# WORKING WITH CLIENTS AND TRIAL COUNSEL IN DEPENDENCY APPEALS

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## I. DUTY TO COMMUNICATE WITH AND PROPERLY ADVISE CLIENT.

### A. Sources

(1) Business and Professions Code, section 6068, subdivision (m), defining attorney's duties: "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to whether the attorney has agreed to provide legal services."

(2) Rules of Professional Conduct of the State Bar of California, Rule 3-500: "A member shall keep a client reasonably informed about significant developments 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 of Professional Conduct are binding upon all members of the State Bar. (Bus. & Prof. Code, sec. 6077.)

(3) "Failure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline." (Layton v. State Bar (1990) 50 Cal.3d 889, 904.)

### B. Inform and Advise Client Globally Before Opening Brief is Filed.

(1) Nature of appellate process.

(2) Remedies available.

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[1] Sections I and IV of this outline borrow heavily from *Ethical Considerations in Criminal Appeals*, by Michael A. Kresser, Executive Director, SDAP, prepared for the California Judicial Council's Appellate Advocacy College 2000. Section V(B) is adopted from *Writs in Criminal Appeals*, by Carmela Simoncini, ADI Staff Attorney, also prepared for the appellate college.

(3) Professional advice regarding the relative benefits versus risks to pursuing appeal: Need to assess chance of prevailing on issues, what benefit will derive from prevailing on appeal, what nature of risks are, give best judgment on how to minimize risk, or whether risks are not prudent to run. But remember, client makes final decision on whether to run the risk. (See Jones v. Barnes (1983) 463 U.S. 745, 751, accused has ultimate authority to make certain fundamental decisions regarding case, including taking of an appeal.)

(4) Obtain informed, express consent to run any significant risk. While adverse consequences are rare in a dependency appeal, they theoretically do exist.

*Hypothetical*: If your client has no chance of obtaining custody or services, but wants to pursue the appeal in order to challenge the grant of services to the other parent, you must advise your client that a successful challenge to the other parent's grant of services could result in the termination of the parental rights of both parents and placement of the child with someone outside the family. Abandonment of the appeal (or at least abandonment of any challenge to the grant of services to the other parent) would preserve the possibility of the other parent reunifying and your client retaining parental rights and, possibly, visitation. (See Cal.R.Ct. 1463(a) (with some exceptions, "[t]he court may not terminate the rights of only one parent under section 366.26)".)

(5) Must obtain informed consent to abandon appeal. (See Borre v. State Bar (1991) 52 Cal.3d 1047, 1053; unauthorized abandonment of a criminal appeal is "a serious matter, warranting substantial discipline.") Must inform appellant that abandonment of appeal is irrevocable, and that no collateral relief available if issue could have been raised on appeal and was not.

(6) Overall goal: to insure client understands options available through appellate process, and is given sufficient correct advice to make informed decisions on aspects of appeal which are under client's control.

**C. Inform And Advise Locally During Appeal.**

(1) Keep client informed by sending copies of EOT's, briefs, opinion, petition for rehearing and/or review.

(2) Respond promptly to client letters, and take collect calls from prisoners.

(3) In-person meetings is a valuable communication tool. (Remember that you generally won't be compensated for travel time, so have the meeting in your office or a place nearby. If you have a home office or lack a conference room, try your county law library.

Alameda County Law Library rents conferences rooms for as low as $15/hour; (510) 272-6480.)

(4) Promptly inform client if you are not going to petition for rehearing or review, send transcripts and explanation on how client can petition in pro per. California Supreme Court accepts pro per petitions for review, though some Court of Appeal districts do not accept pro per rehearing petitions.

(5) If opinion is favorable, insure by communication with trial counsel and/or client that relief ordered is granted.

### D. Duty To Keep Client Confidences.

Source: Business and Professions Code section 6068, subdivision (e): Duty of attorney "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

In the practice of appellate law, there are relatively few opportunities for violation of the attorney client privilege. Yet occasional violations pop up in declarations supporting requests for extension of time. This has usually come up when the appellant has told the attorney something that necessitates some further inquiry, necessitating the extension request. In this situation, do not divulge specifics. It is always possible to divulge that communication has occurred, which causes the need for further action, without divulging the actual content of the communication. A related problem is divulging in an extension request that counsel has been unable to find any arguable issues or that efforts are being made to persuade the client to abandon.

## II. FIND CLIENT/PERFECT NOTICE OF APPEAL

- In every appeal, make every effort to locate your client early in the proceedings. Your client's availability is essential to perfect the current appeal and to appeal subsequent orders in order to prevent the current appeal from becoming moot.

- Where your client has not signed the notice of appeal, it is essential that you find him or her immediately. Dependency appeals and writs may be summarily dismissed in the absence of a showing that the parent consented to, or authorized the filing of, the appeal or petition. (Janice J. v. Superior Court (1997) 55 Cal.App.4th 690, 691; In re Alma B. (1994) 21 Cal.App.4th 1037.) For that reason, some divisions issue orders to show cause why the appeal should not be dismissed where the notice of appeal was signed by trial counsel, but not the

appellant. If the client wasn't at the hearing, it may be possible to get a declaration stating that the appeal was authorized. Know where the client is helps you respond to such an OSC in a timely appeal-saving fashion.

- If the client fails to appeal a subsequent trial court order, the current appeal may become moot. If you know where the appellant is and if you are in regular contact with trial counsel, you can make sure the appeal from the subsequent order is perfected. (See In re Jessica K. (2000) 79 Cal.App.4th 1313, 1316-1317 (appeal from order denying 388 petition dismissed as moot where mother failed to appeal termination of parental rights.)

- Do some social work. If you have early and regular contact with your client you may effectively encourage your client to comply with and take advantage of reunification services.

## III. KEEPING APPELLATE COURT INFORMED OF TRIAL COURT PROCEEDINGS

Some courts want to know the current status of trial court proceedings, ever on the look-out for moot appeals to dismiss. Stay in close contact with trial counsel so you can keep track of trial court proceedings. In particular, check the status of the case before each major appellate court event (opening brief, reply brief, oral argument). By letter, the First District has notified counsel in dependency appeals that they are "directed to inform the Court of Appeal of the results and effect of any status review hearings conducted by the juvenile court in this case while the appeal is pending." (See attachment.)

## IV. CLIENT'S WISHES VERSUS COUNSEL'S RESPONSIBILITY TO MAKE BEST TACTICAL DECISION REGARDING WHICH ISSUE OR ISSUES TO BRIEF.

### A. Ethical Obligations At Play

Attorney "must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client." (McCoy v. Court of Appeals (1988) 486 U.S. 429, 444.) Appointed counsel is not to "consider the burden on the [appellate] court in determining whether to prosecute an appeal." (Id., at p. 443.) Appointed counsel must be "an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claims." (Evitts v. Lucey (1985) 469 U.S. 387, 394.)

All counsel have "obligations to the judicial system to refrain from prosecuting frivolous claims." (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 647.) Definition of a frivolous claim: "totally and completely devoid of merit." (Id., at p. 649.) People v. Craig (1991) 234 Cal.App.3d 1066, 1068 defines it as "unarguably not arguable." If case lacks any arguable issue, counsel must either get consent of client to abandon, or file a Sade C. brief. Fact that current law is against your position does not make if frivolous. There may be a reasonable basis to argue that current authority is mistaken, or to advocate for a change in the law.

**B. Balancing Act**

In all cases, appellate counsel should solicit his client's opinion as to the nature of the issues to be raised on appeal. In so doing, counsel should proceed with an open mind and should engage in a meaningful dialogue with his client. However, following the period of consultation, it is counsel, not the client, who must make the ultimate decision as to which issues will be raised.

In this regard, it is first necessary to establish that there is a distinction between the constitutional role of counsel and his ethical role.[2] Pursuant to Jones v. Barnes, supra, 463 U.S. 745, it is settled that appellate counsel does not have a "constitutional duty to raise every nonfrivolous issue requested by the defendant." *(Id.*, at p. 746.) At the same time however, it is also the view of the American Bar Association that appellate counsel has an ethical responsibility to raise those nonfrivolous issues suggested by the client. *(Id.*, at p. 753, fn. 6.)

Without doubt, appellate issues (like defenses at trial) must be carefully crafted to fit the facts of the case. Moreover, the experienced appellate attorney is in a much better position to make a determination as to the likelihood that a particular claim will prevail. Appellate counsel must have the freedom to determine the nature of the issues to be raised on appeal.

Notwithstanding the foregoing analysis, it is important to note the contrary view expressed by Justice Brennan, who opined that it is counsel's role "to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." (Jones v. Barnes, supra, 463 U.S. 745, 763 (dis. opn. of Brennan, J.).) Thus, in the interests of ensuring a trusting relationship between attorney and client, it is Justice

[2] It is assumed that the constitutional and ethical obligations imposed on a criminal appellate attorney apply in the dependency context.

Brennan's opinion that the attorney should defer to the client's decision as to the issues to be raised. (Id., at pp. 761-762.)

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

"The lawyer's value to each client stems in large part from the lawyer's independent stance, as a professional representative rather than as an ordinary agent. What the lawyer can accomplish for any one client depends heavily on his or her reputation for professional integrity. Court and opposing counsel will treat the lawyer with the respect that facilitates furthering the client's interests only if the lawyer maintains proper professional detachment and conduct in accord with accepted professional standards." (ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Comment to Standard 4-1.1, p. 4- 9.)

Generally speaking, any nonfrivolous issues requested by the client should be briefed, unless it is counsel's professional judgment that the issue would hurt the client's interest by undercutting a stronger argument, or inordinately lengthening the opening brief.

## V. COMMUNICATING WITH TRIAL COUNSEL.

### A. Guiding Trial Counsel With Respect for Subsequent Proceedings

Regular consultation with trial counsel can be of great benefit for your client. Because of the on-going trial court proceedings in dependency cases, there's a unique opportunity for appellate counsel to have input into the trial court proceedings. Your perspective may help trial counsel formulate new strategies, such as filing a 388 petition on grounds you have identified through your review of the record and discussions with your client. Your input may also ensure that trial counsel preserves objections and perfects appeals from subsequent orders.

### B. Approaching Trial Counsel With Respect to a Possible IAC Claim

If, after reviewing the entire record, it may appear that a viable and valid claim of IAC may exist, counsel should contact your appellate project buddy. The staff attorney can give provide a "second opinion" and also help plan a proper way of investigating the

issue. Careful investigation into the circumstances behind the questioned tactic will help appellate counsel evaluate whether the trial attorney in fact had valid reasons for the act or omission. Before raising any claim of IAC you should discuss the questioned act, omission or tactic with trial counsel to rule out the existence of any valid tactical reason. Trial counsel is ethically bound to cooperate in this regard. (See rules 3-400, 30700(A)(2), and 3-700(D)(1), Rules of Prof. Cond.)

Counsel should also discuss the potential issue with the appellate project before engaging in expensive, time-consuming investigation. An ill-considered petition for writ of habeas corpus based upon IAC can undermine counsel's credibility with the court, particularly where the misunderstanding of trial counsel's tactical purposes is based upon appellate counsel's unfamiliarity with trial practice. Open discussion with trial counsel and review of trial counsel's files may reveal a valid tactical explanation for counsel's actions.

Once consultation with the appellate project and investigation have led to the conclusion that an issue relating to IAC must be raised, the next question is how to get the issue before the Court of Appeal. Where the record is silent as to counsel's act or omission or the reasons behind it, the claim of ineffective assistance of counsel must be made in a petition for writ of habeas corpus. Assuming the petition will be grounded on matters outside the record, you will need to include supporting declarations and other supporting documents with your petition.

Trial counsel may be uncooperative in preparing a declaration asserting he or she had no deliberate tactical reason, or an improper tactical reason, even if he or she was candid orally. Any conversations should be confirmed by letter to trial counsel, summarizing what was said. Lack of objection to such a letter may constitute an adoptive admission by trial counsel in the event he or she is reluctant to sign a declaration memorializing those matters. In that event, appellate counsel may execute the declaration regarding the contents of the conversation, and the confirmation letter can be attached as an exhibit.

The client's own statement as to what was said or done, or not said or done, might be of value. Even if trial counsel does not recall or declines to sign a declaration regarding what he did or did not tell the client, the client is usually competent as a witness to make a declaration in support of the claim.

### C. Review of Trial Counsel's File

In the rare event when it is necessary to review trial counsel's file, be assured that you have every right to review the file. If trial counsel is resistant, arm yourself with a copy of State Bar Formal Opinion no. 1994-134 (see attachment), which provides that former

counsel must make the file available to the client or successor counsel. Note, however, that if there are ongoing proceedings in the trial court, trial counsel may be permitted to retain the file. But, the intent of the state bar opinion suggests that even when there are on-going trial court proceedings, trial counsel must make the file available to appellate counsel when the trial court proceedings are dormant.