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**COMMUNICATING ETHICALLY AND EFFECTIVELY  
WITH OUR INCARCERATED CLIENTS**

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# Communicating Ethically and Effectively With Our Incarcerated Clients

## A. Introduction

The goal of this paper is to outline the basic ethical responsibilities of appellate counsel relating to communication with our incarcerated adult clients; take an inventory of some common challenges and problems arising from this task, and consider how we might better resolve them; and, finally, attempt to cultivate in our practice more effective communication with our clients. This endeavor is neither exhaustive nor complete. It is only a beginning. I hope to expand on this document, adding more helpful information about ethically and effective client communication in the future.<sup>1</sup>

While the overall number of incarcerated Californians is dropping, many of our appellate clients still reside behind bars in our state's many prisons or jails. At the end of December 2017, the California Department of Corrections and Rehabilitation (CDCR) had a total of 130,263 persons in custody<sup>2</sup>, while the average adult daily adult jail population in December, 2015 (the latest period for which statistics are available), was 72,501.<sup>3</sup> Incarceration presents special challenges and problems for appellate practitioners who have an ethical obligation to communicate with their clients.

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<sup>1</sup> Please email me with any ideas or information about this subject at [rbraucher@fdap.org](mailto:rbraucher@fdap.org).

<sup>2</sup> CDCR Division of Internal Oversight and Research Office of Research, Monthly Report Of Population As Of Midnight December 31, 2017 (January 1, 2018) p. 1.

<sup>3</sup> Criminal Justice Statistics Center (CJSC) (2015). Interactive crime statistics tables. Arrests. Sacramento: California.

Two rules are directly implicated: the duty of communication and the duty to keep information confidential which present appellate lawyers with special challenges and problems.

**B. The Rules: Duty Of Communication and Duty To Keep Information Confidential**

California Rules of Professional Conduct, Rule 3-500 (Communication) provides:

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.”

Similarly, Business and Professions Code section 6068 requires of all attorneys

(m) To 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.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

California Rules of Professional Conduct, Rule 3-100 (Confidential Information of a Client) provides:

A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed

consent of the client, or as provided in paragraph (B) of this rule.

Likewise, Business and Professions Code section 6068(e)(1) provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Jordan* (1974) 12 Cal.3d 575, 580.)

Even under the most favorable circumstances, faithfully and effectively complying with the foregoing rules is a daunting task for appellate counsel.

### **C. Finding our Client**

In order to communicate at all, often our first task is locating our clients. This should be done expeditiously. Many of our in-custody people are scattered in detention facilities all across California, sometimes hundreds of miles away. We can find our clients in state prison custody using the CDCR's online inmate locator [here](#). Many of our clients are in custody in county jail. Most jails now have an on-line inmate locator which will instantly confirm if your client is there. If you believe your client may have been detained by ICE, the ICE detainee locator is [here](#). In the unlikely event your client is in federal custody, the federal Bureau of Prisons inmate locator is [here](#).<sup>4</sup> If you still cannot find your client, call your consulting FDAP staff attorney for advice.

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<sup>4</sup> Clients who are not in-custody may prove be very difficult to find. A starting point is the probation report, which may contain an old address or phone number for the client, or names of family members who may assist you in finding your client. If you have not received the record yet, call trial counsel for possible contact information.

## D. Letters

Having located our clients, we usually write an introductory letter, consisting of a great deal of information.<sup>5</sup> In addition to informing the client of our appointment, the letter often contains an explanation of counsel's role, the appellate process, the likelihood of substantial delay between filings, the differences between a trial and an appeal. It likely contains an explanation of the importance of keeping attorney-client communications confidential and of the need to refrain from discussion of the case with fellow inmates, prison staff, or others. The letter also often contains a preliminary analysis of the case, perhaps with an explanation of complicated legal concepts, and many other matters.

Let's stop right there for a moment, and ask ourselves some fundamental questions: will our client understand our written communication? If not, then we are not complying with California Rules of Professional Conduct, Rule 3-500. How do we know?

### 1. Writing to be understood

First, assess your client's reading comprehension ability. If your client has already written a letter or filled out the project's background information sheet, pay close attention to your client's own writing, which may provide some indication. If it is apparent that your client is not a native English speaker and may have difficulty comprehending written English, you should inquire at the outset whether he or she would benefit from a translation in his or her native tongue.<sup>6</sup> The inquiry should be done in a sensitive and respectful manner.

If your client does not face a language barrier, he or she may face others. Many of our people are educationally disadvantaged.

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<sup>5</sup> See California Criminal Appellate Practice Manual (Appellate Defenders, Inc, 2006) Initial communication [§ 1.42].

<sup>6</sup> FDAP guidelines for use of translators is [here](#).

According to the U.S. Bureau of Justice Statistics, 68% of all state prison inmates do not have a high school diploma.<sup>7</sup> Counsel should write clearly, using short direct sentences for important information; subject-verb-object order; active voice; positive rather than negative construction. We should avoid excessive legal jargon; when using legal terms, we need to explain them clearly.

One easy way to improve comprehension 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.<sup>8</sup> 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.<sup>9</sup> The lower the score, which translates to a grade level, the easier the text is to understand. For example, a score of 8.2 would indicate that the text is expected to be understood by an average student in 8th grade (between ages 12–14).

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<sup>7</sup> Caroline Wolf Harlow, Education And Correctional Populations, Bureau of Justice Statistics (Jan.1, 2003).

<sup>8</sup> The formula for the Flesch Reading Ease score is:  $206.835 - (1.015 \times \text{ASL}) - (84.6 \times \text{ASW})$  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).

<sup>9</sup> The formula for the Flesch-Kincaid Grade Level score is:  $(.39 \times \text{ASL}) + (11.8 \times \text{ASW}) - 15.59$  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).

There are different ways to obtain readability scores in a Microsoft Word document. One way is to first click the File tab, then click Options; click Proofing, then check the box “Show readability statistics.” Now you are ready to capture readability scores in your document. After you enable this feature, open a file that you want to check, and check the spelling. When Word finishes checking the spelling and grammar, a box will display both Flesch Reading Ease and Flesch-Kincaid Grade Level scores. It also displays how many passive sentences your letter contains, which is also an indicator of readability: the more passive sentences your letter contains, the more difficult it is to read.<sup>10</sup>

Readability scores in word processing software are not a perfect method of ensuring that your clients understand your letters. Readability formulas only measure the difficulty of individual words and sentences, based on length—only one of many factors that affect comprehension written material. Another important factor affecting reading comprehension is actual vocabulary used. So, again, if you are using legal jargon, there is a greater chance your client will not understand you. Accordingly, if you are not certain your client understands the word “concurrent,” it may be advisable not to use the word, or provide an explanation using basic English.

## **2. Maintaining confidentiality**

To ensure confidentiality, we must always remind our clients of the need to label letters and envelopes: “Attorney-Client Confidential Communication.” CDCR regulations have strict requirements for processing outgoing mail as confidential, including (1) the letter must be addressed to the attorney by name; (2) the address of the attorney must match the address listed with the State

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<sup>10</sup> 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.

Bar; (3) the inmate's full name, department identification number, and the address of the facility must be included in the return address appearing on the outside of the envelope; (4) the word "confidential" shall appear on the face of the envelope. (Cal. Code of Regs., tit. 15, § 3142(a)-(c).)

Counsel must also abide by CDCR requirements for processing incoming mail as confidential. To be processed as confidential, incoming letters must show the name, title, return address and the office of the attorney on the outside of the envelope, and the attorney's return address must match the address listed with the State Bar. (Cal. Code of Regs., tit. 15, § 3143.)

### **3. Keeping our Clients Informed**

What it means to "keep a client reasonably informed about significant developments" relating to representation (Rule 3-500) will, of course, depend on the case. However, even when there are no significant developments, in a case pending for many months or years, counsel should provide clients with periodic status updates.

Most of us can do a much better job responding promptly to reasonable requests for information from clients (Rule 3-500). I know I can. Research across the legal profession indicates that clients are often unsatisfied with attorney communication.<sup>11</sup> One comprehensive study concluded: "Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. Clients complained about the quality of their lawyers' services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect . . ." <sup>12</sup>

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<sup>11</sup> See, generally, C. Cunningham, SYMPOSIUM: What Do Clients Want From Their Lawyers?, 2013 J. Disp. Resol. 143.

<sup>12</sup> SYMPOSIUM: What Do Clients Want From Their Lawyers?, supra, 2013 J. Disp. Resol. at p. 146..

## E. When Writing Is Not Effective

If we cannot communicate effectively through writing, and we need to communicate confidentially, other effective means should be explored. One way is to arrange for a confidential phone call.<sup>13</sup> Regulations provide for such a call:

If staff designated by the institution head determine that an incoming call concerns an emergency or confidential matter, the caller's name and telephone number shall be obtained and the inmate promptly notified of the situation. The inmate shall be permitted to place an emergency or confidential call either collect or by providing for the toll to be deducted from the inmate's trust account. A confidential call shall not be made on an inmate telephone and shall not be monitored or recorded.

(Cal. Code of Regs., tit. 15, § 3282(g).)

Usually, the designee for the prison is the litigation coordinator. [Here](#) is a list of litigation coordinators in California.<sup>14</sup> Confidential calls are supposed to be "approved on a case-by-case basis," however, "[i]t is within the discretion [of the head or designee] to approve or deny a confidential call." (Cal. Code of Regs., tit. 15, § 3282(g)(1)&(6).) It has been my experience that some institutions seldom, or never, allow confidential calls. The request must be in writing on the attorney's letterhead. (Cal. Code of Regs., tit. 15, § 3282(g)(1).)

It is important to explain in some detail why normal mail or an attorney visit will not suffice. Regulations provide: "As long as

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<sup>13</sup> When confidentiality is not an issue, counsel should make herself available for collect calls.

<sup>14</sup> For prisoners housed out of state, in Arizona and Mississippi, the CDCR has some contact information [here](#).

the attorney/client communication privilege is not violated, a confidential call may be denied where the institution head, [...] designee, determines that normal legal mail or attorney visits were appropriate means of communication and were not reasonably utilized by the inmate or attorney.” (Cal. Code of Regs., tit. 15, § 3282(g)(6).)

Regulations state that the request must be mailed or faxed, but some institutions permit submission via email. The institution will require you to fill out a form<sup>15</sup> (link is [here](#)), containing all the information required by regulations. (Cal. Code of Regs., tit. 15, § 3282(g).

Sometimes nothing less than an in-person visit will accomplish the task of communicating effectively.<sup>16</sup> Protocol and regulations governing legal prison visits are like those listed above for confidential phone calls.

An attorney who wishes to consult in person with an inmate shall contact the institution/facility at which the inmate is housed. The request shall be made by calling or writing (including via facsimile) the staff designated (usually the litigation coordinator) in the institution/facility operational supplement. In order to obtain approval/clearance, the attorney shall provide the following personal and professional information in writing (including via facsimile): name; mailing address; date of birth, valid driver’s license or state-issued identification card number; proof of current registry and good standing with a governing bar association; and indication of the jurisdiction(s) licensed to practice law. Requesting attorneys must also report

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<sup>15</sup> “CONFIDENTIAL PHONE CALL REQUEST CDCR 106-A (02/08)”

<sup>16</sup> For compensation, be sure to contact your consulting project attorney for pre-approval before arranging an in-prison visit.

any prior felony convictions, explain any prior suspension or exclusion from a correctional facility and declare one or more of the following: [in relevant part]  
(1) They are the inmate's attorney either by appointment by the court or at the inmate's request [...]

(Cal. Code of Regs., tit. 15, § 3178(d).)

## **F. Ethical and Effective Communication Entails**

### **Understanding Our Clients and their Communities, Their Difficulties, and Developing a Collaborative Relationship Whenever Possible**

Often, in my experience, the better I know and understand my client, the more successful my representation will be. Many practitioners have stories to tell about “that one thing” they learned about – or from--our client that directly resulted in a favorable outcome of the case. Even so, understanding and empathizing with our clients goes far in paving the way for effective communication. Clients trust us when we attempt to understand and empathize with them. That trust results in mutual respect and a greater likelihood of a more dynamic and collaborative relationship between attorney and client.

While our clients come from all walks of life, many of them have experienced serious trauma and privations from a young age. According to one report, “45 percent of state prison inmates have been treated for severe mental illness within the past year.”<sup>17</sup> “In California alone, there are over 30,000 seriously mentally ill prisoners presently confined in state prison, as compared to fewer than 6,000 persons in state psychiatric hospitals, making CDCR the defacto mental health treatment provider in the state.”<sup>18</sup> “Prisons

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<sup>17</sup> Stanford Law School Three Strikes Project, *When Did Prisons Become Acceptable Mental Healthcare Facilities?* (2014) p. 1. [https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report\\_v12.pdf](https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf) (last visited 01/28/2018)

<sup>18</sup> *When Did Prisons Become Acceptable Mental Healthcare Facilities?*, *supra*, at p. 7.

and jails are singularly ill-suited to house the mentally ill. Premised on punitive forms of social control, prisons are not remotely compatible with the kind of supportive therapeutic milieus that the mentally ill require. They are austere and intimidating environments that are painful and difficult for even the strongest and most resilient prisoners to withstand. The pains of imprisonment – severe material deprivations, highly restricted movement and liberty, lack of meaningful activity, a nearly total absence of personal privacy, high levels of interpersonal uncertainty, danger, and fear – are powerful psychological stressors that can adversely impact a prisoner’s well-being.”<sup>19</sup>

While California’s state prison population continues to fall, the rate of prison inmates with mental illness continues to rise. “Over the past decade, the percentage of state prisoners with mental illness has increased by 77 percent.”<sup>20</sup>

However, just being in prison is psychologically damaging to our clients. Mika’il DeVeaux, released from prison after decades behind bars, put it this way: “The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred. The experiences are hard to describe. When I review my experiences, I often feel like a deer caught in oncoming headlights; I seem to stand still and stare.”<sup>21</sup>

Prison itself is an acutely traumatic and damaging experience for even short period of time.

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<sup>19</sup> When Did Prisons Become Acceptable Mental Healthcare Facilities?, *supra*, at p. 7.

<sup>20</sup> Stanford Justice Advocacy Project, *The Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise* (2017) p. 2, <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf> (last visited 01/29/2018)

<sup>21</sup> DeVeaux, *The Trauma of the Incarceration Experience*, Harv. Civ. Rights – Civ. Liberties Law Rev. (2013) Vol 48, p. 257.

A prison experiment in the early 1970s attests to the psychological damage caused by the experience of incarceration. During the Stanford Prison Experiment, a group of college students were randomly assigned roles as guards or as prisoners and then placed in a prison-like environment. Because the prisoner subjects experienced such intense psychological pain in the simulated environment, the researchers terminated the experiment after six days – eight days ahead of schedule. A number of the student prisoners experienced “acute psychological trauma and breakdowns”; some pleaded for release from the environment because of “intense pains” and five were released due to the “extreme emotional depression, crying, rage, and acute anxiety” they suffered during their brief, mock incarceration. In one instance, the Stanford professors observed that a student prisoner “developed a ‘psychosomatic rash which covered portions of his body.’” Researchers concluded that “adjusting” to prison life would be difficult for anyone. The experience “can create habits of thinking and acting that are extremely dysfunctional” and permanently change those made to endure it.<sup>22</sup>

However, understanding our clients must not end with our client’s pathologies. We should try to understand who our clients are and the communities they come from. For instance, three of every four men in prison are nonwhite (38% are Latino, 29% are African American, and 6% are of another race or ethnicity).<sup>23</sup> Most

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<sup>22</sup> *The Trauma of the Incarceration Experience*, Harv. Civ. Rights –Civ. Liberties Law Rev. *supra*, Vol 48, at pp. 260-261.

<sup>23</sup> Public Policy Institute of California, *Who’s in Prison? The Changing Demographics of Incarceration* (2006) [http://www.ppic.org/content/pubs/cacounts/CC\\_806ABCC.pdf](http://www.ppic.org/content/pubs/cacounts/CC_806ABCC.pdf) (last visited 01/30/2018)

state prison admissions are from Southern California (65%); Bay Area is (8.4%) – of that figure, most come from Santa Clara, Alameda San Mateo, and Contra Costa counties.<sup>24</sup> However, those are merely statistics. While important, they do not tell us who our clients are. Our task is to find out, understand them, and be the best advocates we can be.



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<sup>24</sup> CDCR, Offender Information Services Branch Estimates and Statistical Analysis Section Data Analysis Unit, Characteristics Of Felon New Admissions And Parole Violators Returned With A New Term (2013), pp. 1, 10. [https://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/ACHAR1/ACHAR1d2013.pdf](https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2013.pdf) (last visited 01/30/2018)