FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 21, 2006

When the Defendant Becomes a Plaintiff.....

PROFESSIONAL RESPONSIBILITY & LIABILITY STANDARDS FOR CRIMINAL APPELLATE PRACTICE

J. Bradley O'Connell

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INTRODUCTION

If there is one forum which is less hospitable to criminal defendants than criminal court itself, it is civil court. Defendants frustrated with the criminal appellate and writ process occasionally attempt to bypass those procedures and seek redress for assertedly wrongful convictions by pursuing civil suits against various participants in the criminal justice system, including their defense attorneys (both trial and appellate). However, both the U.S. and California Supreme Courts have established standards which effectively preclude a defendant from using such a suit (whether labeled as a "malpractice" or "civil rights" action) as a vehicle for litigating the legality of their convictions. Most significantly, a suit against defense counsel cannot proceed *until after the defendant has succeeded in obtaining post-conviction relief setting aside his conviction*. Consequently, very few of the suits filed against appellate defense counsel have any real prospect of proceeding beyond the pleading stage.

I. STATE MALPRACTICE STANDARDS.

"The failure to provide competent representation in a civil or criminal case may be the basis for civil liability under a theory of professional negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) The basic liability standards governing a malpractice claim against criminal defense counsel mirror those in other professional liability contexts: "To prove a legal malpractice cause of action, the plaintiff must show: (1) a duty by the attorney to use such skill, prudence and diligence as members of his or her profession commonly possess and exercise; (2) breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citations.]" (*Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1356.)

But, over the past decade, the California Supreme Court has established a further set of prerequisites for maintaining a malpractice action against criminal defense counsel (trial or appellate):

- Necessity of "actual innocence." Under *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, a criminal defendant[1] must plead and prove his "actual innocence" of the offense in order to pursue a malpractice claim against defense counsel. A defendant's innocence is an "element" of the malpractice action. According to the California Supreme Court (as well as those of some other states), "'"permitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit from his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime."' [Citation.]" (*Id*. at p 537.) The Court emphasized that the standard for maintaining a damages action was a more demanding one than for obtaining appellate or writ relief for ineffective assistance of counsel: "The fact that nonnegligent counsel 'could have done better' may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole." (*Id*. at p. 539.)

- "Postconviction relief." Although the standards for a malpractice action are different from and considerably more onerous than those for postconviction relief, that does not mean that a civil damages suit is entirely independent of the ordinary postconviction process. On the contrary, **a defendant must actually succeed in setting aside his conviction (by appeal, writ, or other postconviction remedy) before proceeding on a malpractice suit.** (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194.) In *Coscia*, the Supreme Court ruled out any thought of using the malpractice action itself as the forum for litigating the invalidity of the conviction. The Court cited both considerations of "judicial economy" (e.g., avoiding relitigation of the same ineffective assistance issues) and "protect[ion] against inconsistent verdicts" (such the inconsistency between a habeas denial and a malpractice verdict against defense counsel). (*Id*. at p. 1204.) "Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* preclude recovery in a legal malpractice action." (*Id*. at p. 1201.) (Note, however, that "postconviction relief may be obtained on grounds other than attorney ineffectiveness." (*Id*. at p. 1205 fn. 4.))

  Coscia's requirement of "*exoneration* by postconviction relief" (*id*. at p. 1206, emphasis added) demands more than simply setting aside the original conviction: "[A] plaintiff must obtain postconviction relief in the form of *a final disposition of the*

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[1] For simplicity, this article will refer to such claimants as "defendants" (their posture in the criminal justice system), but it will focus principally on the standards they must meet as civil plaintiffs.

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." (*Id.* at p. 1205, emphasis added.)

- Relationship between postconviction relief requirement and statute of limitations. By statute, an attorney malpractice action "shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (Code Civ. Proc. § 340.6(a), emphasis added.) The *Coscia* Court recognized that its requirement that the defendant first obtain post-conviction relief could pose a Catch 22. Because "years, even decades, may elapse before the wrongfully convicted criminal defendant obtains postconviction relief," (*Coscia*, *supra*, 25 Cal.4th at p. 1207), the statute of limitations may well run before the defendant can satisfy that prerequisite for maintaining a suit. The *Coscia* Court's solution was a "two-track approach" adopted in some other states. Although postconviction relief is a prerequisite for going forward on a malpractice claim, it is not a precondition to *filing*:

  > [T]he plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff's conviction remains intact, *the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies*.... By this means, courts can ensure that the plaintiff's claim will not be barred prematurely by the statute of limitations. (*Coscia*, *supra*, at pp. 1210-1211, emphasis added.)

- Applicability to claims against appellate defense counsel. Although *Wiley* and *Coscia* involved malpractice claims against defense trial counsel, a subsequent Fourth District opinion has confirmed that the dual requirements of first obtaining postconviction relief and showing "actual innocence" apply equally to claims against appellate counsel. (*Redante v. Yockelson* (2003) 112 Cal.App.4th 1351.) The *Redante* opinion also addressed the types of claims which potentially could be cognizable against appellate counsel. Not surprisingly, it repeated the principle that the ultimate selection of issues is up to appellate counsel's professional judgment, not the client's. Counsel "had no duty to argue every issue Redante wanted to raise, but rather was entitled to assess which issues were potentially meritorious." (*Id.* at p. 1357.)

Beyond that, however, the *Redante* court took a strikingly narrow view of *appointed* appellate counsel's responsibilities. In particular, it held that **ordinarily a defendant cannot sue appointed appellate counsel for his failure to pursue habeas remedies**. It noted that there is "no constitutional right to counsel in habeas corpus proceedings, and, consequently, no right to effective assistance of counsel. [Citations.]" (*Ibid*.) The *Redante* court viewed the responsibilities of appointed appellate counsel in California as similarly circumscribed: "[I]n noncapital appeals, *appointed counsel has no obligation to investigate possible bases for collateral attack on a judgment* and no duty to file or prosecute an extraordinary writ believed to be desirable or appropriate by the defendant. (*In re Clark* (1993) 5 Cal.4th 780, 783 fn. 20 []; *In re Golia* (1971) 16 Cal.App.3d 775, 786 [].)" (*Redante, supra*, at p. 1356, emphasis added.) Though the *Clark* footnote does contain a similarly limited description of noncapital appellate counsel's duties, in practice appointed appellate attorneys *do* often investigate and file habeas claims, and that work is considered within the scope of the appellate appointment in most districts (including in the Fourth District) .

Presumably, the *Redante* rationale would not apply in those unusual situations in which an appellate court does appoint counsel for the specific purpose of litigating a writ petition, such as where an appellate court appoints counsel after issuing an OSC on an inmate's pro. per. habeas petition

- Implications for claims against appellate counsel. Taken together, the holdings in such cases as *Wiley*, *Coscia*, and *Redante* mean that very few inmate suits against appellate defense counsel will progress very far beyond the initial pleading stage. But they won't necessarily be dismissed outright. Most such suits will be stayed, pursuant to *Coscia*, while the inmate continues to pursue habeas or other postconviction remedies.

  Of course, an inmate who does succeed in obtaining postconviction relief may go forward with a suit against former trial counsel, appellate counsel, or both. Indeed, one inmate recently prevailed on a malpractice claim against a deputy public defender in Los Angeles. The essence of the case was that the attorney hadn't adequately investigated or obtained evidence to support the client's claim that rogue police officers had shot him and framed him for assault by planting a weapon on him. (The malpractice case involved some of the same officers implicated in Los Angeles' notorious Ramparts scandal. But the underlying criminal case had occurred approximately 2 years before the Ramparts story broke.) (See "Defender Loses Malpractice Case," San Francisco Daily Journal (May 27, 2005), p. 3 {discussing *Ovando v. Toister,* BC237276}.)

  But the grounds on which a client could successfully sue an appellate defender are

much more limited, in light of *Redante v. Yockelson*. A claim like the one in *Ovando* would not lie against appellate counsel, because, under *Redante*, appointed appellate counsel cannot be held liable for failure to investigate possible writ issues. Consequently, the only types of claims cognizable against appellate counsel would be those involving a failure to pursue *a meritorious issue on direct appeal*.

- Exceptions. The various limitations discussed here –such as the necessity of obtaining postconviction relief and showing actual innocence – apply only to *malpractice* actions against appointed appellate attorneys. These opinions do not rule out the availability of other types of suits arising from the relationship between a criminal defense client and his retained appellate or postconviction counsel. For example, though postconviction relief and a showing of actual innocence would still be required to pursue malpractice damages (against either retained or appointed counsel), a client might still pursue contractual claims against his former retained counsel – such as for overbilling or for failing to perform a specific service (e.g., filing a timely writ petition) specified in the contract. (E.g., *Bird, Marella, Boxer & Woolpert v. Superior Court* (2003) 106 Cal.App.4th 419 {allowing suit for breach of contract, breach of fiduciary duty, fraud, and overbilling to proceed, without necessity of showing actual innocence or postconviction exoneration}.)

II. FEDERAL CIVIL RIGHTS SUITS.

Some defendants have attempted to recast their complaints against defense counsel as "civil rights" actions, under 42 U.S.C. § 1983, rather than as traditional state malpractice suits. But such inmate suits face even greater obstacles than malpractice actions. And, in the case of damages claims that appointed defense counsel infringed a defendant's civil rights by rendering ineffective assistance, those obstacles appear insurmountable, and such suits should be subject to prompt dismissal.

- No "state action" for § 1983 purposes. 42 U.S.C. § 1983 is the basic Reconstruction-era statute under which most private civil rights suits are prosecuted. Section 1983 authorizes civil suits for damages and/or equitable relief for deprivations of constitutional or other civil rights "under color of state law." A few defendants, of course, view their appointed attorneys as simply additional participants in a hostile criminal justice system. Some defendants have attempted to sue defense counsel, alleging that their errors or misconduct resulted in their wrongful convictions (or wrongful affirmances of convictions) and deprived them of their constitutional rights. (In addition to trial and/or appellate defense counsel, such putative civil rights suits commonly name prosecutors, judges, police or sheriff's officers, and other agencies or officials as additional defendants.)

Whatever rights defendants may have to sue state or local officials for wrongful convictions in egregious cases, the U.S. Supreme Court has unequivocally held that **appointed defense counsel are immune from suit under § 1983 because there is no "state action."** (*Polk County v. Dobson* (1981) 454 U.S. 312.) The Court reasoned that, when he or she is representing a client *against* the prosecution in a lawyer's traditional adversarial role, a deputy public defender or other appointed attorney is not a "state actor" within the intent of § 1983, even though the attorney's role may derive from a court appointment. There is a possible exception for suits against a supervising public defender for actions in an administrative, rather than a representation capacity. (Cf. *Miranda v. Clark County, Nevada* (9th Cir. 2003) 319 F.3d 465.) But that possible wrinkle should pose no concerns for panel attorneys. Appointed panel attorneys come squarely within the holding of *Polk County*, and any putative § 1983 suit against a panel attorney should be subject to dismissal on the pleadings.

- Additional obstacles to use of § 1983 to challenge convictions. The other kinds of parties typically named in civil rights suits alleging wrongful convictions (e.g., police and prosecutors) *are* "state actors" for § 1983 purposes. But the Supreme Court has made clear that a civil rights suit is not an appropriate vehicle for challenging the constitutionality of a conviction. A federal civil rights suit is no substitute for a habeas corpus petition, and a defendant cannot avoid the many procedures obstacles to habeas relief (exhaustion, procedural default, etc.) by filing a § 1983 action instead. A federal habeas petition is the exclusive federal remedy for setting aside an unconstitutional state conviction. **A defendant cannot use § 1983 to seek equitable or declaratory relief directed to his or her state criminal case**. (*Preiser v. Rodriguez* (1973) 411 U.S. 475.)

  Nor may a defendant attempt to litigate the legality of his conviction through a suit for damages against state officials. A defendant **must first obtain state or federal post-conviction relief overturning the conviction** before proceeding with a suit for damages. "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or some other harm caused by actions whose unlawfulness would render a conviction or sentence invalid [fn.], a § 1983 plaintiff must prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ..., or called into question by a federal court's issuance of writ of habeas corpus." (*Heck v. Humphrey* (1984) 512 U.S 477, 486-487.) (This requirement, of course, is very similar to the California Supreme Court's rule (adopted two decades later) requiring a defendant to obtain postconviction relief before proceeding with a state malpractice suit. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194.)

(Note that the limitations of such cases as *Preiser* and *Heck* apply only to § 1983 actions challenging the constitutionality of the conviction itself, not to suits against police, jail or prison officials, or others in the criminal justice system alleging other kinds of constitutional violations. Thus, these rules do not bar § 1983 suits alleging police brutality or unconstitutional jail or prison conditions, because those claims are independent of the legality of the conviction.)

III. DON'T WORRY. YOU'RE COVERED.

Under the substantive standards outlined above, panel attorneys have nothing whatever to fear from a putative civil rights suit and very little to fear from a state malpractice suit – at least in terms of any serious risk of being held liable for damages. Nonetheless, such suits are a nuisance, since they may require the filing of demurrers, motions to dismiss, motions for summary judgment, or other responsive pleadings. However, panel attorneys should rest easy, since there is no need to master civil procedure, make appearances, or devote precious time to responding to such suits. **Panel attorneys are expressly covered by FDAP's professional liability policy for any suits by defendant-clients arising out of their representation on court-appointed appeals.**

- Scope of coverage. The policy covers suits against panel attorneys for their actions within the scope of their appointments through FDAP – i.e., appellate appointments by the California Court of Appeal or the California Supreme Court – including any claims regarding habeas representation (or failure to file a habeas petition) during and as part of that appointment. (However, as noted earlier, as a substantive matter, *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, takes a narrow view of counsel's responsibilities and appears to bar any liability for an appointed appellate attorney's failure to file a habeas petition.) The coverage includes any damages or settlement and, equally important, costs of defense.

  The policy would likely not extend to any further actions on a former client's behalf *outside the scope of the appellate appointment*. For example, if the appellate court issued an OSC on a habeas petition and counsel obtained a superior court appointment to continue representing the client for the evidentiary hearing or other proceedings, a suit arising out of that superior court representation would likely be deemed outside the coverage of FDAP's policy, because that representation would not have been within the scope of the appellate appointment through FDAP. The same goes for any post-affirmance representation (either by appointment or on a pro bono basis) in federal habeas proceedings.

- Counsel's duties if threatened with suit. In the event that a current or former

appellate counsel files suit against you or threatens to sue you, **you should notify FDAP immediately,** and FDAP in turn will report the matter to the insurer. Do not wait until you are formally served with a lawsuit. If someone mails you what appears to be a state or federal suit, that is the time to contact FDAP, regardless of whether or not you believe that the mailing qualifies as "service" of the complaint. Similarly, if a client, by letter or in a phone conversation, clearly states that he has or is about to sue you, that too should be reported to FDAP. (However, a client's assertion that he is going to write to the Court of Appeal, file a writ alleging your ineffective assistance, or submit a complaint to the State Bar does not require notice to the insurer (because those action would not implicate the professional liability policy). (Nonetheless, depending on the circumstances, a panel attorney may still want to contact the FDAP buddy to discuss the matter.)

When FDAP notifies the insurer of a suit (or a threat of suit), the insurer's counsel determines whether the matter requires any immediate action. If there is no indication that a complaint has actually been filed, the insurer will generally defer taking any action. However, if a complaint has been filed (even if not necessarily served properly), the insurer will generally refer the case to local insurance defense counsel. From that point, the local counsel will represent you, and you will deal directly with that firm. Of course, it is your responsibility to cooperate fully with the insurance defense counsel, including digging out copies of briefs, correspondence, and other information relevant to the case.