FIRST DISTRICT APPELLATE PROJECT

BEING UNDERSTOOD: THE ETHICS OF CLIENT COMMUNICATION IN APPELLATE PRACTICE

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FDAP

ESTABLISHING THE FOUNDATION FOR EFFECTIVE CLIENT COMMUNICATION

Purpose of communications.

- To understand our client and the case.
- To assist our client in understanding their case and our representation.
- Adequate communication with clients is an integral part of competent professional performance as an attorney. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.)

Duty to communicate.

- California Rules of Professional Conduct, rule 1.4, and Business and Professions Code section 6068 provide the central framework.
- Reasonably consult with the client about the means of accomplishing the client's objectives. (Rule 1.4(a)(2).)
- Keep the client reasonably informed about significant developments and promptly comply with reasonable requests for information and copies of significant documents. (Rule 1.4(a)(3); Bus. & Prof. Code, § 6068(m).)
- Explain the matter to the extent reasonably necessary to permit informed decisions. (Rule 1.4(b).)
- Also consult the ABA Criminal Justice Standards for the Defense Function, including the standards addressing client relationships and appellate representation.

Duty of confidentiality.

- Business and Professions Code section 6068(e)(1) and rule 1.6(a) impose confidentiality obligations. Consider who may have access to a communication before using institutional messaging, email, shared devices, family accounts, or employer systems.

Find the client and establish contact early.

- For a client on probation or supervision, check the appellate record for an address and, when available, a telephone number or email address. Contact details may appear in the sentencing minute order, probation terms, or a probation report.

- For a client in custody, use FDAP's "Locating and Contacting a Person in Custody" resource to identify the appropriate facility and available contact methods.
- Make the first contact promptly, even while the record is being prepared. Early contact builds trust, invites client input, and establishes expectations about the appellate process. In dependency matters, early communication with a parent, grandparent, or child client can also help counsel learn about developments in ongoing proceedings.

The first letter: purpose, confidentiality, and readability.

- A first letter can explain the appointment, counsel's role, the appellate process, an approximate timeline, and how and when future communications will occur.
- Set expectations early about how and when you will communicate and explain that an appeal may include long periods with little visible activity.
- Most importantly, it is the most confidential channel available for incarcerated clients if properly marked as legal mail. Institutional telephone and electronic messaging systems may be monitored or recorded; do not assume those channels are confidential.
- Write for the client you have. Consider age, education, possible language or communication barriers, disability-related needs, and prior experience with appeals.
- Use the Judicial Council's interpreter resources where appropriate. The Judicial Council's Master List of Interpreters includes more than a thousand certified interpreters and registered interpreters (counsel can use either kind), and their contact information. The list covers more than a dozen certified languages and many more registered languages.
- Translation is reimbursable only for correspondence and, when pre-approved by FDAP, for live client meetings. There is no reimbursement for translating briefs, petitions and other legal documents. Rates will be reviewed for reasonableness. FDAP can approve up to $1,900 (increasing to $2,100, effective July 1, 2027), over that needs approval from COA.
- Consider readability tools in Microsoft Word, but treat scores as prompts for review—not as substitutes for judgment. Plain-language and AI tools may help simplify correspondence, subject to confidentiality and verification safeguards (see below).

Ethics implications.

- "[O]n any matter which requires client understanding, Attorney must take reasonable steps to ensure that the client comprehends the legal concepts involved and the advice given… Attorney is not truly 'communicating' with the client if the client does not understand what Attorney is saying — whether because of a language barrier or simply a lack of understanding of the legal concepts being discussed." Where communication is not in person, counsel is "without nonverbal cues… or even verbal clues," and "may need to take additional reasonable steps" to form a reasonable belief that she is truly communicating with the client. State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-184.
- *Also consider:* ABA Standard 4-3.1(d): "In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability."
- Do not send privileged communications through a channel known or reasonably suspected to be monitored or accessible to others. Recorded phone lines and tablet/messaging systems in custody (i.e. GTL/ViaPath/Connect Network/GettingOut) are generally not confidential. For a detailed discussion of the methods available for communicating with clients in CDCR, and the ethical and practical implications of using each method, see FDAP's Communicating with Clients in the California Department of Corrections and Rehabilitation.

COMMUNICATING TO UNDERSTAND THE CLIENT AND THE CASE

Contact trial counsel.

- Reach out early.
- Ask about the client's comprehension, engagement, preferred communication methods, language needs, and any concerns about competency or disability. Ask trial counsel what communication approaches have worked with this client.
- Ask which issues mattered most to the client and trial counsel, and whether family members played an important role or may help facilitate communication.

Discuss issues with client.

- Once you have identified issues for appeal, check in with the client.
- Check whether you understand the full context of the events underlying the case, not only the portions emphasized in the record.
- Ask what aspects of the proceedings, sentence, or orders concern the client most. A charge or ruling may carry personal significance that is not obvious from a legal perspective.
- Explain why certain issues may be raised and others may not be: the kinds of error an appellate court reviews, the need for error to be reflected in the record, standards of review, and harmless-error analysis.
- Give your best professional evaluation of potential appellate issues and discuss probable and possible outcomes and consequences. (See ABA Standard 4-9.2(c).)
- Reasonably consult with the client about the means by which to accomplish the client's objectives in the representation. (Rule 1.4(a)(2))
- Communicate with warmth, patience, and empathy; confirm understanding rather than assuming that a letter or conversation was understood.

Show the client they've been heard.

- If the client requests an issue you do not consider arguable, explain your reasoning. When useful, share citations or copies of the authorities supporting your analysis.
- Although counsel exercises professional judgment in selecting appellate issues (*People v. Beckstrom* (1974) 43 Cal.App.3d 996, 1001–1002; *Jones v. Barnes* (1983) 463 U.S. 745, 751), counsel should nevertheless discuss the arguments to be presented and diligently attempt to accommodate the client's wishes when possible. (See ABA Standard 4-9.2(g).)
- Distinguish counsel's issue-selection judgment from decisions that belong to the client, including decisions about waiving potentially beneficial issues or whether to challenge a plea and risk losing its benefits.
- The statement of facts can be a major point of sensitivity. Explain the constraints imposed by the record and appellate standards while considering lawful, accurate ways to address the client's concerns.

Investigate further if warranted.

- Question the record when the client's account raises concerns not reflected in the appellate record.
- Consider whether relevant documents were produced but not admitted, whether competency issues were overlooked, or whether further investigation into ineffective assistance is warranted.
- Consider potential post-conviction remedies, including habeas corpus, and consult with the client about timing and who may represent them. (See ABA Standards 4-9.3(k) and 4-9.6(a).)

ONGOING COMMUNICATIONS AND RECORDS

Make sure communication is actually received.

- Verify contact information when correspondence does not appear to be reaching the client.
- Keep the client reasonably informed about significant developments and respond promptly to reasonable requests for information. (Rule 1.4(a)(3); Bus. & Prof. Code, § 6068(m); Formal Opinion No. 2012-184.)
- Custody makes communication harder, but does not reduce the obligation to maintain an effective and regular client relationship. (See ABA Standard 4-3.1(f).)
- "[O]nce Attorney begins the representation, she must keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents. . . . Attorney must take reasonable steps to determine that the client in fact is receiving the information in a timely manner." Ethics Opinion No. 2012-184.

Avoid client dissatisfaction.

- Be responsive. If several messages arrive while you are completing a brief, acknowledge receipt, give a realistic response timeframe, and follow through. "A lawyer shall… promptly comply[] with *reasonable* requests for information." Rule 1.4(a)(3) (emphasis added).
- Proactively send copies of extensions and explain what happens next. Clients may experience silence as neglect, especially when deadlines shift or months pass between argument and decision.

Respond to reasonable requests for records.

- The original file and transcripts belong to the client. Well before the case concludes, counsel should affirmatively inquire about whether the client will want a copy of the record.
- A digital copy of record should be provided when the client is able to receive the record electronically.
- In no-issue cases, counsel should normally send the record to the client upon filing the no-issue brief, unless there is a strong indication the client does not intend to file a supplemental brief. If the record is digital, prior to filing the no-issue brief, counsel should ask the client whether they want a copy of the record prior to reproducing the record.
- Before sending materials, review for confidential information the client is not entitled to receive and be sure to redact it. Avoid sending sensitive content (e.g., in sex-offense cases) that could expose the client to risk in custody.
- Plan practical reproduction and delivery options. When appropriate and authorized, a trusted family member or friend may receive the record where the clients can't receive a full copy safely or practically.
- Rule 1.4, comment 2, recognizes that documents may be supplied electronically or by other means. ABA Standard 4-3.9(b) addresses prompt compliance with reasonable requests for information and documents, subject to legal restrictions.

Oral argument access.

- For many clients, oral argument feels like their "day in court," even when briefing is more consequential. Tell the client the date and explain available options.
- For an out-of-custody client, offer attendance and explain logistics: arrival time, where to meet, security, dress, and courtroom decorum. Discuss potential strategic advantages and disadvantages. (See ABA Standard 4-9.3(h).)
- Family and friends may be able to attend in person or remotely, depending on the court's arrangements.
- For an incarcerated client, do not assume that streaming access is available inside the institution. Confirm current court streaming practices and facility rules.

Communicating with family members.

- Family members may help locate a client, facilitate receipt of correspondence, encourage a response, and share information about the client's needs.
- Do not disclose attorney-client information without informed consent or another applicable basis. (Rule 1.6(a); Bus. & Prof. Code, § 6068(e)(1).)
- Use family involvement to support communication while keeping the client's autonomy, confidentiality, and preferences central.

TECHNOLOGY: TEXTING AND GENERATIVE AI

Texting with clients who are not in custody.

- Texting is often the default mode of communication for many clients.
- Benefits include prompt reading of messages and quicker response time.
- Risks include inability to control the number of messages received, messages outside business hours, interruptions, inadvertent disclosure through lock-screen previews, and incomplete record retention.
- Use texts primarily for logistics, scheduling, and confirming receipt. Do not use texts for substantive privileged exchanges unless the platform and circumstances are appropriate and secure.
- Best practices include setting expectations about response times and hours; protecting devices with strong authentication; adjusting notifications to hide details; and establishing a reliable method for retaining relevant communications.
- Apply the confidentiality duties in Business and Professions Code section 6068(e)(1) and rule 1.6(a).
- Rule 1.1 identifies the benefits and risks of relevant technology as part of maintaining competence. Comment 1 provides: "The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."

Generative AI and client communications.

- Potential uses include drafting or simplifying client letters, translating dense legal concepts into plain language, and reorganizing counsel's own work product for clarity.

- Confidentiality: do not enter client names, facts, record details, or other protected information into a tool unless you have evaluated the tool's data practices and the use is permitted. Treat an AI prompt like any other communication channel: if it isn't confidential, client's confidential information is not provided to it. (B&P Code § 6068(e)(1); Rule 1.6(a))
- Accuracy: AI systems can produce false statements and fabricated authorities. Independently verify every legal proposition, citation, and client-facing statement before use.
- Competence: understand how the tool handles inputs, retention, access, and training. Using AI is not inherently prohibited; using a tool without understanding its risks may create ethical problems. (Rule 1.1, cmt. 1; ABA Rule 1.1, cmt. 8.) See the California State Bar's Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law.
- Practical rules: sanitize inputs where appropriate, use approved tools and settings, verify outputs, and never provide confidential material through an unsecured tool.

ADAPTING COMMUNICATION TO CLIENT NEEDS AND CIRCUMSTANCES

Setting boundaries without abandoning.

- If a client sends excessive messages, explain that you need to focus on the brief and state when you will respond; one thoughtful response may address several messages.
- If a client repeatedly revisits facts or issues, explain the limits of appellate review and acknowledge that you understand the client's position before redirecting the discussion.
- If a client sends inappropriate or unwanted messages, clearly state the boundary, document the communications, retain copies, and do not engage in an escalating exchange.
- If you have concerns about a challenging relationship with a client, consult the appellate project. Counsel need not manage a challenging client relationship alone.

Communicating with clients with mental health conditions.

- Avoid language that reinforces stigma. For example, describe the client as afraid rather than labeling the client "paranoid," unless a clinical term is necessary and supported.
- Mental-health conditions do not automatically indicate incompetence or lack of intelligence. Adapt your communication style to the client's needs.
- Mental health can change during the representation. If attention or focus is difficult, use short statements, one question at a time, and clear follow-up.
- For accessible background information on specific conditions, consult the National Alliance on Mental Illness (NAMI).

Communicating with youth.

- Remember the young people are neurologically and developmentally different from adults.
- Young people are still developing decision-making capacities. Peer influence, short-term focus, emotional variability, impulsivity, and developing abstract reasoning may affect how a young client processes choices and consequences. (Patricia Puritz, Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating A Paradigm for Specialized Juvenile Defense Practice* (2007) 45 Fam. Ct. Rev. 466, 474.)
- The ethical obligation that follows: "Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel's ability to ascertain the client's expressed interests. Counsel must work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication." (Nat'l Juv. Defense Standards, Rule 2.6: Overcoming Barriers to Effective Communication with the Client.)
- Explain counsel's role in developmentally appropriate terms. Do not assume a young person understands confidentiality, the lawyer's independence, or the purpose of appellate representation.
- Be warm, interested, and empathetic with your client to facilitate effective communication and build trust.

- Look for language or communication impairments and relevant clues in the record, including an IEP.
- If appropriate try short sentences, one concept at a time, repetition in different phrasings; avoid compound or lengthy questions. Follow up important letters with a call.
- *Be on the lookout for trauma,* which can interfere with the formation of strong client-attorney relationships by impairing the youth's capacity to trust others, process information, and communicate. Telltale trauma reactions typically represent some version of fight, flight, or freeze. (The National Child Traumatic Stress Network, Justice Consortium Attorney & Workgroup Subcommittee, *The Impact of Trauma on the Attorney-Client Relationship* (2017) 36 Child. L. Prac. 109.)
- For deeper guidance, consult The Gault Center's current standards and trauma resources.