keep her officer informed of her location, and to notify the officer (usually in writing) before changing residence. Calling your client's probation officer may trigger a probation violation. As this is obviously adverse to your client's interests, it violates an attorney's duties of loyalty and zealous advocacy. (Rules Prof. Conduct, rule 3-110.)

It should be noted that the appellate court retains jurisdiction over a case even if the client is a fugitive. Thus counsel must proceed with the appeal and should not *sua sponte* advise the court that the client is a fugitive.

C. The Demanding Client

"It is the duty of an attorney to do all of the following: [¶] . . . [¶] [t]o counsel or 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." (Bus & Prof. Code, § 6068, subd. (c).) "Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." (Bus & Prof. Code, § 6068, subd. (g).)

"A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: [¶] (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or [¶] (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." (Rules Prof. Conduct, rule 3-200.)

Some clients send ten page letters each day and sometimes place collect telephone calls several times a day. Patience and a thick skin is sometimes required. It can be

frustrating to be responding repeatedly to the same point. It is important to maintain your professionalism and to maintain the channels of communication. It is important to follow up on possible leads, even if several previous leads proved fruitless. Clients sometimes sense when there is an injustice but cannot point to the source or articulate the problem. At the same time, reasonable limits can be set. You can explain to the client that collect calls must be limited, especially if the client is just as able to communicate by letter. Several letters can pile up before responding, so long as the response to the earliest letter is still timely.

The client might demand that certain issues be briefed. If the issue is frivolous, it should not be briefed. On the other hand, there have been numerous instances where the client insists on a certain issue being briefed, which as described by the client is frivolous, but there can be strong grounds for relief if the issue is defined differently.

D. The Threatening Client

"[A]n attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (Bus & Prof. Code, § 6068, subd. (e)(2).)

> (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
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> (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
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> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
>
> (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
>
> (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

(Rules Prof. Conduct, rule 3-100.)

The relatively new rule of professional conduct *permits* but does *not require* counsel to report a true threat. This is an exception to both the duty of loyalty and the duty of confidentiality. If the threat is to a third person, often the best course of action is to counsel the client against taking such action, saying the words, or even contemplating carrying out such a course of conduct.

If the threat is directed to you, take a step back. One's personal safety is important. But it is also important to be careful and not to overreact. Reporting a possible threat could cause irreparable harm to the client and make any relationship with successor counsel impossible. Most defense counsel have seen the phantom criminal threat cases. A person is angry or frustrated, says something, and ends up with a felony strike conviction for violating Penal Code section 422 when the real risk of harm was negligible at best. Twenty years ago, idle threats were a common way of expressing frustration or anger. It continues to be a common mode of communication for the less sophisticated. If you perceive a real threat, you should contact SDAP. Discussing the matter with a colleague can help you assess objectively whether there is a real danger. Even if there is a real threat, certain actions might be possible short of calling law enforcement on your own client.

E. The Client Seeking to Further a Crime or Fraud

"It is the duty of an attorney to do all of the following: [¶] (a) To support the Constitution and laws of the United States and of this state." (Bus & Prof. Code, § 6068.)

"A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal." (Rules Prof. Conduct, rule 3-210.)

This rule expresses the obvious notion that an attorney cannot use the shield of confidentiality to aid and abet in criminal activity. This most often comes up not in planning a new criminal scheme but instead in facilitating a cover up of a crime the client is already charged with (e..g., concealing evidence or dissuading witnesses). Obviously, if the client asks how to carry out a crime, the answer is to not do it.

G. The Victorious Client

If you receive an opinion granting all or part of the relief requested, you must promptly notify the client. If the relief granted is total, the only remaining significant decision will be whether to prepare an answer to the AG's petition for review if one is filed. If relief is partial, the client will have to make an informed decision on whether it is prudent to risk what has been gained by seeking greater relief by way of petition for rehearing and review. You should analyze the relative benefits and risks and convey them to your client. You need an informed decision by the client before you either risk the benefit obtained or abandon the chance for greater benefit by failing to seek review.

It is important to make sure the client receives the relief granted. Sometimes the court of appeal reverses a judgment and no one in the trial court level does anything, depriving the client of meaningful relief. After the remittitur issues, counsel should write to the court, with service on the district attorney and trial counsel, requesting that the court take action as directed by the remittitur. You should also request receipt of a minute order or amended abstract of judgment to verify that relief was indeed given.

If the appellate court orders a new trial, it is sometimes more helpful to the client to wait a little. Penal Code section 1382 states that if a new trial is ordered, it must occur within 60 days of the issuance of the remittitur (or within 90 days if a new preliminary hearing is required). Failure to hold a new trial within the time limit can result in dismissal of the outstanding charges, so long as there is not a time waiver and there is an objection.

III. TRIAL COUNSEL

A. Generally

Especially in appeals from trials, trial counsel should be contacted early in the case. Indicate that you are interested in hearing from him or her with ideas about potential issues; the possibility of a motion for release; or any matters which trial counsel feels you should know about, i.e., potential adverse consequences. You may need to rely on trial counsel for assistance in obtaining copies of released exhibits, settled statement, or information about off-the-record matters.

Some cases, especially juvenile cases, are continuing in the trial court while the appeal is pending. Some events might impact the appeal, even in adult cases. For example, in probation cases, challenged conditions of probation can be modified or probation can be revoked. Sentencing or dispositional errors might be corrected by the trial court. In dependency cases, dismissal or decisions in subsequent hearings might make some issues moot. To competently represent your client (see Rules Prof. Conduct, rule 3-110 [failing to act competently]), you must stay informed about your client's case in juvenile court. A

good way to stay informed is to communicate frequently with your client. Another way is to communicate with the client's parent, guardian, or conservator.

Communication might arise later about a possible claim of ineffective assistance of counsel, but that should not be the first overture in the case. The Rules of Court do not require that a copy of briefs be served on trial counsel. However it is a professional courtesy to do so. The small expense will reap rewards if trial counsel can be made to feel a part of the "team." This positive approach will also make the transition back to the trial court easier if relief is granted and trial counsel is required to follow through with post-reversal proceedings.

B. Investigating Ineffective Assistance of Counsel

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*, at p. 784, fn. 20.) Appellate counsel should consider filing a habeas petition 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.)

"For noncapital cases in California, there is no express time window in which a petitioner must seek habeas corpus relief. (*In re Huddleston* (1969) 71 Cal.2d 1031, 1034.) Rather, the general rule is that the petition must be filed 'as promptly as the circumstances allow . . . . ' (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5 . . . .) An untimely petition for writ of habeas corpus may still be considered if the delay is justified by the petitioner, who bears the burden of demonstrating either: '(i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness' (*In re Robbins* (1998) 18 Cal.4th 770, 780 . . . .)" (*In re Douglas* (2011) 200 Cal.App.4th 236, 242-243.) The equitable defense of laches can be a procedural bar if there has been an inexplicable delay in bringing a petition. (*In re Swain* (1949) 34 Cal.2d 300, 302.) As a practical matter, if a petition is not filed by the time the reply brief is filed, the client might not receive full consideration from the court of appeal.

There are two things we require that you do before raising an ineffective assistance of counsel claim: (1) communicate with the trial attorney to see what can be offered in terms of explanation or justification for what you think is arguable ineffectiveness; and (2) consult

with SDAP. These requirements apply whether the case is assigned to you on an independent or assisted basis.

The first requirement is an absolute prerequisite to arguing ineffective assistance. First of all, you may find out from the trial attorney that the objection you thought the trial counsel missed was actually made, but not put on the record. If this is the case, you can seek a hearing in the trial court to settle the record to reflect that the objection was made. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 192-194.) Following this course benefits the client, because the issue can then be raised directly as judicial error, without scaling the barriers of *Strickland v. Washington* (1984) 466 U.S. 668, regarding proof of prejudice. It also demonstrates your competence in investigating the situation so that it may be accurately presented to the Court of Appeal. And, of course, trial counsel will be glad to have encountered an appellate attorney who has enough professional courtesy to inquire, before reflexively raising an ineffective assistance claim.

In other cases, there will be an act or omission, clearly on the record, which raises a substantial question of trial counsel ineffectiveness. You must communicate with the trial counsel, preferably by letter or e-mail, telling trial counsel what your concerns are, and asking the trial counsel to respond in writing stating his or her reasons for making the act or omission. From trial counsel, you may find reasons outside the appellate record which gave counsel a reasonable tactical basis for his or her conduct. Remember, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland, supra*, 466 U.S. at p. 689.) Sometimes, trial counsel base decisions on what evidence to introduce or which witnesses to call on what the client told them. Particularly in such cases, raising an ineffective assistance of counsel claim without proper communication with trial counsel and your client can be like entering a minefield, with very harmful revelations surfacing after you have waived the attorney-client privilege by attacking counsel. (See *In re Gray* (1981) 123 Cal.App.3d 614, 617 [attorney-client privilege “is waived only as to issues raised in the petition . . .].”)

Generally, until you know trial counsel's reasons for acting or failing to act, you simply cannot know whether or not there was "an informed tactical choice within the range of reasonable competence, ..." (*Pope, supra*, 23 Cal.3d at p. 425.) As *Pope* stated, “[h]aving afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable tactical competence." (*Id.*, at p. 426, fn. omitted.)

Only after you have received the reasons from trial counsel are you in a position to

evaluate the merit of an ineffective assistance of counsel claim. If reasons are given which clearly establish a reasonable tactical basis for the decision, the issue should be abandoned. If not, trial counsel's letter indicating either lack of knowledge or a professionally unreasonable basis for the challenged conduct can be the basis for drafting a declaration for trial counsel's signature which can be used in support of a habeas petition. It has been our experience that a professional approach by the appellate attorney to trial counsel, including a straightforward statement of why you think there might be an ineffective assistance of counsel issue and a request for explanation, often results in the same type of unemotional, professional response by trial counsel. We have had trial counsel, despite the obvious professional disincentives, be very candid and cooperative in admitting a lack of research or knowledge on a particular point, when they feel they have been fairly treated by appellate counsel.

C. Uncooperative Trial Counsel

Appellate counsel, as successor counsel, owes no duty to the trial attorney. (*Pollack v. Lytle* (1981) 120 Cal.App.3d 931, 942.) On the other hand, trial counsel is under a continuing duty of loyalty to his former client (*Galbraith v. State Bar of California* (1933) 218 Cal. 329, 333; *Wutchumna v. Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574) and is bound to place his client's interests over his own. (ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Standard 4-1.6.) Even though the employment relationship between trial counsel and the client has ended, "an attorney's obligation to [the] client does not cease with the termination of the employment relationship," but extends beyond and encompasses a continuing obligation "to avoid prejudice to the rights of the client." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, pp. 1-2; rule 3-700.)

Trial counsel is ethically obligated "to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, *even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel.* This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client. [Citations.] And, inasmuch as the attorney's duty to the client survives the termination of the attorney-client relationship, the fiduciary duty to the former client requires the attorney to protect the interests of the client and make appropriate disclosure." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, p. 4; italics added.) In accordance with the duty of complete fidelity to the client, it is also prohibited for a trial attorney to "assume a position adverse or antagonistic to [the client]. . ." (*People v. Davis* (1957) 48 Cal.2d 241, 256.)

The disclosure requirement referred to above includes a duty to release any papers and property in the client's file to either the client or successor counsel. This rule encompasses "not just the pleadings, depositions and exhibits in the file, [but also] work product reasonably necessary to the client's representation . . . [and] [t]he attorney's impressions, conclusions, opinions, legal research, and legal theories prepared in the client's underlying case.. . ." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, p. 2, relying on Rules Prof. Conduct, rule 3-700(A) & (D); *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950.)

If trial counsel refuses to produce the file after reasonable requests have failed, appellate counsel may file a motion in the Court of Appeal requesting a court order for its production. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.) **A motion to compel production of the file should only be used as a last resort**.

If trial counsel is called to testify, he or she is bound to assert the attorney-client privilege except as to those matters put in issue by the habeas petition. (*Gray, supra,* 123 Cal.App.3d at p. 617.) Some trial attorneys say that they would disclose additional bad facts about the client if called to testify or draft a declaration in a habeas proceeding. However, trial counsel has a duty to refrain from acting antagonistically toward the client. (*Davis, supra,* 48 Cal.2d at p. 256.) Thus, under the rules of evidence, trial counsel must maintain his client's secrets unless they are relevant to the issues before the court. (*Gray*, at p. 617.)

California and federal courts agree 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, *Feggans, supra,* 67 Cal.2d at p. 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, supra,* 469 U.S. at p. 394 [appellate counsel "must play the role of an active advocate, rather than a mere friend of the court. . . .")

If trial counsel fails to respond, appellate counsel can submit a declaration in a habeas petition describing the efforts to obtain information. Exhibits can include letters and e-mails to and from trial counsel, including any declarations against interest made by trial counsel. While it is desirable for counsel not to become a witness in a proceeding, it is not forbidden. (Comment to Rules of Prof. Conduct, rule 5-210 [attorney may testify in non-jury trial

proceedings].)

IV. Client Communications to SDAP

In cases in which SDAP is counsel of record, send us copies of all of your client correspondence. The most frequent complaint clients have about their appellate lawyers is a failure to communicate. For some time, it has been SDAP policy that we are to receive copies of all correspondence between panel attorneys and clients. The reason for the requirement is twofold. First, SDAP is counsel of record on all cases unless there has been an explicit declaration of a conflict of interest. Thus, SDAP has a duty to be aware of the advice and information being transmitted between co-counsel and the client. Second, SDAP receives numerous complaints from clients. The copies of correspondence ensure that panel attorneys are satisfying their statutory and ethical duty of reasonable communication with our clients. (See Bus. & Prof. Code, sec. 6068, subd. (m).) In cases in which SDAP is not counsel of record due to a conflict, it is inappropriate for counsel to send us copies of client correspondence.

Aside from the need to keep us informed, you have another reason for sending SDAP copies of client correspondence. The failure to send us copies can result in a delay or reduction of your claim for compensation. In virtually every case, you will bill time for communicating with the client. The compensation guidelines allow between 2.5 and 3.5 hours for this purpose. If we do not have copies of client correspondence, we may have an inadequate basis upon which to evaluate a claim over guidelines. When we evaluate your claim, we may therefore ask you for the copies and hold your claim until we receive them.

You should also keep in mind the eleventh and greatest commandment: **If problems arise with the client, contact SDAP.** Too often the first time we hear of a problem is when we receive a letter from an irate client complaining about an attorney. Learning of a problem after the attorney-client relationship is severely damaged puts SDAP in the role of mediator between you and the client. That role is not one we relish. If you let us know of a problem with a client as early as possible, we can assist you in finding ways to ameliorate it and retain the client's trust. You should not hesitate to call on us for help.

V. CODEFENDANTS

"While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Rules Prof. Conduct, rule 2-100(A).) "This rule shall not prohibit: [¶] . . . [¶] (2) Communications

initiated by a party seeking advice or representation from an independent lawyer of the party's choice." (Rules Prof. Conduct, rule 2-100(C).)

Often the position of codefendants on appeal are not antagonistic, and cooperation with appellate counsel and SDAP is possible, even useful. Nonetheless, counsel should be careful not to disclose confidential information to a codefendant's attorney and should always keep the interests of one's own client paramount.

VI. THE COURT

A. Ex Parte Communications

"A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except: [¶] (1) In open court; or [¶] (2) With the consent of all other counsel in such matter; or [¶] (3) In the presence of all other counsel in such matter; or [¶] (4) In writing with a copy thereof furnished to such other counsel; or [¶] (5) In ex parte matters." (Rules Prof. Conduct, rule 5-300(B) Any non-confidential pleading filed in a court should be served on the prosecution, and this should be reflected in a proof of service.

B. Duty of Candor

"It is the duty of an attorney to do all of the following: [¶] . . . [¶] (b) To maintain the respect due to the courts of justice and judicial officers [¶] . . . [¶] (d) To 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 to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus & Prof. Code, § 6068, subds. (b) & (d).)

"In 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 truth; [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; [¶] (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision; [¶] (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and [¶] (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness." (Rules Prof. Conduct, rule 5-200.)

An appellant must fairly set forth all the significant facts, not just those beneficial to the appellant. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "It is the duty of counsel to refer to the portion of the record supporting his contentions on appeal."

(*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) "A party who challenges the sufficiency of evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient." (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208; accord *Schmidlin*, at pp. 737-738.) "Counsel should never misrepresent the holding of an appellate decision. Not only would that be a violation of counsel's duty to the court (Bus & Prof. Code, § 6068, subd. (d)), it will backfire because the court will discover the misrepresentation, particularly when it relates to a decision issued by that court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 417.)

Appellate counsel has a duty to bring to the court's attention information which may render an appellate issue moot. (*Guardianship of Melissa W.* (2002) 96 Cal.App.4th 1293, 1300-1301.) A court may take judicial notice of documents to determine if the appeal is moot. (*In re Karen G.* (2004) 121 Cal.App.4th 1384, 1390.)

C. Jurors

When investigating potential juror misconduct, it is important to be clear who you are and who you represent. "After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service. [¶] . . . [¶] (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service. [¶] (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror. (Rules Prof. Conduct, rule 5-320.)

D. Request for Investigation Funds

In some cases, the assistance of a professional investigator or expert would greatly advance the client's interests. Pursuant to Penal Code section 1241, the Court of Appeal has the authority to award a reasonable sum for "necessary expenses." In some appellate courts, appointed counsel is entitled to expert investigation funds without prior approval. (See California Supreme Court Policies Regarding Cases Arising From Judgments of Death, Section 2-2.3; "[w]ithout prior authorization of the court, counsel may incur expenses up to a total of $3000 for habeas corpus investigation . . . .")

The Sixth District does not reimburse investigative expenses unless the court has approved them. Thus, unless you are willing to risk paying for investigative expenses out of your own pocket, you should not expend investigative fees until they have been approved

by the Court of Appeal.

In order to seek investigative or expert fees, counsel must file an ex parte motion. The motion must specify the lines of inquiry which the investigator or expert will pursue. (*People v. Faxel* (1979) 91 Cal.App.3d 327, 330.) The showing must be as specific as possible. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320.) The motion should specify the exact sum sought for investigation.

If the Court of Appeal denies the motion, this fact should be mentioned in the pleading section of the habeas petition. It should be alleged that the defendant would have made a better factual presentation had the motion been granted. In this way, the defendant will be able to broaden his factual showing in a subsequent federal habeas proceeding if he is able to obtain investigative funds from the federal district court. (But see *Cullen v. Pinholster* (2011) 131 S.Ct. 1388, 1398 [petitioner's right to an evidentiary hearing in federal court is limited].)