

FIRST DISTRICT APPELLATE PROJECT TRAINING SEMINAR
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POINTS OF LAW RELEVANT TO
DEALING WITH A DIFFICULT CLIENT

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POINTS OF LAW RELEVANT TO DEALING WITH A DIFFICULT CLIENT

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I. Pro Per Representation/ Pro Per Briefs¹

1. There is no federal constitutional right to proceed in pro per on appeal.

Martinez v. Court of Appeal of California (2000) 528 U.S. 152, 163; 120 S.Ct. 684, 692:

“[W]e conclude that neither the holding nor the reasoning in *Faretta [v California, 422 U.S. 806]* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. . . . In requiring Martinez, under these circumstances, to accept against his will a state-appointed attorney, the California courts have not deprived him of a constitutional right.”

2. There is no California constitutional right to proceed in pro per on appeal.

People v. Scott (1998) 64 Cal.App.4th 550, 579:

“California has created an elaborate scheme to ensure that criminal defendants receive competent appellate representation. The denial of self-representation on an initial

¹ See also discussion of Selection of Issues on Appeal, in Section II below.

appeal as of right does not contravene due process or equal protection guarantees.”²

In re Barnett (2003) 31 Cal.4th 466, 474:

“Notably, however, there is no right – constitutional, statutory, or otherwise– to self-representation in a criminal appeal in California.”³

3. It is not clear to what extent, as a matter of exercising its discretion, the court may permit an appellant to proceed in pro per. The First District has, on rare occasions, granted applications for pro per status.

The decision in *Martinez v. Court of Appeal of California, supra*, 528 U.S. at p. 163 (120 S.Ct. At p. 692), clearly left open to the states the possibility of pro per representation:

“Our holding [that the federal constitution does not create a right of self-representation on appeal] is, of course, narrow. It does not preclude the States from recognizing such a right under their own constitutions.”

The leading decision of *People v. Scott, supra*, did not discuss whether the court, in its discretion, could permit an appellant to represent himself in pro per. It has long been recognized that appellate courts have “inherent power ... to develop rules of procedure aimed at facilitating the administration of criminal justice.” (*Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 801-802.)

The practice in the First District has been to permit, on rare occasions, the

² Until 1974, the California Constitution contained a provision which stated that “In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend, in person and with counsel.” However this provision was deleted from the Constitution in 1974 revisions. (See discussion in *People v. Scott* (1998) 64 Cal.App.4th 550, 570-571.)

³ “Inmates, moreover, have no state constitutional right to self-representation in habeas corpus proceedings.” *In re Barnett, supra*, 31 Cal.4th at p. 475.

application of an appellant to proceed in pro per, though most such applications are denied. We are aware of only one instance since the *Martinez* decision in 2000 in which the First District (Division 4) granted an application to proceed in pro per; however, the appellant then appeared to waver in his desire for pro per representation, and the court changed its decision and withdrew permission to proceed in pro per.

4. There is no right of an appellant to file pro per briefs, and ever since the California Supreme Court decision in *In re Clark* (below) the First District has rejected pro per briefs. However, there are two exceptions to this restriction: (1) there is a right to file pro per briefs in *Wende* appeals; and (2) there is a right to have the Court of Appeal consider a pro per motion to vacate counsel for failure to provide effective assistance on appeal.

Since the seminal opinion in *People v. Mattson* (1959) 51 Cal.2d 777, 798, the courts have held there is no right to submit a pro per brief:

“The general rule that a defendant will not be personally recognized by the court in the conduct of his case [citations] applies to the filing of *pro se* documents on appeal. Because of the undesirability of fruitlessly adding to the burdens of this court the time-consuming task of reading *pro se* documents which are not properly before us, and, if they be read, of consequently enlarging this opinion by a recountal and discussion of the contentions made in propria persona, such documents filed in this appeal by defendant should be stricken.”

Despite this general language, the practice of the First District in the 1970's and 1980's was, at least on occasion, to permit the appellant to file a pro per brief. Indeed, one Presiding Justice articulated the reason for doing so as lessening potential conflicts between counsel and client over what issues to raise on appeal.

However, in 1992 the California Supreme Court reiterated this general rule in *People v. Clark* (1992) 3 Cal.4th 41, 173: “We now reiterate this rule [of *Mattson*]. Motions and briefs of parties represented by counsel must be filed by such counsel.”

Since *Clark*, there has been a noticeable change in the First District. In virtually every case we are aware of, where an appellant has sought to file a pro per brief the court has refused to entertain the brief.

However, there are two situations which are exceptions to the *Mattson/Clark* rule: (1) *Wende* cases; and (2) documents alleging ineffective or otherwise inadequate representation by appellate counsel.

A. *Wende* cases.

Where an attorney files a brief under *People v Wende* (1979) 25 Cal.3d 436, 439 (briefs requesting that the court independently review the record for issues, where counsel has not filed a substantive brief raising any issues), the court held (citing *Anders v. California* (1967) 386 U.S 738, 87 S.Ct. 1396):

“A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; ...”

The practice in the First District as well as in the other appellate districts, is to give the appellant 30 days from the filing of a *Wende* brief to file his/her own pro per brief or letter, raising any points the appellant believes should be argued in the case.

B. Complaints about representation.

In *People v. Clark, supra*, holding that an appellate court will not review or consider pro per briefs, the court noted one exception:

‘Developments since *Mattson* [*People v Mattson* (1959) 51 Cal.3d 777] was decided necessitate one exception to this rule. We will accept and consider pro se motions regarding representation, including requests for new counsel. (Cf. *People v Marsden* (1970) 2 Cal.3d 118.) Such motions must be clearly labeled as such, and must be limited to matters concerning representation. We will not consider extraneous matters even in such documents unless submitted by counsel. Any pro se documents by represented parties not clearly coming within this exception will be returned unfiled.’
(3 Cal.4th at 173.)

Under this exception, the First District has generally considered and reviewed pro per letters and motions claiming that the appellant is not being properly represented. In some such filings, the appellant lists the various issues he claims should be raised but his attorney is not raising. Thus, in effect the appellant is getting these issues before the court, since the court will have to at least look at the possible issues in order to determine the

effectiveness of the representation. The practice in the First District, upon receiving such a letter, has varied. At times (particularly where the appellant's letter or motion is very coherent and appears to be focusing on issues that seem, at face value, to be arguable) the court has referred the matter to FDAP, requesting that we contact appellate counsel and review the case, to determine if any significant issues are being missed. At other times the court has not acted on the letter/motion until it considers the merits of the case. In some cases the court has simply denied the motion, or, per *Clark*, has determined that the motion is really just a pro per brief and the court has returned it unfiled.

5. It is not clear to what extent the court will accept a pro per habeas petition from the appellant.

The practice in the First District, albeit very sparse, has generally been to entertain pro per habeas petitions, where appointed counsel files an AOB but does not file a habeas him/herself.

However, in August 2003, the Supreme Court decided *In re Barnett* (2003) 31 Cal.4th 466. In that capital case, the court held that where there has been counsel appointed to represent the person for the purpose of habeas representation, the court will not consider the client's pro per habeas. The court then went on to author a somewhat unclear footnote regarding pro per habeas petitions in non-capital appeals:

“We recognize that inmates convicted solely of noncapital crimes typically are represented only by appellate counsel who have no obligation to investigate or present grounds for habeas corpus relief. [Citation.] Nothing in this opinion should be construed to bar a court's filing and consideration of pro se habeas corpus petitions and claims from a noncapital inmate unless counsel has also been specifically retained or appointed to prosecute habeas corpus remedies on the inmate's behalf.”⁴
(31 Cal.4th at p.478.)

⁴ The *Barnett* court did note that, as held in *People v. Clark* (1992) 3 Cal.4th 41, the court would consider pro per habeas petitions where the petition is regarding complaints about the appellate representation. The court also noted that it would consider pro per habeas petitions which raised issues of prison conditions, which are outside the scope of the appointment on the appeal.

This footnote would apply to those districts (generally the 3rd and 5th) where counsel needs to get a specific “expansion” of the appointment to include filing a habeas petition. It would also clearly apply to any case where appellate counsel actually did file a habeas. But in the First District, as in most, the appointment of counsel on appeal is considered sufficient for counsel to raise issues, where appropriate, in a habeas corpus petition. It is unclear if this constitutes counsel being “specifically retained or appointed to prosecute habeas corpus remedies” within *Barnett*. *Barnett* is a very recent case, and we are not aware of any First District appeals since *Barnett* in which the appellant sought to file a pro per habeas petition.

6. There is no right for the appellant to appear at oral argument.

Price v. Johnson (1948) 334 U.S. 266, 285, 68 S.Ct. 1049, 1060:

“[A] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court.”

In re Walker (1976) 56 Cal.App.3d 225, 228:

“Under California law a criminal defendant has neither a constitutional nor statutory right to argue his case on appeal, or to be present during such proceedings.”

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II. Selection of Issues on Appeal⁵

1. The client should be consulted about possible issues, but the caselaw is clear that it is the professional responsibility of appellate counsel, not the appellant, to determine what issues are arguable on appeal.⁶

People v Eckstrom (1974) 43 Cal.App.3d 996, 1001-1002:

⁵ See also discussion of Pro Per Briefs, in Section I above.

⁶ The exception is where counsel files a *Wende* brief. In that situation, the appellant can file his/her own pro per brief noting issues the appellant believes should be raised. See discussion of Pro Per Briefs in Section I, above.

“There is nothing ... which says that an appellate attorney should abdicate his responsibilities as a professional man and become the lackey of his client. It is the lawyer, not the client, who after a review of the record chooses the issues.”

People v. Davis (1987) 189 Cal.App.3d 1177, 1188 n.7:

“The defendant’s appellate counsel rightfully asserts that the responsibility for determining all questions of strategy and tactics is hers and hers alone.”

Jones v. Barnes (1983) 463 U.S. 745, 751, 103 S.Ct. 3308, 3312:

“[No] decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.”

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III. Appellate IAC⁷

1. Ineffective Assistance of Counsel applies on appeal as well as at trial.

In re Smith (1970) 3 Cal.3d 192, 202:

“In the instant action 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 petition of the effective assistance of appellate counsel to which he was entitled under the Constitution.”

People v. Harris (1993) 19 Cal.App.4th 709, 714 [citations omitted]:

“Our Supreme Court has set forth some of the specific duties which appointed appellate counsel must fulfill to meet his or

⁷ See also discussion of Adverse Consequences, Section V, below.

her obligations as a competent advocate. These include the duty to prepare a legal brief containing citations to the [appellate record] and appropriate authority, and setting forth all arguable issues, and the further duty not to argue the case against his client. Additionally, appellate counsel must provide an adequate appellate record and ‘serves both the court and [her] client by advocating changes in the law if argument can be made supporting change.’”

2. Cases finding appellate ineffective assistance generally involve extreme situations, and usually do not involve situations where counsel has decided to argue some issues and reject others.

In the seminal case of *In re Smith, supra*, the court stressed that:

“We do not suggest that failure of appellate counsel in a future case to raise any or all of the specific potential assignments of error discussed [in this case] will establish that the appellant was denied effective assistance of counsel. ... [T]he determination will depend on whether the appellant’s counsel failed to raise assignments of error which were crucial in the context of the particular circumstances at hand.”
(3 Cal.3d at p. 203.)

The *Smith* court noted that the case was “bristling with arguable claims of error,” but counsel “filed an opening brief consisting of a 20-page recitation of the facts and a one-page argument. The purported argument consisted of [a] ludicrous proposition” (3 Cal.3d at p. 198.)

The court in *In re Smith* also held that “Petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of counsel.” (3 Cal.3d at p. 202.) The failure to raise any of the many arguable issues deprived the appellant of the opportunity to argue for and demonstrate cause for reversal of his conviction. The court issued the remedy of remanding the case to the Court of Appeal with directions to reinstate the appeal and appoint a new attorney. However, this view of the required prejudice is probably no longer good law in light of the U.S. Supreme Court’s decision in *Smith v. Robbins* (1999) 528 U.S. 259, 120 S.Ct. 746, which held that the standard of prejudice for IAC announced in *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, applies to appellate IAC. Thus, there must be a showing of a “reasonable probability that, but for

counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Smith v Robbins, supra*, 528 U.S. at p. 286, quoting from *Strickland*.)

There have been a number of published decisions since *Smith* finding ineffective assistance, and these tend to have been egregious situations where clearly strong issues were not raised and the brief that was filed was woefully deficient in raising issues and citing to appropriate authority. See, e.g., *In re Banks* (1971) 4 Cal.3d 337; *People v. Rhoden* (1972) 6 Cal.3d 519; *People v. Lang* (1974) 11 Cal.3d 134; *People v. Barton* (1978) 21 Cal.3d 513; *People v. Taylor* (1974) 39 Cal.App.3d 495; *People v. Valenzuela* (1985) 175 Cal.App.3d 381 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470]. A number of other courts have found no ineffective assistance. See, e.g., *People v. Stephenson* (1974) 10 Cal.3d 652; *In re Yurko* (1974) 10 Cal.3d 857.

As noted in Section II above (Selection of Issues on Appeal), an appellate attorney is given wide latitude to determine, even among all nonfrivolous issues, which issues to raise and which to reject.

3. There is no right to effective assistance on habeas or other postconviction writs.

Coleman v. Thompson (1991) 501 U.S. 722, 752, 111 S.Ct. 2546, 2566:

“There is no constitutional right to an attorney in state postconviction proceedings. [Citations.] Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.”

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IV. Adverse Consequences

1. Appellate counsel probably has a duty to inform the appellant of any adverse consequences in pursuing the appeal.⁸

⁸ Potential adverse consequences can include a range of items. The most frequently arising items include:

(1) Where the trial court made an unauthorized sentence in favor of the appellant. This is the most pressing situation of potential adverse consequences, since unauthorized sentences can be corrected on appeal or remanded to the trial court for correction, even if the corrected sentence is greater than the original. See, e.g., *People v. Dotson* (1997) 16 Cal.4th 547, 554 n.6: “A claim that a sentence is unauthorized, however, may be raised for the first time on

We are not aware of any clear published holding that appellate counsel has a duty to inform the appellant of potential adverse consequences and to offer the appellant the options of abandoning or pursuing the appeal. However, in at least one unpublished case the court found ineffective assistance in this failure. The unpublished opinion stated that it was relying on *In re Alvernaz* (1992) 2 Cal.4th 924 by analogy for establishing this duty. The *Alvernaz* case involved deciding “under what circumstances, if any, a criminal defendant who rejects an offered plea bargain prior to trial and thereafter is convicted and receives a sentence less favorable than the terms of the offer, may challenge that conviction and sentence on the ground of ineffective assistance of counsel in the decision to reject the offered plea.” (2 Cal.4th at p. 928). The court held there was a duty to properly advise the defendant of the plea offer.

This analogy seems plausible—the duty is essentially the same, i.e., fully advising the appellant of the potential benefits and consequences of proceeding with the legal action at hand.

2. However, there is no ineffective assistance or breach of duty where the appellate counsel has in fact advised the appellant of the potential consequences and the appellant then chooses to go ahead with the appeal.

In *People v. Harris* (1993) 19 Cal.App.4th 709, the appellant alleged he had received ineffective assistance on his first appeal because his attorney filed an opening brief (alleging credits error) and the A.G. then raised an unauthorized-sentence issue (incorrect dismissal of special circumstance). The court in the first appeal remanded the case to the trial court concerning the unauthorized sentence, and the trial court this time did not dismiss the special circumstance. The result was that his sentence went from 27-life to LWOP.

However, the *Harris* court found no ineffective assistance. The court found that after the A.G. filed its brief in the initial appeal, and before the appellate attorney filed her reply brief, the attorney sent a letter to appellant informing him of the risk that the special circumstance might be reinstated and asking appellant to decide whether he wanted to abandon the appeal or go ahead with it. Appellant decided to proceed. The *Harris* court then held:

appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court.”

(2) Where the appellant is seeking to set aside a guilty plea, and must be made aware that if successful it means all the original charges can be reinstated and he can receive a greater sentence than in the current plea bargain.

“With the record thus illuminated we have no occasion to decide whether pursuing rather than abandoning an appeal may constitute ineffective assistance of counsel. On this record it was petitioner, not counsel, who decided to pursue rather than abandon the appeal.”
(19 Cal.App.4th at p. 715.)

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V. Malpractice Suits

1. In a State suit for malpractice, the appellant must: (1) allege and prove actual innocence; and (2) must show, as a prerequisite to obtaining relief in a suit for malpractice, that his/her conviction was overturned on appeal or by writ.

In *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, the court held that to maintain a cause for malpractice, the plaintiff must allege and prove actual innocence.

In *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1205 the court held that:

“[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case— for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People’s refusal to continue the prosecution, or a grant of habeas corpus relief— as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel.”

These two requirements were recently held to apply to malpractice suits based on appellate representation. *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351.⁹ Taken together, the two requirements mean as a practical matter that most malpractice suits will either be dismissed at the demurrer stage, or delayed indefinitely until the client can achieve exoneration by postconviction relief so the malpractice suit can proceed.

2. A federal civil rights suit (42 U.S.C. § 1983) cannot be brought against an

⁹ The appellant in *Redante* filed a pro per Petition for Review in the California Supreme Court (S120805) on December 2, 2003. As of the printing of these materials, the Supreme Court has not yet acted on the Petition.

attorney for malpractice, because the appointed attorney is not considered a state actor.

In *Polk County v. Dodson* (1981) 454 U.S. 312, 102 S.Ct. 445, the court held that an appointed public defender was not a state actor within 42 U.S.C. § 1983, and thus could not be sued under that statute for allegedly depriving the person of his rights including the right to effective assistance of counsel.

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VI. Attorney-Client Privilege

1. Where the client has accused the attorney of a breach of duty, including effective representation, the Attorney-Client Privilege does not apply to communications relevant to that issue. Thus, if the client writes to the court requesting a new attorney because the client believes he/she is not receiving effective representation, or if the client complains to the State Bar or files a malpractice suit, the attorney can reveal any communications relevant to the matters alleged by the client.

Evidence Code § 958. Exception: Breach of duty arising out of lawyer-client relationship:

“There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.”

The Law Revision Commission Comment to the enactment of this section states:

“It would be unjust to permit a client . . . to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge . . . Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged.”

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VII. Abandoning the Appeal

1. The appellant, not the attorney, has the right to decide whether or not to abandon the appeal.

Jones v Barnes (1983) 463 U.S. 745,751, 103 S.Ct. 3308, 3312:

“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... take an appeal.”

Rule 38 of the California Rules of Court (Voluntary Dismissal of Appeal) provides that an abandonment of the appeal may be signed by the appellant or by counsel; however, the wording of the rule seems to indicate that the decision to abandon must be by the appellant.¹⁰ As seen above, *Jones v Barnes* held that the decision whether or not to appeal is a “fundamental decision” belonging to the appellant.

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¹⁰ “An appellant may dismiss his appeal at any time by filing an abandonment thereof, signed by him or his attorney of record.”