ETHICAL ISSUES IN APPELLATE ADVOCACY

by: Lori A. Quick

TABLE OF CONTENTS

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Introduction

Following ethical rules are just as important when representing clients in the Court of Appeal as when representing them in the trial court. Some of the ethical considerations that arise in the trial court context do not apply in appellate advocacy. There is no jury or discovery, for example, nor are there are examinations and cross-examinations of witnesses. Nevertheless, there are numerous ethical issues that may arise when representing a client on appeal. This article will discuss some of the many issues that may be encountered in appellate practice.

The Legal Framework

When it comes to ethics in appellate practice, just like everything else in the practice of law, there are rules. Attorneys in California are guided mainly by the California State Bar Rules of Professional Conduct and the California Business & Professions Code, most specifically Business & Professions Code section 6068.

Ethical Considerations

1. Is the Appeal Cognizable and not Frivolous?

Issues cognizable on appeal are confined to matters contained in the appellate record. (See *People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.) Appellate counsel "has a duty to insure that there is an adequate record before the appellate court from which . . . contentions may be resolved on their merits. Where the appropriate record is missing or incomplete, counsel must see that the defect is remedied, by requesting augmentation or correction of the appellate record [citation] or by other appropriate means [citation.] Otherwise, counsel has not provided that advocacy which permits 'full consideration and resolution' of the appeal, as required by the Constitution. [Citation].)" (*People v. Barton* (1978) 21 Cal.3d 513, 520; see also Cal. Rules of Court, rules 8.147, 8.155.) Thus, counsel must be sure that the record contains support for the claims to be

raised. If not, it is incumbent on counsel to correct or augment the record so that it contains factual support for the claim.

Appellate counsel should determine as soon as possible whether a certificate of probable cause is necessary. Other than sentencing and Fourth Amendment issues, a guilty plea forfeits appellate issues except those which affect the legality of the plea or the trial court's jurisdiction. (See *People v. Turner* (1985) 171 Cal.App.3d 116, 123-129 [listing issues which survive a guilty plea]; see also *In re Chavez* (2003) 30 Cal.4th 643, 649, fn. 2.) An example of such an issue is the denial of a motion to withdraw the guilty plea. In order to raise an otherwise cognizable issue on appeal, the defendant must obtain a certificate of probable cause from the trial judge. If a certificate is obtained on one issue, all otherwise cognizable claims may be raised on appeal. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1173-1174.)

Attorneys are officers of the court and are "duty bound not to maintain or continue a 'frivolous' proceeding." (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1105.) "What is and is not an arguable issue depends both on the facts established in the record on appeal and on the state of the law. It is frequently a matter of opinion and therefore necessarily left to the professional judgment of counsel. However, that is not to say all issues are incapable of definitive classification. In some cases there may be issues on one extreme of the continuum which are indisputably arguable. On the opposite extreme of the continuum may be issues which are manifestly and indisputably not arguable. For want of a better description, the latter are 'nonissues.'" (*People v. Craig* (1991) 234 Cal.App.3d 1066, 1068.) The California Supreme Court has defined a frivolous appeal as one which "is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 370.) Of course, ". . . that an appeal lacks merit does

not, alone, establish it is frivolous." (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 518; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.) The California State Bar Rules of Professional Conduct define a frivolous claim as one "that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law." (Rules Prof. Conduct, rule 3.1(a)(2).)

2. Client Communication

There are numerous authorities describing and detailing the duty of counsel to communicate with the client. An attorney has the duty "[t]o 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." (Bus. & Prof. Code, sec. 6068, subd. (m).) Rule 1.4 of the State Bar Rules of Professional Conduct states as follows:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent is required by these rules or the State Bar Act;
>
> (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
>
> (3) 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 when necessary to keep the client so informed; and
>
> (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
>
> (d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation

under statutory or decisional law.

In order to meet client communication standards, appellate counsel should:

(1) Write to the client immediately upon appointment. Introduce yourself and give him or her a general overview of what to expect. Typically, at least in the Sixth District, the record will not yet have been prepared. Be sure to advise the client of this and explain that consequently you cannot yet have any idea what legal issues might be raised on appeal. If you have a business card, include it with the letter. If the client is in custody, be sure that the envelope is marked as legal mail in order to preserve confidentiality. (Cal. Code of Regs., title 15, secs. 3141, 3143.)

(2) Write to the client at each important stage in the appeal. (Bus. & Prof. Code, sec. 6068, subd. (m).) Keep in mind they have no idea what is happening with their cases. Give them timelines as to when they can expect briefs to be filed. Let them know if you have had to request an extension of time, or if you had to correct the record. Of course, clients should promptly be sent a copy of the opinion with a brief explanation about its practical effect on them and what the next step in the process will be.

(3) Be available to your client. You must be able to accept collect phone calls from them. Letters from a client should be answered as quickly as possible, certainly within a week. "Failure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline." (*Layton v. State Bar* (1990) 50 Cal.3d 889, 903-904.)

(4) Do not write in "legalese." Not only may this be difficult for many clients to understand, it can be intimidating and may hamper the development of the attorney-client relationship. Attorneys are required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (Rules Prof. Conduct, rule 1.4(b).)

3. Maintaining Client Confidentiality

It is of course the duty of every attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, sec. 6068, subd. (e)(1); Rules Prof. Conduct, rule 1.6(a); *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167, fn. 3.) The duty of confidentiality is broader than the attorney-client privilege (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 and "survives the termination of the attorney's representation." (*City and County of San Francisco v. Cobra Solutions, Inc*. (2006) 38 Cal.4th 839, 846.) It protects virtually everything the lawyer knows about the client's matter regardless of the source of the information. (*Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 151.)

There are of course limitations. An allegation of legal malpractice necessarily waives all claims of confidentiality. (Evid. Code, sec. 958; see *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 579-580.) Thus, no unethical breach of the duty of confidentiality occurs if an attorney must reveal a client's confidence or secret in order to defend against a malpractice claim. In addition, "an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (Bus. & Prof. Code, sec. 6068, subd. (e)(2); see also Rules Prof. Conduct, rule 1.6(a); Evid. Code, sec. 956.5.) However, before revealing confidential information for this reason, an attorney must *if reasonable under the circumstances*:

(1) make a good faith effort to persuade the client:
    (i) not to commit or to continue the criminal act; or
    (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(Rules Prof. Conduct, rule 1.6(c).)

4. Issue Selection

A. Who's the Boss?

Issue selection is not a topic that immediately jumps to mind when considering legal ethics. However, it is something the United States Supreme Court has considered. In *Jones v. Barnes* (1983) 463 U.S. 745, a defendant sent his attorney a letter listing several claims he felt should be raised. The attorney responded, accepting some but rejecting most of the issues. He filed a brief raising three issues, and also submitted a *pro se* brief filed by the defendant. The defendant thereafter filed two more *pro se* briefs. At oral argument, the attorney addressed the three issues he had presented but did not argue the issues raised in the *pro se* briefs. Several rounds of litigation ensued, eventually involving an allegation of ineffective assistance of appellate counsel for failing to raise the issues the defendant had wanted raised. The United States Court of Appeals for the Second Circuit laid down a new standard, holding that when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel must argue the additional points to the full extent of his professional ability." (See *Jones, supra,* 463 U.S. at p. 749.) Relying on *Anders v. California* (1967) 386 U.S. 738, which held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal, the Court of Appeals held that since *Anders* bars counsel from abandoning a nonfrivolous appeal, it also bars counsel from abandoning a nonfrivolous issue on appeal.

The United States Supreme Court granted certiorari and reversed. The Court noted that it had recognized:

> [T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury,

> testify in his or her own behalf, or take an appeal . . . In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, *Faretta v. California*, 422 U.S. 806 (1975). Neither *Anders* nor any other 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.

(*Jones, supra,* 463 U.S. at p. 751.) The Court went on:

> This Court, in holding that a state must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," [citation]. Yet by promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation. Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.

(*Id.,* at pp. 751-752.) The Court concluded:

> *Anders* recognized that the role of the advocate "requires that he support his client's appeal to the best of his ability." [Citation.] Here the appointed counsel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.

(*Id.*, at p. 754; accord, *In re Sade C.* (1996) 13 Cal.4th 952, 970.) Accordingly, it is the attorney, not the client, who determines which issues to raise.

B. How do Ethics Impact an Attorney's Choice of Issues to Raise?

There are as many styles of advocacy as there are attorneys. In trial courts, some attorneys follow the philosophy of "throw everything at the wall and see what sticks." This is rarely a winning strategy at trial, and even less so on appeal. But is it unethical?

Certainly, an attorney "must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client." (*McCoy v. Court of Appeals* (1988) 486 U.S. 429, 444.) As stated above, attorneys are officers of the court and are "duty bound not to maintain or continue a 'frivolous' proceeding." (*People v. Sperling, supra,* 12 Cal.App.5th at p. 1105.) The California Supreme Court has stated:

> [A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.] However, any definition [of a frivolous claim] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals."

(*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650.) This same rule also applies to petitions filed in the California Supreme Court pursuant to its original jurisdiction. (*In re Reno* (2012) 55 Cal.4th 428, 511.) However, although attorneys may not bring frivolous appeals or raise frivolous issues, their function is not to assist the court. Appointed counsel must be "an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claims." (*Evitts v. Lucey* (1985) 469 U.S. 387, 394.)

On November 1, 2018, rule 3.1 was added to the Rules of Professional Conduct. The rule states:

> (a) A lawyer shall not:
>
> (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
>
> (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

> (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

This is simply a codification of the case law involving frivolous claims. The Supreme Court clearly did not want to chill the rights of appellants. Courts may be hesitant to label an appeal frivolous because there is probably almost always a rational argument that can be made. Nevertheless, the Court made it clear, as does this rule, that there is a point beyond which one should not go.

Raising a frivolous claim or appeal has consequences. The first and most obvious is dismissal of the appeal. In addition, the Court of Appeal can impose sanctions against the attorney.

C. What if You Have Information not in the Record?

"It is elementary that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to a consideration of matters contained in the record of trial proceedings, and . . . '[matters] not presented by the record cannot be considered on the suggestion of counsel in the briefs.'" (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397; see also *People v. Hernandez* (1957) 150 Cal.App.2d 398, 402.) What is an attorney's ethical obligation when he or she is aware of the existence of information not in the record that renders a claim frivolous or meritless? For example, it is clear from the record that an instruction on a lesser included offense should have been given. The issue on appeal would be a strong one. However, appellate counsel learns from trial counsel that during an off the record discussion of jury instructions which was not memorialized for the record, trial counsel asked the court *not* to give that instruction, hoping instead for a full acquittal. Here, there is a strong meritorious issue that could be raised based on the record, yet appellate counsel knows that events occurring off the record would render the issue unarguable.

One of counsel's duties is "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, sec 6068, subd. (d).) "Concealing material facts cannot be condoned. [Citation.]" (*Davidson v. State Bar* (1976) 17 Cal.3d 570, 574.) The presentation of false evidence is prohibited. (Rules Prof. Conduct, rule 3.3(a)(3); see *Nix v. Whiteside* (1986) 475 U.S. 157, 167-169.) So, the issue should not be raised.

Nevertheless, there are arguments that can sometimes be made to enable ethically raising the argument. In the example given regarding the instruction, it might be possible to argue that the request to omit the LIO instruction was the result of an uninformed or incompetent choice. Accordingly the claim is not waived unless the record affirmatively shows "that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. . . . A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Of course, because making such a claim would require the introduction of evidence outside the record, it would have to be raised in a petition for writ of habeas corpus.

5. Some Ethical Issues in Brief Writing

At first blush, it does not seem that the simple act of writing the brief - aside from issue selection and evaluation - could present any ethical issues. There are, however, a few ways in which an attorney may run afoul of ethical considerations.

A. Know What is in Your Brief

This seems almost too obvious to discuss. It is important to keep in mind that:

> By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: (1) It is not being presented primarily for an improper purpose, such as to

> harass or to cause unnecessary delay or needless increase in the cost of litigation.
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
> (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(Code Civ. Proc., sec. 128.7, subd. (b).) Every time a brief is filed, the attorney is attesting that the claims are warranted by existing law or that there is a good faith argument for extension, modification, or reversal of existing law, and that all facts presented, whether in the statement of facts or in the body of the brief, have evidentiary support. (See *Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 427.) Before filing a brief, always be sure that nothing is misrepresented.

How might an attorney not know that there is a misrepresentation of law or fact in the brief? The most likely way this could happen is by copying and pasting either from old briefing of one's own, or from briefing by another attorney. Without careful research, it is very possible to make mistakes such as citing to case or statutory law that is no longer good authority, or even including facts from a previous case. (See, e.g., *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.app.4th 267, 290.) Thus, attorneys must be careful not to take "short cuts" that might result in a misrepresentation to the court.

B. Acknowledging Adverse Facts and Law

The California Rules of Professional Conduct make it clear that an attorney has a duty to disclose adverse legal authority. "A lawyer shall not: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ." (Rules Prof. Conduct, rule 3.3(a)(2).) Legal authority in the controlling jurisdiction may include

legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case determinative of an issue in a state court proceeding or of course a Supreme Court decision that is binding on a lower court.

Appellate counsel has an ethical obligation to disclose applicable legal authority adverse to the client's position. (See *Harbour Vista, LLC v. HSBC Mortgage Services, Inc.* (2011) 201 Cal.App.4th 1496, 1512; see also *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82–83, fn. 9; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32 [appellate court sanctioned counsel for failing to discuss applicable, adverse authority].) How does one define "adverse legal authority?" Must it be directly adverse, or is there an obligation to disclose only tangentially adverse legal authority? While this may be a matter of subjective judgment, something an attorney never wants to do is lose credibility with the court. If there is uncertainty about whether existing authority is truly adverse, the better practice is to bring it to the court's attention, then distinguish it or otherwise explain why it does not compel a ruling adverse to the client. This is a much safer course of conduct than to raise suspicions by the court and opposing counsel that you are not being altogether candid.

It is often tempting to omit or at least gloss over adverse facts when writing a statement of facts. This temptation should be avoided as it might well be viewed as an attempt to mislead the court in violation of the Rules of Professional Responsibility. (See, e.g. *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.) In addition, omitting harmful facts does your client no favors. They will no doubt be presented in great detail in the respondent's brief, leading to a perception by both the Court and opposing counsel that your veracity and credibility might be questionable.

This is not to say, of course, that an attorney should not attempt to present his or her client in as favorable a light as possible. "Emphasize the strengths and minimize the weaknesses of your case. In most briefs, there will be a negative fact about your client that, in the interest of full disclosure, you must reveal. When you do this, focus on

providing the best possible representation for your client's specific situation. If it is critically important for the court to know that your client has done something distasteful, frame it in the best way possible, but do disclose it. You cannot change what happened; you are only working to change how you can accurately present the situation in a persuasive way." (*Writing a Statement of Facts in an Appellate Brief*, The Writing Center, Georgetown University Law Center, 2014, p. 2.)

C. Unpublished Cases

It is unethical to mislead the court by "knowingly misquot[ing] to a tribunal the language of a book, statute, decision or other authority." (Rules Prof. Conduct, rule 3.3(a)(2).) Clearly this makes it unethical to present overruled or unpublished case law as binding or persuasive authority. In the past, attorneys were not allowed to cite from cases in which the California Supreme Court had granted review. As of July 1, 2016, the rule has changed so that now, while a case in which the Supreme Court has granted review still has no binding or precedential value, it may be cited for potential persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) You must of course clearly indicate that review has been granted.

6. Timeliness

California Rules of Court, rule 8.63 allows attorneys to request an extension of time to file briefs in the Court of Appeal. When requesting an extension, attorneys must make a showing of good cause. The rule enumerates 10 factors the court *must* consider, plus allows courts to consider "any other factor that constitutes good cause in the context of the case." (Cal. Rules of Court, rule 8.63(b)(11).)

There are ethical considerations with respect to requests for extensions of time. First, of course, as described above, attorneys must always be truthful with the court. Accordingly, any request for an extension of time must truthfully advise the court of the circumstances which make it impossible to file the brief in a timely manner. In *Kim v. Westmoore Partners, Inc., supra,* 201 Cal.App.4th 267, counsel requested an extension of

time stating additional time was required to file his respondent's the brief because of the many "complex issues raised" and the need for more to time to conduct research. However, when his brief was filed, the Court discovered that it was almost a verbatim duplicate of a brief he had file in that same court in another case. In addition, the cut and paste job was obvious since the brief referred to "an accident," despite the fact there was no accident involved in the case, though there had been in the previous one; and under his signature, the attorney failed to change the prior client's name to that of the current client. He also included an assertion that the appeal was frivolous which was "word-for-word identical" to the assertion made in the prior appeal. (*Kim, supra,* 201 Cal.App.4th at p 290.) The Court of Appeal noted "[t]his assertion is utterly inconsistent with [the attorney]'s prior contention, in his request for extension of time, that the issues raised by appellants in this case were 'complex,' and required significant time to research. Frivolous claims, by their nature, do not require significant research to rebut." (*Ibid.*) The Court further stated "[t]he brief [the attorney] ultimately filed herein did not reflect any research of complex issues, and its preparation simply could not have claimed any significant amount of his time. His conclusory claims to the contrary, in support of his extension request, were—not to put too fine a point on it—untrue." (*Id.,* at p. 292.) The Court went on:

> We cannot overlook such conduct. It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only "little" lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible. [The attorney]'s violations of the requirements set forth in the California Rules of Court governing extension requests meet the standard of unreasonableness, and warrant the imposition of sanctions.

(*Id.,* at pp. 292-293.) Requests for extensions of time must set forth good cause, and

those assertions must be accurate and truthful.

Secondly, however, is the duty to the client.

California Rules of Professional Conduct, rule 1.3 states:

> (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
> (b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Assuming an extension of time has been granted, the due date for the brief is arriving, and the attorney is still not going to be able to file the brief by then, what can ethically be done? Another extension of time may be requested but again, good cause must be shown. Other than a new request, counsel may rely on the "grace period" provided by California Rules of Court, rule 8.220. Subdivision (a) allows a grace period of 15 days after the notice is sent notifying a party that he or she has failed to file the brief.[1] Is it ethical to simply count on this additional period of time even when you do not have good cause to request another extension of time? Put another way, is that a failure to act with reasonable diligence?

There does not appear to be a rule directly addressing this issue, and it is probably resolved on a case by case basis. However, the duty of due diligence as embodied in Rule 1.3 above is implicated, as are the duty of loyalty and the duty of competence (Rules of Prof. Conduct, rule 1.1.) The focus must always be on what course of duty will best further the client's interests. Counsel should consider factors such as whether the client is a juvenile; whether the client is on probation with onerous terms; or whether, if the client obtains the relief requested, his or her period of incarceration may be shortened.

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[1] The Sixth District Court of Appeal routinely gives a 30 day grace period.

7. Oral Argument

A. Should the Client be Informed as to Whether Oral Argument Will be Waived?

If an attorney decides not to orally argue the case, should the client be notified? As discussed above, attorneys have a duty to keep their clients apprised of significant developments in matters with regard to which you have agreed to provide legal services. (See Rules Prof. Conduct, rule 1.4(a)(3); Bus. & Prof. Code, sec. 6068, sec. (m).) Obviously, a lawyer will not be subject to discipline under paragraph (a)(3) for failing to communicate insignificant or irrelevant information. Whether a particular development is significant will generally depend on the surrounding facts and circumstances. Oral argument is not mandatory, so it is unlikely that the failure to advise the client of the intent to waive it would be considered unethical, particularly because the decision belongs to the attorney, not the client. However, clients tend to believe oral argument is much more important than it is, given their only experience has been in trial court. Therefore, even if it is not ethically required, the better practice is probably to write to the client to advise him or her that you are waiving oral argument and why.

B. Maintaining Respect for the Court

Lawyers have a duty "[t]o maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, sec. 6068, subd. (b).) "[I]t is the settled law of this state that an attorney commits a direct contempt when he impugns the integrity of the court by statements made in open court either orally or in writing." (*In re Ciraolo* (1969) 70 Cal.2d 389, 394-395; accord, *In re Buckley* (1973) 10 Cal.3d 237, 248.) "Insolence to the judge in the form of insulting words or conduct in court has traditionally been recognized in the common law as constituting grounds for contempt. [Citation.]" (*Buckley, ibid.*) Accusing the court - either the superior court or the Court of Appeal - of being biased or prejudiced against your client can make the attorney subject to being held in contempt if the accusation is unsupported. (See *In re S.C.* (2006) 138 Cal.App.4th 396,

422.)

It should go without saying that language insulting toward the superior court - or any court or judicial officer - is unethical. In *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, appellate counsel in his notice of appeal called the lower court's order "disgraceful," and commented on "[t]he ruling's succubustic adoption of the defense position . . ." (*Martinez v. O'Hara, supra,* 32 Cal.App.5th at p. 857.) The Court of Appeal concluded that "[t]he notice of appeal's reference to the ruling of the female judicial officer, from which plaintiff appealed, as 'succubustic' constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon … gender' (Cal. Code Jud. Ethics, canon 3B(6)) and thus qualifies as reportable misconduct." (*Id.,* at p. 858.) Keep in mind that the ruling is the main issue, not the judge who made it. Failure to do so could lead to sanctionable conduct.

C. Do Not Sacrifice Vigorous Advocacy

The necessity for respect and decorum does not mean counsel should not vigorously advocate for the client. Counsel "has a right to press a legitimate argument and to protest an erroneous ruling. [Citation.] Indeed, so essential is this 'fundamental interest of the public in maintaining an independent bar' . . . that 'a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly process.'" (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 560; accord, *Bauguess v. Paine* (1978) 22 Cal.3d 626 [overruled by statute on another ground].)

8. The Duty of Candor in Areas Unrelated to the Legal Issues

A. The Client Cannot be Located

Unfortunately, this is not an unusual situation on appeal. It occurs most frequently with clients who were placed on probation, but it can also occur in other situations, such

as clients who have been deported. When this occurs, and all efforts to locate the client have failed, is it necessary to inform the Court? The answer should be no. Appellate counsel "must play the role of an active advocate, rather than a mere friend of the court . . . ." (*Evitts v. Lucey*, *supra,* 469 U.S. at p. 394.) Absent express statutory law, rule, or binding case law to the contrary, an attorney should continue with the appeal. This is true because there is a "presumption that an attorney of record has authority to appeal . . . unless the appellant himself objects or there is a clear showing of lack of authority. [Citations.]" (*People v. Bouchard* (1957) 49 Cal.2d 438, 440.) Thus, under California law, it is presumed that a defendant wishes to prosecute his appeal unless he takes affirmative action to the contrary. Given this presumption, counsel is under an obligation to pursue his client's appellate remedies. This is especially true since counsel is ethically barred from abandoning an appeal absent his client's consent.

Though counsel has an ethical obligation to prosecute the appeal (*People v. Brych* (1988) 203 Cal.App.3d 1068, 1076), an appellate court has the discretion to dismiss an appeal by a party who has refused to comply with the orders of the trial court. (*People v. Kubby* (2002) 97 Cal.App.4th 619, 622.) "In keeping with this principle, it has long been the rule in California that a court may dismiss the appeal of a fugitive from justice. [Citations.]" (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897.) This rule does not apply to an appellant who has been deported. (*Id.,* at p. 898.)

The question then becomes whether counsel is misleading the court by not advising it that it may exercise that authority. Since there is no authority requiring appellate counsel to volunteer that information, and since appellate counsel has a duty to prosecute the appeal, it does not appear ethically necessary to inform the court that the client cannot be contacted. Of course, if asked directly, counsel must by all means be candid with the court. What form should that candor take? Just because counsel has lost contact with the client does not mean he or she is a "fugitive from justice." Thus, if counsel is asked by the Court for information on the whereabouts of the client, it should

be acceptable to respond that counsel has no evidence that client has fled the jurisdiction. Counsel should urge the Court to entertain the appeal since that evidence does not exist.

B. The Client is Not Indigent

Does the duty of candor to the court require appointed appellate to inform the court if he or she learns that the client does not qualify for the services of appointed counsel? Yes. In *People v. Nilsen* (1988) 199 Cal.App.3d 344, 351-352, the First District Court of Appeal stated:

> In our view, if appointed counsel becomes aware of a significant change in a defendant's financial circumstances, he has a duty as an officer of the court to disclose that fact to the court. (Cf., ABA Model Rules Prof. Conduct, rule 3.3 (a)(2) [CANDOR TOWARD THE TRIBUNAL, 'A lawyer shall not knowingly: fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client']; State Bar Rules Prof. Conduct, rule 7-105(1) [Trial Conduct, 'In presenting a matter to a tribunal, a member of the State Bar shall: Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth . . .'].)

Given the ruling in *Nilsen*, appointed counsel has an ethical duty of disclosure when it appears that a client may not be indigent. Of course, before disclosing anything to the Court, counsel should consult with SDAP.

C. The Issue on Appeal is Moot

The wheels of justice sometimes grind exceedingly slowly. What happens if the issue on appeal becomes moot while the appeal is pending? This is not all that uncommon in cases where the issue involves the legality or propriety of probation conditions.

The online Merriam Webster Dictionary defines the term "moot" as "deprived of practical significance: made abstract or purely academic." (Merriam-Webster Dict. Online <https://www.merriam-webster.com/dictionary/moot> [as of September 16, 2021].) "[W]hen, pending an appeal from the judgment of a lower court, and without any fault of the [opposing party], an event occurs which renders it impossible for this court, if

it should decide the case in favor of [the appellant], to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal as moot. (*People v. DeLeon* (2017) 3 Cal.5th 640, 645.) That is because, [a]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. [Internal quotations omitted.]" (*People v. Gonzalez* (2017) 7 Cal.App.5th 370, 380, disapproved on another ground in *DeLeon*, *supra*, at p. 646.)

Because counsel owes a duty of candor to the court, it would be unethical to proceed with an appeal knowing that the issue is moot. There are exceptions, however. It can be argued that the issue must still be decided because the client will still face some disadvantageous collateral consequence. (See *DeLeon, supra,* 3 Cal.5th at p. 645; see *Carafas v. LaVallee* (1968) 391 U.S. 234, 237 [discussing collateral consequences of a criminal conviction]; *People v. DeLong* (2002) 101 Cal.App.4th 482, 487–492 [collecting cases].) Another possible exception is that the issue is capable of repetition yet evading review. "A reviewing court may exercise its inherent discretion to resolve an issue rendered moot by subsequent events if the question to be decided is of continuing public importance and is a question capable of repetition, yet evading review." (*People v. Alsafar* (2017) 8 Cal.App.5th 880, 883, citing *Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 199.) "A dispute qualifies for that exception only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" (*Turner v. Rogers* (2011) 564 U.S. 431, 439-440, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) A reviewing court may also retain the matter for decision " 'to provide guidance for future cases' by reviewing application of the substantive legal standard to a specific set of facts for the first time." (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 994; accord, *In re White* (2020) 9 Cal.5th 455, 458, fn. 1.)

If an issue has become moot, counsel must advise the court. However, counsel should also advocate for retention of the matter for one of the reasons discussed above.

Conclusion

Ethical considerations arise frequently when representing clients on appeal. Always consult the Rules of Professional Conduct and the Business & Professions Code when in doubt.