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**ETHICS OF
REPRESENTING A RETAINED CLIENT ON
APPEAL WHOM THE ATTORNEY
REPRESENTED AT TRIAL**

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ETHICS OF REPRESENTING A RETAINED CLIENT ON APPEAL WHOM THE ATTORNEY REPRESENTED AT TRIAL

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Introduction.

These materials discuss the ethics of representing the same client at trial and on a retained appeal (where the client lost at trial).

Sections II and III discuss whether the client has a federal or California state constitutional right to retain counsel of choice on appeal, even in a situation where there is a conflict of interest between the client and counsel (which the client waives). If there is such a right, then the representation of the client on appeal should necessarily be ethical since it is within the client's constitutional rights. However, although there are good arguments that can be made that there is a limited constitutional right to retained counsel of choice on appeal, such a right would probably be held not to apply in a conflict of interest situation.

Section IV then discusses that the courts have viewed such representation as an inherent conflict of interest, since on appeal the attorney might have to argue his/her own ineffective assistance (IAC) at trial, a situation the courts have labeled 'untenable.'

Section V discusses an ethical ruling by the San Diego Bar Association which dealt with an analogous situation.

The Conclusion reached in these materials is that it is probably ethical to undertake such representation so long as: (1) the client waives any conflict; and (2) the attorney withdraws from the appellate representation if the attorney does find arguable IAC that might be raised on the appeal and/or by way of writ. However, although probably ethical, it seems unwise to undertake such representation.

II.¹ The client has a limited federal Sixth Amendment and Due Process right to retain the attorney of his/her choice for trial. However, this right can be overcome by other considerations, including the need to avoid a conflict of interest even if the client waives the conflict. Any federal constitutional right to retained counsel of choice on appeal would likely be similarly limited.

In *United States v Gonzalez-Lopez*, ___ U.S. ___, 126 S.Ct. 2557, 2561 (2006), the Supreme Court held:

“The Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.’ We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.”

However, the court also noted that this right is subject to a balancing test, and can be overcome by a number of considerations:

“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. We have recognized a trial court’s wide latitude in balancing the right to counsel of choice against the need of fairness. The court has, moreover, an ‘independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.’” (126 S.Ct. at 2565-66. Citations omitted.)

As will be discussed below, two of these considerations which can overcome the right to counsel of choice are relevant here: ensuring conflict-free representation (even if the client is willing to waive the conflict); and meeting the ethical standards of the

¹ These materials discuss the right of a client to retain an attorney of his/her choice for the appeal. Note that there is no federal or state constitutional right of the client to proceed in pro per on an appeal. (*Martinez v Court of Appeal*, 528 U.S. 152, 163 (2000); *People v Scott* (1998) 64 Cal.App.4th 550, 579.)

profession which includes a non-waivable duty of the attorney to act competently in the current representation.

First, however, is the question whether there is any Sixth Amendment/Due Process right to counsel of choice on appeal. No cases have directly held that there is– or is not– such a federal constitutional right.²

It seems that such a right can be argued for by linking several U.S. Supreme Court holdings.

The links are as follows:

1. The Sixth Amendment provides the right to “Assistance of Counsel” at trial.
2. The right to Assistance of Counsel includes several components, inter alia: (a) the right to effective assistance of counsel at trial;³ and (b) the right to retained

² We have found three Circuit cases which touched upon the issue of whether there is a federal Sixth Amendment/Due Process right to retained counsel of choice on appeal, but without deciding it:

In *United States v. Friedman*, 849 F.2d 1488 (D.C. Cir. 1988) the court noted: “We assume, without deciding, that the sixth amendment right to counsel of choice, which we have recognized as applying to choice of trial counsel, applies to a first appeal of right as well.” (849 F. 2d, at 1490 n. 5.) The court did not need to reach the issue, because it concluded that the appellant did not have funds to retain an attorney.

In an unpublished Sixth Circuit opinion (*Carpenter v. Morris* (No. 89-3575, Aug., 31 1990) the court did not reach the issue because it concluded on the facts that the appellant had in fact been granted the right to retain an attorney of his choice.

In *Miller v Smith*, 115 F.3d 1136 (D.C. Cir. 1997) the panel’s majority did not reach the issue, since it held that where the appellant wanted a free transcript due to indigence, it was valid for the State of Maryland to require that he use the State Public Defender’s office for the appeal. The dissenting judge would have held that there is a constitutional right to retained counsel of choice on appeal, and that Maryland’s system violated that right.

³ *McMann v Richardson*, 397 U.S. 759 (1970).

counsel of choice at trial.⁴

3. In the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963) the court extended the Sixth Amendment trial right to counsel to the states via the Due Process clause of the Fourteenth Amendment.⁵ This includes both the effective assistance of counsel component,⁶ and the counsel of choice component.⁷ Thus, both components of the trial right to counsel are applicable to the states, via the Sixth Amendment and the Due Process clause of the Fourteenth Amendment.

4. There is no constitutional obligation for a state to provide an appeal at all;⁸ but where the state does provide an appeal of right, the appeal is of such fundamental importance that the right to counsel on the appeal is required by the Due Process clause of the Fourteenth Amendment.⁹ This Due Process right to counsel includes effective assistance of counsel.¹⁰ Thus, by the sequence of the above steps, the “effective

⁴ *Wheat v United States*, 486 U.S. 153 (1988); *United States v Gonzalez-Lopez*, ___ U.S. ___, 126 S.Ct. 2557, 2561 (2006).

⁵ The *Gideon* court held that the Sixth Amendment right to counsel is “so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” (372 U.S. at 340, citations and internal quote marks omitted; *See also Evitts v Lucey*, 469 U.S. 388, 395 (1985).)

⁶ *Strickland v Washington*, 466 U.S. 668 (1984). This right to effective assistance of counsel applies to both retained and appointed attorneys: “An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” (466 U.S., at 685.)

⁷ *Powell v Alabama*, 287 U.S. 45, 53 (1932): “It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”

⁸ *McKane v. Durstan*, 153 U.S. 684 (1894); *Jones v. Barnes*, 463 U.S. 745 (1983).

⁹ *Douglas v California*, 372 U.S. 353 (1963). *See also Evitts v. Lucey*, 469 U.S. 387 (1985).

¹⁰ *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985): “The two lines of cases mentioned—the cases recognizing the right to counsel on a first appeal as of right and the cases recognizing that the right to counsel at trial includes a right to effective assistance of counsel—are dispositive A first appeal as of right is not adjudicated in accord with due process of law if the appellant

assistance” component applies to appeals.

5. Therefore, by the same logic and reasoning, the “counsel of choice” component of the right to counsel should also apply to appeals. Such a right already applies to state trials, and there are no apparent countervailing considerations in applying such a component of the Due Process right to counsel to state appeals.¹¹ There does not seem a basis for making the “effective assistance” component applicable to appeals, but not the “counsel of choice” component.

It is important to note, however, that the trial right to counsel of choice itself is, as stated in *Gonzalez-Lopez*, subject to a balancing test and can be overcome by a number of factors, including the need to ensure conflict-free representation and the need for counsel to act within the ethical requirements of the profession.¹² There is no reason why the appeal right, if it did exist, would be broader than the trial right, and thus it likely would be subject to the same limiting factors.

In other words, although it can be argued that a federal constitutional right to retained counsel of choice applies on appeal, nonetheless as a matter of both law and policy the attorney and client cannot rely on any such absolute right that would automatically trump the need to ensure conflict-free representation. This is important, because, as discussed below, the courts and bar associations have found representing the same client at trial and appeal is a conflict of interest, and may possibly also violate the requirement that the attorney provide competent representation for the client. It does not seem, therefore, that the (limited) federal constitutional right to retained counsel of choice can be invoked to assert that it is automatically ethical for the attorney to represent the same client at trial and on appeal.

does not have the effective assistance of an attorney.”

¹¹ As noted in this discussion immediately below, the trial right itself is limited by a number of factors, and thus the appeal right would likely be similarly limited. But there seems no reason to exclude an appeal “counsel-of-choice” right entirely.

¹² The right to conflict-free representation is itself a constitutional right of the client’s under the Sixth Amendment: “The Sixth Amendment’s right to counsel requires effective assistance by an attorney, which has two components: Competence and conflict-free representation.” (*Wood v. Georgia*, 450 U.S. 261, 271 (1981). Although a client can waive conflict-free representation, the trial court may still factor that in to the decision whether or not to grant the client his retained counsel of choice. Thus, the Supreme Court has upheld a trial court’s discretionary decision to deny the client his retained counsel of choice because of the attorney’s conflict of interest. (*Wheat v. United States*, 486 U.S. 153 (1988).)

III. The client has a California constitutional right to retain the attorney of his/her choice at trial. The courts have left open the question whether that right is broader than the federal Sixth Amendment right, and specifically whether the right applies in a conflict of interest situation where the client waives the conflict. Thus it is unclear what the scope of any California constitutional right to retained counsel of choice on appeal would be.

It is clear that in addition to any federal Sixth Amendment right to retained counsel of choice at trial, there is also a California constitutional right. Article I, section 15 of the Constitution provides “The defendant in a criminal cause has the right ... to have the assistance of counsel for the defendant’s defense” This right includes the right to retained counsel of choice:

“Under both the state and federal Constitutions, a defendant in a criminal case has a right to the assistance of counsel, and that right embraces the right to retain counsel of one’s own choice, within limits.”
(*People v Baylis*, (2006) 139 Cal.App.4th 1054, 1070)¹³

However, the California courts have left open whether the California and federal rights are the same, or whether California’s right is broader in that it requires the trial court to appoint counsel of choice in a conflict of interest situation as long as the client waives the conflict.¹⁴

In *People v Jones* (2004) 33 Cal.4th 234, the court dealt with a situation where the trial court removed the client’s trial counsel due to a conflict of interest, even though the client waived the conflict. The Supreme Court upheld the removal. The court discussed

¹³ In addition to the California Constitution, there is a statutory right to counsel of choice: Code of Civil Procedure, section 284. However, there is no indication that the statutory right is broader than the constitutional right. Thus, the text in this section discusses the possible limits of the California constitutional rights as delineated in California cases.

¹⁴ As discussed in Section I, above, under the federal Sixth/Fourteenth Amendment right, the trial court has discretion to permit or to disallow the counsel of choice where there is a conflict of interest. The California courts have left open the question whether under the California constitutional right the trial court must permit the representation even if there is a conflict of interest between the attorney and the client, so long as the client knowingly waives the conflict.

prior California cases, noting that it was unclear whether those cases were based on federal or California constitutional provisions. The *Jones* court concluded that since the client's attorney was court-appointed, the removal was within the trial court's discretion whether or not such removal would be insufficient in a retained case. It left open the question whether the state constitutional guarantee of assistance of counsel was broader than the federal right by encompassing an absolute right of retained counsel of choice in a conflict situation where the client waived the conflict:

“In *Alcocer v Superior Court* (1988) 206 Cal.App.3d 951, 957 the Court of Appeal stated: ‘A court abridges a defendant’s right to counsel when it removes *retained* defense counsel in the face of a defendant’s willingness to make an informed and intelligent waiver of his right to be represented by conflict-free counsel.’ (Italics added.) We need not decide whether the state Constitution permits a defendant to insist on being represented by a *retained* attorney who has a potential conflict of interest, for here defendant’s attorney was appointed by the court, not privately retained by defendant.”
(33 Cal.4th at p. 245, n.3.)¹⁵

Recently Division Five of the First District discussed this area of law in *People v Baylis*, supra. The court concluded that it did not have to reach the question whether the state Constitution guaranteed counsel of choice even in a conflict situation, because in *Baylis* the conflict was with another defendant (Baylis’ counsel had represented the co-defendant previously and had confidential information from that client). The court upheld the removal of Baylis’ counsel on grounds that the integrity of the judicial process supported the removal:

“That a defendant is ‘master of his own fate’ does not mean that the trial court must disregard the interests of others potentially adversely affected by the representation and the effect of the conflict on the integrity of the judicial process. ...

¹⁵ With regard to court-appointed counsel, the *Jones* court upheld the removal of the attorney in language which could also be applied to the question of a right to choose retained counsel: “[W]hen, as here, a trial court removes a defense attorney because of a potential conflict of interest, the court is seeking to protect the defendant’s right to competent counsel. In such circumstances, there is no violation of the right to counsel guaranteed by article I, section 15 of the state Constitution, notwithstanding the defendant’s willingness to waive the potential conflict.” (33 Cal.4th at 244-45.)

Ultimately the issue involves a conflict between a client's right to counsel of his choice and the need to maintain ethical standards of professional responsibility. The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. ... The client's recognizably important right to counsel of his choice must yield, however, to considerations of ethics which run to the very integrity of the judicial process."
(139 Cal.App.4th at 1071, 1073. Internal quotation marks omitted.)

These cases thus leave open the question whether there is an unfettered California right to counsel of choice at trial in a conflict of interest situation (as long as the client waives the conflict of interest).

In addition, as the *Baylis* quote shows, the trial right to retained counsel of choice is also subordinate to the ethical rules of the judicial process. As discussed below, one of the grounds found relevant in the Ethical Opinion of the San Diego Bar Association is that the client on appeal cannot waive the requirement that his attorney on appeal represent him competently. The cases in the next section below show that the courts believe an attorney cannot competently argue his/her own ineffectiveness of counsel. Thus, in this particular kind of conflict of interest, the integrity of the judicial process (i.e., that a lawyer cannot intentionally act in an incompetent manner) might overcome the general right to counsel of choice.

It is thus unclear to what extent any California trial right to retained counsel of choice is limited, and thus, it would be unclear whether any California appeal right to retained counsel of choice would be similarly limited.¹⁶ In any event, the first question is whether there is arguably any California constitutional right to retained counsel of choice on appeal at all.

¹⁶ In addition to the possible limit left open in *People v Jones*, supra (whether the constitutional right to retained counsel of choice applies in a conflict of interest situation), the courts have noted other limits on the right: "A trial court need not permit a defendant to discharge retained counsel where (1) it would cause significant prejudice to the defendant, e.g., by forcing him to trial without adequate representation; or (2) it is untimely and would result in ... disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v Turner* (1993) 7 Cal.App.4th 913, 918-919 [citations and internal quote marks omitted].)

There are no cases directly holding that there is– or is not– a California right to retained counsel of choice on appeal. However, it is possible to argue for such a right, built on the same kind of scaffolding that was shown in the previous section, regarding arguing for a federal Sixth Amendment/Due Process right to retained counsel of choice on appeal.

The argument is first, as noted, the California constitution provides for assistance of counsel at trial.¹⁷ Second, the courts have held that this trial right has two components: (1) there is a trial right to retained counsel of choice;¹⁸ and (2), there has long been a right to effective assistance of counsel at trial.¹⁹

In the landmark case of *In re Smith* (1970) 3 Cal.3d 192, the court dealt with “a case of first impression on the subject of incompetency of appellate counsel.” (3 Cal.3d, at 195.) Without much analysis, the court concluded that the effective-assistance component of the right to counsel applied to appeals: “We hold that the inexcusable failure of petitioner’s appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal, deprived petitioner of the effective assistance of counsel to which he was entitled under the Constitution.” (Id., at 202-203.)

The argument for retained counsel-of-choice on appeal would then simply be that if the effective-assistance component of the right to counsel is significant enough to warrant inclusion in appeals as well as trials, then so should the counsel-of-choice component.

There are some problems with this analysis, however. First, the *Smith* case did not specify which “Constitution” the court meant as the basis for applying the right to effective assistance on appeal. California cases following *Smith* likewise did not specify, though they cite federal cases and thus imply that the court was interpreting the federal Constitution, not California’s.²⁰ This does not matter for the “effective assistance”

¹⁷ California Constitution, article I, section 15.

¹⁸ *People v Jones* (2004) 33 Cal.4th 234

¹⁹ *E.g., In re Williams* (1969) 1 Cal.3d 168.

²⁰ *See, e.g., People v Barton* (1978) 21 Cal.3d 513. The *Barton* court referred to federal cases such as *Douglas v California*, 372 U.S. 353 (1963) in asserting the right to effective assistance on appeal, and the court specifically stated it was “unnecessary to reach appellant’s remaining contentions which include ... whether appellant was denied any right under

component, because after *Evitts v. Lucey*, supra, the federal due process clause requires effective assistance of counsel on appeal.

It would be problematic, however, if any California appeal right to retained counsel of choice is based on the federal Constitution. The problem is that the federal constitutional right can clearly be overcome by a conflict of interest. Thus, it would be necessary for a broader California right to be based on the following argument:

(1) The California trial right to counsel of choice applies even where there is a conflict of interest as long as the client waives the conflict— as noted above, this question has not been decided and is the precise question left open in *People v Jones* and *People v Baylis*, supra.

(2) Just as a right to effective assistance of counsel is so important it applies to appeals, so should the right to counsel of choice. Both of these rights would be based on the California Constitution's due process clause.²¹

(3) And since the trial right counsel of choice applies (arguably) even where there is a conflict of interest, so should the parallel appellate right be similarly broad.

As noted, no court has ruled on such an argument. Thus, it is speculative whether there is an independent right to retained counsel on appeal in California which applies even in a conflict of interest situation; and therefore, there is no such clear right which can form the basis of an argument that representing the same client at trial and on appeal must be ethical because the client has a constitutional right to such representation if he or she so chooses.

California's independent Constitution." (21 Cal. 3d, at 518 n. 2.)

²¹ Article I, Section 15 of the California Constitution states "Persons may not ... be deprived of life, liberty or property without due process of law." Just as *Evitts v. Lucey* based the federal constitutional right to appellate effective assistance of counsel on the due process clause, so California's right would be based on its due process clause. And it would be argued that any California constitutional appellate right to retained counsel of choice would similarly be based on the due process clause.

IV. Courts have held that representing the same client at trial and on appeal (where client lost at trial) is a conflict of interest.

The most notable case for this proposition is the First District, Division Five case of *People v Bailey* (1992) 9 Cal.App.4th 1252. The court stated at length:

“We believe that there is an inherent conflict when appointed trial counsel in a criminal case is also appointed to act as counsel on appeal. We therefore discourage the practice of allowing such appointments even when, as here, the client signs a declaration under penalty of perjury that he does not believe “... there is any reason for another lawyer to review the records of my case regarding potential issues of ineffective assistance of counsel. I do not believe that such issues exist and I make no such request.” We know, of course, that defendant later specifically requested his counsel raise such issues on appeal. In fact, defendant may now be estopped from raising such issues because of his declaration. Such manipulation by a defendant who, from the moment the trial began, attempted to use the issue of the adequacy of counsel as a ploy to stall proceedings will undoubtedly result in further proceedings on appeal to keep the “game” going.

The American Bar Association's Model Rules of Professional Conduct, rule 1.7(b) provides: “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests” And, as the comment points out, “The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” (ABA Model Rules Prof. Conduct, rule 1.7(b); see also [rule 3-310\(F\) Rules Prof. Conduct](#) of State Bar.)

The result is often that which is evidenced here; namely, bogus issues are raised without much analysis of whether representation was deficient. Counsel is in the untenable

position of urging his own incompetency. (See *In re Fountain* (1977) 74 Cal.App.3d 715, 719 [141 Cal.Rptr. 654].) The issue of effective assistance of counsel is thus left open to further attack without a final resolution. (*In re Benoit* (1973) 10 Cal.3d 72, 78 [109 Cal.Rptr. 785, 514 P.2d 97] [habeas corpus available to attack denial of right to effective appeal].) We, therefore, disapprove appointed trial counsel being appointed to represent a defendant on appeal.” (9 Cal.App.4th at pp 1254-55. Footnotes omitted.)

Other courts have agreed. In *People v Kipp* (2001) 26 Cal.4th 1100, 1139, the California Supreme Court stated:

“[R]epresentation by the same attorney at trial and on appeal [is] a situation in which courts have recognized ‘an inherent conflict’ because counsel ‘is in the untenable position of urging his own incompetency.’” (Quoting from *People v Bailey*, *supra*.)

The Eighth Circuit similarly has found a conflict of interest. In *Burns v Gammon* 173 F.3d 1089, 1092 (8th Cir. 1999), the court stated:

“No doubt there was a conflict of interest in the present case. The lawyer who represented petitioner on direct appeal came from the same office as the lawyer who had represented him at trial. So far as an argument that trial counsel had been constitutionally ineffective is concerned, direct-appeal counsel had a clear conflict of interest.”

One court, Division Two of the Fourth District, has promulgated Miscellaneous Order 03-2, stating: “[Because trial counsel is not able to objectively review the record to determine if trial counsel committed ineffective assistance of counsel], the court discourages retained appellate counsel from representing parties whom they represented in the trial court ...”

Overall, the courts have been clear that there is at the least a potential, and in some cases an actual, conflict of interest when an attorney represents the same client at trial and appeal. California courts have defined a conflict of interest as “all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened ... by his own

interests.” (*People v. Bonin* (1989) 47 Cal.3d 808, 835.) In the instant situation, an attorney may: (1) avoid seeing any ineffective assistance in the trial representation out of concern for the attorney’s reputation; or (2) bend over backwards to find ineffective assistance (when it’s not really there) in order to help a client to whom the attorney feels obligated because the client lost at trial, or just to show that the attorney is being extremely considerate to avoid the potential conflict; or (3) be so ‘locked in’ to the attorney’s trial strategy that the attorney fails to see IAC that any reasonably experienced arms-length appellate attorney would spot. In all of these cases there is a conflict of interest between the client and the attorney’s own interests and motivations, and, as discussed in the next section below, there may also be a violation of the attorney’s ethical obligation to provide competent representation.

V. The San Diego County Bar Association has issued an Ethics Opinion holding that the attorney may ethically represent in a current case (which charges a three-strikes prior) a client whom the attorney represented at the prior, provided: (1) the client waives the potential conflict of interest; and (2) if the attorney discovers arguable IAC in the prior the attorney must then withdraw from the representation.

In preparing these materials we contacted the State Bar Ethics Hotline, but they were unable to refer to any State Bar opinion on point. However, the San Diego Bar Association has issued an opinion which seems directly relevant.

In *San Diego County Bar Association Ethics Opinion 1995-1*, the opinion dealt with a clearly analogous situation— counsel had represented the defendant in a prior criminal case which resulted in a strike conviction, and now counsel wanted to represent the defendant in a new case in which the earlier case was charged as a strike prior. A copy of Opinion 1995-1 is attached to these materials as an appendix.

The Opinion noted that “Prior counsel’s effectiveness [in the strike prior] may be an issue, thereby creating a potential conflict interest.” Thus, at a minimum, counsel had to disclose that to the client and had to obtain a waiver from the client.

However, once the representation begins, if counsel then discovers arguable ineffective assistance, the Opinion states that the determination that the prior representation was constitutionally suspect

“Infect[s] the representation with issues of competence that place unnecessary burdens on counsel and needlessly compromise the integrity of the process, without regard to the effectiveness of the [current] representation. Therefore, Attorney should withdraw from or decline the representation.”

The Opinion also notes that California’s Rules of Professional Conduct, rule 3-110(A) states that a lawyer “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence,” and the Opinion states that a client cannot waive the duty of an attorney to practice competently. Given the policy expressed by the courts (see above) that it is “untenable” for the lawyer in the current case to argue his/her incompetence in a prior case, this supports the Opinion’s conclusion that the attorney must withdraw because otherwise his/her current representation could amount to intentional incompetence in trying to perform the untenable act of arguing his/her own incompetence in the prior proceeding.

VI. Conclusion

There appears to be obvious wisdom in the *Bailey* court's observation that an attorney cannot review his or her own ineffective assistance with the same dispassionate scrutiny with which he/she would review another's. Thus it seems wise to avoid being put in that situation. However, we have found nothing which would clearly hold that it violates an attorney's ethical obligations to represent the same client at trial and on appeal.

Although there is probably no federal or state constitutional right to retained counsel of choice which would automatically permit such dual representation where there is a potential conflict of interest, the fact that the client does have at least a limited constitutional right to retained counsel of choice means courts likely will tread lightly on impinging such a right by deciding that dual representation (where the client is willing to waive the conflict) is unethical. This can be seen in the Fourth District. Division Two's Miscellaneous Order 03-2 (*supra*). With regard to appointed counsel, the court, as did the First District in *Bailey*, stated that the trial attorney absolutely should not be appointed on appeal. But with regard to retained counsel, likely in deference to the client's potential right to counsel of choice, the court Order simply states that trial counsel is "discouraged" from representing the client on appeal.

The San Diego Bar Association Opinion (*supra*) is probably the best compromise. It indicates that if the client waives the potential conflict of interest, the representation is ethical; however, if the attorney then goes on to discover arguable ineffective assistance the attorney should then withdraw from the case.