

SIXTH DISTRICT APPELLATE PROGRAM

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	]	
	]	NO. H020666
Plaintiff and Respondent,	]	
	]	(SANTA CLARA CO.
vs.	]	SUPERIOR COURT
	]	NO. GG123456)
JOHN SCOPES,	]	
	]	
Defendant and Appellant.	]	
	]	
	]	

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MOTION FOR AN ORDER DIRECTING  
ATTORNEY CLARENCE DARROW TO PROVIDE  
DOCUMENTS FROM APPELLANT'S TRIAL FILE

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TO THE HONORABLE CONRAD L. RUSHING, PRESIDING  
JUSTICE OF THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT:

Appellant moves this court for an order directing his trial attorney,  
Clarence Darrow, to provide documents from appellant's trial file to his  
present appellate counsel, Dallas Sacher. The documents in question are those

specified in Mr. Sacher's letter to Mr. Darrow of March 1, 2006. This motion is supported by the attached memorandum of points and authorities and declaration.

Dated: May \_\_\_\_, 2006

Respectfully submitted,

DALLAS SACHER  
Attorney for Appellant,  
John Scopes

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL FACTS

Appellate counsel has read the record on appeal and communicated with appellant. (Exhibit A.) Appellate counsel has made a determination that he is required to investigate possible issues of ineffective assistance of trial counsel. (Exhibit A.) On March 1, 2006, appellate counsel wrote to trial counsel, Clarence Darrow, and asked him to forward copies of specified discovery provided by the District Attorney or to indicate that no such discovery had been provided. (Exhibit A.) Having received no response to his letter, appellate counsel sent follow-up letters on March 10, 2006 and March 27, 2006. (Exhibit A.) To date, appellate counsel has heard nothing from Mr. Darrow. (Exhibit A.)

I.

THIS COURT SHOULD ORDER MR. DARROW TO COMPLY WITH HIS MANDATORY DUTY TO PROVIDE THE REQUESTED DOCUMENTS FROM APPELLANT'S TRIAL FILE.

Pursuant to rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar of California,<sup>1</sup> trial counsel has a mandatory duty to provide

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1. Rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar of California provides:

“A member whose employment has terminated shall:  
“(1) Subject to any protective order or non-disclosure

papers from the client's file to successor counsel. (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599.) In this case, appellate counsel has asked Mr. Darrow to provide copies of specified documents. It is Mr. Darrow's duty to provide these documents to appellate counsel or to indicate that he does not have them. (*Ibid.*)

*Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 governs this case. There, the plaintiff in a civil action discharged his lawyer. When the discharged lawyer declined to turn the client's file over to successor counsel, the Court of Appeal ordered him to do so. (*Id.*, at p. 1006.) While the court did not cite any authority in support of its order, it is manifest that ample statutory authority exists.

Code of Civil Procedure section 187 provides:

“When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”

Section 187 applies to proceedings pending on appeal. (*Warren v. Schechter*

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agreement, promptly release to the client, at the request of the client, all the client papers and property. ‘Client papers and property’ includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; . . .”

(1997) 57 Cal.App.4th 1189, 1199.) As this court has recognized, section 187 authorizes a court to provide a procedural remedy to a litigant whose substantive rights are established under the law. (*Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1344-1345.)

Here, there is no doubt that Mr. Darrow has a legal duty to provide the documents requested by appellate counsel. Thus, this court should order Mr. Darrow to do so. (Section 187.)

Aside from section 187, Code of Civil Procedure section 128, subdivision (a)(5) also authorizes the relief requested by appellant. Section 128, subdivision (a)(5) provides:

“(a) Every court shall have the power to do all of the following:

.....  
“(5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.”

Pursuant to section 128, a court has the authority to compel an attorney to perform his legal duty. For example, section 128 authorizes a court to issue an order compelling a lawyer to serve as advisory counsel to a pro per defendant. (*Ligda v. Superior Court* (1970) 5 Cal.App.3d 811, 825-826.) No reason appears why this court should not utilize section 128 to require Mr. Darrow's compliance with rule 3-700(D)(1) of the Rules of Professional Conduct.

Mr. Darrow has a mandatory duty to assist appellate counsel in the proper representation of his former client. This court should order Mr. Darrow to comply with his mandatory obligations.

CONCLUSION

For the reasons expressed above, this court should issue an order directing Mr. Darrow to provide the documents specified in appellate counsel's letter of March 1, 2006 or to indicate that he does not possess the documents.

Dated: May \_\_\_\_, 2006

Respectfully submitted,

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DALLAS SACHER  
Attorney for Appellant,  
John Scopes

# Exhibit A

## DECLARATION OF DALLAS SACHER

I am an attorney licensed to practice in California. I have been appointed by this court to represent appellant on his pending appeal.

After reviewing the record on appeal and communicating with appellant, I made a determination that there were possible issues of ineffective assistance of trial counsel which I was ethically bound to investigate. On January 23, 2006, I wrote to trial counsel, Clarence Darrow, at his office address as it appeared on the State Bar Website. In my letter, I asked Mr. Darrow to respond to a series of questions regarding his omission to render certain objections at Mr. Scopes's trial.

As of February 4, 2006, I had not received a response from Mr. Darrow. On that date, I wrote to Mr. Darrow and stated that I would presume that he had no tactical justification for any of his omissions unless I heard from him by February 13, 2006. Mr. Darrow did not respond to my letter of February 4, 2006.

On March 1, 2006, I realized that there was an additional issue of ineffective assistance of counsel which I was required to investigate. On that date, I wrote to Mr. Darrow and asked him to provide copies of discovery which I presumed that the District Attorney had given him prior to trial. I asked Mr. Darrow to send me the discovery or to advise me that no such discovery had been provided. I also asked Mr. Darrow to respond to a

question regarding the action he had taken concerning the contents of the discovery.

On March 10, 2006 and March 27, 2006, I wrote to Mr. Darrow and reminded him that I was awaiting a response to my letter of March 1, 2006. Along with the March 27, 2006 letter, I enclosed a State Bar ethics opinion which provides that it is trial counsel's duty to cooperate with appellate counsel. A copy of the State Bar opinion is attached to this declaration. I have received no response to my letters of March 10, 2006 and March 27, 2006.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this \_\_\_ day of May 2006 at Santa Clara, California.

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DALLAS SACHER

## PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***MOTION FOR AN ORDER DIRECTING ATTORNEY CLARENCE DARROW TO PROVIDE DOCUMENTS FOR APPELLANT'S FILE*** to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Attorney General's Office  
455 Golden Gate Avenue  
Suite 11,000  
San Francisco, CA 94102-7004  
[Counsel for Respondent]

Clarence Darrow, Esq.  
1 Tennessee Street  
San Jose, CA 95112

John Scopes  
N-12345  
Kern Valley State Prison  
3000 W. Cecil Avenue  
Delano, CA 93216

I declare under penalty of perjury the foregoing is true and correct. Executed this \_\_\_ day of May, 2006, at Santa Clara, California.

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Priscilla A. O'Harra