ETHICS IN THE MODERN AGE:
THE NEW RULES OF PROFESSIONAL RESPONSIBILITY

By Patrick McKenna and Jonathan Grossman

I. RECENT DEVELOPMENTS

Ethics rules derive mostly from three sources: (1) the State Bar Act (Bus. & Prof. Code, § 6068) and other statutes, (2) the Rules of Professional Conduct, and (3) case law. There have been rules for the conduct for attorneys for many years. The American Bar Association promulgated the Model Code of Professional Responsibility in 1969. The Watergate scandal, during which many of the wrongdoers were lawyers, created a movement to remove the regulation of lawyers from the state bar associations to the legislatures. The ABA decided its model code was a failure and replaced it with new Model Rules of Professional Conduct in 1983. 49 states quickly adopted most or all of the ABA rules, but California held out.

California finally adopted a modified version of the ABA rules in 2018 when the State Bar recodifed the Rules of Professional Responsibility as the new Rules of Professional Conduct. While most of the rules remain substantively the same, some have been changed, and some rules are new. The numbering has changed to parallel the ABA Model Rules. For example, old rule 1-110 became rule 8.1.1. Attorneys are no longer referred to as "members" of the State Bar. Instead, they are referred to as "lawyers." Some terms are defined in rule 1.0.1[1] and are marked in the rules with an asterisk.*

A. Discrimination and Contemptuous Behavior

Some new rules reflect the #MeToo era. Rule 8.4.1 prohibits discrimination, harassment and retaliation. Specifically, a lawyer may not "unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic" or "unlawfully retaliate" against one. (Rule 8.4.1(a).) A " 'protected characteristic' means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived." (Rule 8.4.1(c)(1).) And " 'retaliate' means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by" the rule. (Rule 8.4.1(c)(4).) It is also unlawful for a law firm to permit unlawful discrimination, harassment, or retaliation. (Rule 8.4.1(b).) Official comment

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[1]Unless otherwise specified, all further references to rules are to the new Rules of Professional Conduct.

[2] to the rule states exercising a peremptory challenge in a discriminatory manner does not necessarily amount to a violation of the rule. The contents of the rule is not new, but unlike the predecessor rule, a civil or administrative adjudication of unlawful conduct is no longer required before the State Bar can take action.

A rule was also added to generally prohibit a lawyer from "engag[ing] in sexual relations with a current client . . . unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." (Rule 1.8.10(a).)

Recently, Division Three of the Fourth District published a decision announcing it was reporting a lawyer to the State Bar because of statements he made in court papers which the appellate court said amounted to sex discrimination. Ironically, the plaintiff sued a former employer for sexual harassment. Though the employer was found to be liable, the award was only a few thousand dollars and the trial court refused to award legal fees. The lawyer for the plaintiff filed a notice of appeal calling the court's decision "disgraceful," "succubustic," "pseudohermaphroditic misconduct," and "reverse peristalsis." In the opening brief, the attorney alleged the trial court intentionally erred in making its rulings against the plaintiff. (*Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, 855.)

Indeed, courts can be sensitive to perceived disrespect for its authority. "It is the duty of an attorney," according to the State Bar Act, "[t]o maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, § 6068, subd. (b).) "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 unsupported assertions that the judge was 'act[ing] out of bias toward a party.' [Citation.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.)

One must be especially careful in rehearing petitions not to act impulsively. In short, just because you think you have been unfairly treated by the court does not permit you to appear to attack the integrity of the judge or justices. A rehearing petition was deemed to be contemptuous when it alleged bias, "the fix was in," the opinion was a "manipulated affirmance" and showed the "ends justified the means," oral argument was "window dressing," the court conspired and concocted ways to defeat the claim, and the court was part of a "good 'ol boys" network. (*In re Koven* (2005) 134 Cal.App.4th 262, 272-273.) In sum, if you think the court screwed you, writing a brief that might be considered to be contemptuous gives it an opportunity to really screw you.

B. New Rules on the Duties of Prosecutors

Many defense practitioners have been excited that the State Bar enacted a special rule concerning prosecutorial misconduct. Rule 3.8 states:

> The prosecutor in a criminal case shall:
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> (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
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> (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
>
> (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and
>
> (e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6 [concerning trial publicity].
>
> (f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
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> (1) promptly disclose that evidence to an appropriate court or authority, and
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> (2) if the conviction was obtained in the prosecutor's jurisdiction,
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> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
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> (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
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> (g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

While the new rule might be exciting to those frustrated by prosecutorial misconduct, the Rules of Professional Conduct do not provide grounds for relief for a criminal defendant.

The Constitution, statutes, and case law protect criminal defendants from prosecutorial misconduct.

C. The Effects of Computers on Modern Practice

Some rules have been updated to meet the demands of new technology. For example, rule 3.4 prohibits destroying or concealing evidence. The comments to the rule state the rule's application "includ[es] computerized information."

An increasingly common dilemma in the computer age is receiving confidential material you are not supposed to have. This can be records that mistakenly include in camera hearings where the defense was not allowed to attend, or *Marsden* hearing transcripts or probation reports of codefendants. It can include emails that were misdirected. There is a rule that applies:

> Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:
>
> (a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
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> (b) promptly notify the sender.

(Rule 4.4.) The official comments also state: "[i]f a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817.)" Further, "[t]his rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person.* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37.)"

By the same token, it is a lawyer's duty to not make an unauthorized disclosure of private or confidential information. In *Marriage of Anka and Yeager* (2019) 31 Cal.App.5th 1115, 1118, the lawyer was sanctioned for willfully disclosing information from a confidential custody evaluation. "It is axiomatic that an attorney must represent a client to the best of his or her ability. The attorney owes a duty to that client to present the case with vigor in a manner as favorable to the client as the rules of law and professional ethics permit. But besides being an advocate to advance the interest of the client, the attorney is also an officer of the court. (See Bus. & Prof. Code, § 6067; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.)" (*Id.* at p. 1117.) Juvenile proceedings are confidential. (Welf. & Inst. Code,

§ 827; see also Cal. Rules of Court, rule 8.401(a)(2) [prohibiting identifying the parties in a juvenile proceeding in briefs and other documents filed in the court].) It is important to not share the record with the public.

If a brief, petition, or motion in a non-juvenile case contains information that was sealed in the superior court, the lawyer must file two versions, a public version with any reference to the confidential information redacted, and an unredacted version. (Cal. Rules of Court, rule 8.46(g).) The Sixth District Court of Appeal has issued Miscellaneous Order 14-1m permitting the parties to refer to the contents of a probation report in a publically filed brief.

Further, California Rules of Court, rule 1.201 requires parties and their attorneys to redact from papers filed in court personal identifiers, such as social security numbers, drivers license numbers, and financial account numbers from all papers filed in the court's public file. If the identifying numbers are relevant for some reason, one should only use the last four digits. (See also Ct. App., Sixth Dist., Local Rules of Ct., rule 6(f).)

There is a new rule of court concerning the identity of protected parties in court opinions. The courts are required to protect the privacy of domestic violence victims, wards, conservatees, mental health patients, and those protected by civil protective orders. The court shall not identify others if this would reveal the identity of a protected party, such as a parent. (Cal. Rules of Court, rule 8.90.) This is a result of search engines that will call up unpublished opinions. People who were not convicted of crimes have been surprised to find their past has been open to public scrutiny through the Internet. While the rule applies to the court, lawyers should be mindful not to identify protected parties, as the briefs are often open to the public, and it is possible that the brief or motion can find its way onto the Internet.

It is also important that the lawyer carefully keep confidential client communications confidential. Business and Professions Code 6068, subdivision (d)(1) states: "It is the duty of an attorney [¶] . . . [¶] [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (See also rule 1.6(a).) California's rule is among the strictest in the country. A common concern is when a lawyer, usually a criminal defense lawyer, hears from the client an intention to harm a victim, witness, or someone else. The Legislature made an exception permitting but not requiring, the lawyer to disclose this: "(1), an 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. (d)(2); see also rule 1.6(b).) The rule makes it clear the lawyer should first try to persuade the client to act lawfully and advise the client that the lawyer might disclose the threats to authorities. (Rule 1.6(c).) Any disclosure of a threat should be no more than necessary to

address the threat. (Rule 1.6(d).) It is interesting there is not the same concern for corporate lawyers aware of the harmful actions of their clients. In any event, one should be especially cautious when revealing a possible threat by a client. If such a problems arises, you should contact your SDAP staff attorney buddy.

A lawyer must also not participate in the crime of the client. "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 lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal." (Rule 1.2.1(a).) Nonetheless, the new rule makes clear a lawyer may "(1) discuss the legal consequences of any proposed course of conduct with a client; and [¶] (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal." (Rule 1.2.1(b).)

Rules 5.1 and 5.3 were added concerning the responsibility of supervising attorneys. They require a lawyer to make sure everyone in the firm complies with the rules and the laws and makes a lawyer responsible for other's actions in some circumstances.

With so much now available by computer, it is easier to find material that has addressed an argument you now wish to make. If you are formulating an argument based on another's work, you should describe the source of a writing used in a brief for purposes of attribution, even if the source is not citable precedent. (See *In re White* (2004) 121 Cal.App.4th 1453, 1484.) In at least one unpublished case, the Sixth District Court of Appeal expressed displeasure after seeing a respondent's brief that was mostly lifted from an unpublished opinion by the court without attribution.

II. SPECIAL RULES CONCERNING THE DUTY OF APPELLATE COUNSEL[2]

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, with gross negligence, or repeatedly fail[ing] to perform legal services with competence." (Rule 1.1(a).) " 'Competence' in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service." (Rule 1.1(b).)

Under the Sixth Amendment, "counsel 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." (*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.)

A. Is There A Proper Notice Of Appeal?

The required components of an operational notice of appeal are set forth in California Rules of Court, rule 8.304 and Penal Code section 1237 et seq. Make sure the notice of appeal complies with these sections by correctly specifying whether the appeal is from a final judgment of conviction (Penal Code section 1237, subd. (a)); from an order made after judgment, affecting the substantial rights of the party (Penal Code section 1237, subd. (b); Cal. Rules of Court, rule 8.304(a)); or from a guilty or nolo contendere plea. (Penal Code section 1237.5; Cal. Rules of Court, rule 8.304(b).) The notice of appeal must be filed within 60 days of sentencing or entry of the order being appealed. (Cal. Rules of Court, rule

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[2]Much of the following material is derived from prior seminar material, "Ethical Duties You Need to Know about in Communicating with Clients, the Court, and Others" by Lori A. Quick and Jonathan Grossman and "Ethical Duties of Appellate Counsel Toward Clients" by Lori A. Quick.

8.308(a).)

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

B. Correcting The Record

An attorney appointed to represent a client on appeal has a duty to ensure a proper record is prepared. (*People v. Barton* (1978) 21 Cal.3d 513, 519-520; *People v. Acosta* (1996) 48 Cal.App.4th 411, 426; *People v. Harris* (1993) 19 Cal.App.4th 709.) The contents of the normal record on appeal are set forth in California Rules of Court, rule 8.320. In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274; *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 573-576; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186 & fn. 2.)

C. Adverse Consequences And Abandonment Of The Appeal

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

D. Duties Related to the Opening Brief

Appellate counsel has a duty to prepare a legal brief which sets forth all material facts. (*Acosta*, *supra*, 48 Cal.App.4th at p. 427; California Rules of Court, rule 8.204(a)(2)(C).) The brief must set forth all arguable issues, and contain citations to the appellate record as well as appropriate authority. (*People v. Barton* (1978) 21 Cal.3d 513, 519; see also *Harris*, *supra*, 19 Cal.App.4th at p. 714.) Counsel has a duty to refrain from arguing against the client's interests (*ibid.*), and to refrain from advancing frivolous arguments (Bus. & Prof. Code, § 6068, subd. (c); *In re Smith* (1970) 3 Cal.3d 192, 198).

The format of the brief must comport with California Rules of Court, rule 8.204. Each argument must be stated under a separate heading or subheading summarizing the point. (Cal. Rules of Court, rule 8.204(a)(1)(B).) The Court of Appeal has no duty to address an argument presented in violation of a court rule. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

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.) "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).) "A lawyer shall not: [¶] (1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer; [¶] (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or [¶] (3) offer evidence that the lawyer knows* to be false." (Rule 3.3(a).)

E. When there are no Issues on Appeal or the Issue Becomes Moot

In *People v. Wende* (1979) 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 first reviewed the record.

An issue can become moot "when the decision of the reviewing court 'can have no

practical impact or provide the parties effectual relief. [Citations.]' [Citation.] 'When no effective relief can be granted, an appeal is moot and will be dismissed.' " (*MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) A lawyer has a duty to inform the court when an issue he or she has raised might have become 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.) But a lawyer also has a duty not to argue against the client's interests (*People v. Barton* (1978) 21 Cal.3d 513, 519) and to not abandon an appeal without the client's written consent (*Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053). The solution is to write to the court, state he or she has the duty to provide information to the court when an issue might be moot, and then explain what the new development is. Now stop. While the conclusion might be obvious, the lawyer should not argue the issue actually is moot.

F. Petitions for Rehearing

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

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

Sometimes we win the appeal, but the remedy is lacking or ambiguous. This can cause confusion on remand and unnecessarily delay the appropriate relief. "A petition for rehearing is the correct remedy to address material inaccuracies or omissions in a disposition. 'It is not inconceivable that the directions of a reviewing court may be imperfect, or impractical of execution. Under those circumstances the aggrieved party has his remedy in a petition for rehearing.' [Citation.]" (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 314.)

G. Petitions for Review

Like the petition for rehearing, appellate counsel has no affirmative duty to file a petition for review. (Cal. Rules of Court, rule 8.500(a)(1).) However, upon receiving the

Court of Appeal's opinion, appellate counsel does have a duty to inform the client as to whether and why a petition for review should be filed, and if so, the date by which it must be filed if counsel does not intend to do it.

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

a. the Court of Appeal's opinion was published;
b. the Court of Appeal's opinion rejects a published case;
c. a good faith argument can be made for a change in existing precedent; and
d. an issue must be preserved for federal review.

The petition for review must be filed within 10 days after the Court of Appeal's decision is final in that court, which is 30 days after the opinion is filed. (Cal. Rules of Court, rules 8.500(e)(1), 8.264(b)(1).) In other words, the petition for review is due no later than 40 days after the date of the court of appeal opinion. The date of the finality of the Court of Appeal opinion in the Court of Appeal **is not extended if the thirtieth day falls on a weekend or holiday.** (Cal. Rules of Court, rule 8.500(e)(1).) However, if the tenth day after finality in the Court of Appal falls on a weekend or holiday, the petition may be filed on the next court day. (Cal. Rules of Court, rule 8.60(a), referencing the Code of Civil Procedure as governing computation of time to do any act required by the Rules of Court.)

III. HABEAS CORPUS PETITIONS

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

Appellate counsel should consider filing a habeas petition whenever direct appeal is either not an available remedy; will not provide relief soon enough (*In re Newbern* (1960) 53 Cal.2d 786, 789-790); or when there are facts outside the record which would establish the evidentiary basis for a claim of ineffective assistance of trial counsel (*People v. Pope* (1979) 23 Cal.3d 412, 426-427). As a practical matter, a habeas petition should be filed no later than the filing of the reply brief or a no issues brief.

As there is no duty to file habeas petitions, why should appointed counsel even consider it? First, many panel attorneys as well as staff attorneys have had some astounding successes resulting in extraordinary relief that was unavailable through direct appeal. Second,

assuming appellate counsel recognizes that there is or may be a habeas issue and so advises the client, the chances that the client is going to be able to put together a coherent, persuasive petition are almost nonexistent. Many are simply intellectually incapable of it. Others suffer from physical or mental illness making it just too daunting of a task. Many feel so hopeless and depressed that it is unlikely they will have the energy and determination to file a petition. Finally, those clients who manage to file a petition are probably not going to get the consideration they might otherwise get if an attorney prepared and filed the petition. For all of these reasons, SDAP strongly encourages panel attorneys to investigate and pursue habeas petitions when there are issues to be raised in that manner. We will endeavor to give you as much assistance as possible.

IV. THE CLIENT

A. Duty to Keep the Client Informed

"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 lawyer must "keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed." (Rule 1.4(a)(3).)

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 . . . " You should sign your name on the envelope.

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 *Wende, supra,* 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.[3] 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.[4] The lower the score, which translates to a grade level, the easier the text is to understand. For

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[3]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).

[4]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).

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).

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. A sample application is located on the SDAP website.

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*, *supra*, 52 Cal.3d at p. 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.

E. Termination of Representation

"A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client . . . . ." (Rule 1.16(d).) Upon the termination of a representation, "the lawyer promptly shall release to the client, at the request of the client, all client materials and property. 'Client materials and property' includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not." (Rule 1.16(e)(1).)

"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.

F. 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 *United States 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

Santa Clara County Jail: https://eservices.sccgov.org/OVR/FindInmate/Find.

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 1.1.)

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.

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 petitions 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.