Pre-Briefing Responsibilities
By Patrick McKenna

A. Introduction.

For many appellate advocates, myself included, drafting the opening brief is viewed as the most substantive and time-intensive component of our advocacy. Particularly if a deadline is looming, finishing the opening brief can often feel as though I'm sprinting up Mount Everest. For some, it feels more like a long, painful trek, maybe with some weird detours along the way. While most appellate attorneys acknowledge that it's a relief to finish the opening brief, the view from the top depends on the strength of the case. No matter whether one's approach to brief-writing is an exhausting sprint or a grueling trek, it's important to start your ascent by having the right tools with you. This article will focus on some of those tools.

Cheesy metaphors aside – I just re-read Jon Krakauer's *Into Thin Air* and so my Mount Everest comparisons are a bit stronger than necessary – I hope to provide the reader with an overview of the various pre-briefing responsibilities we confront as appellate advocates. By taking a careful approach before we start drafting the opening brief, we can ensure that we have all the right tools at our disposal. We can eliminate future headaches during the brief-writing process or as the case progresses. In this article, some of the tools covered include: client and trial counsel communications; reviewing and perfecting the appellate record; dealing with issues involving the notice of appeal, the judgment's appealability, or the Court of Appeal's jurisdiction; and drafting any necessary motions or writs.

For many appellate attorneys, these topics may seem basic or mundane. Weird things happen, however, and it's important to have a solid foundation in these subjects when wrestling through a case. For each of these topics, I'll address any relevant case law, statutes, rules of court, and ethical duties. But more interesting for the reader will be the advice and war stories provided by several of our experienced panel attorneys, including Julie Schumer, Courtney Shevelson, Jennifer Peabody, Jeff Glick, Candace Hale, Alan Siraco, and Sol Wollack. The advice they provide should be invaluable for any reader, regardless of his or her experience level. I truly thank these panel attorneys for their assistance, generosity, and wisdom.

If nothing else, I hope this article will encourage the reader to take a deliberate and careful approach to his or her pre-briefing responsibilities. In confronting problems with the record, the client, or the case's appealability, I urge the reader to think creatively and attempt to solve any problems before they snowball. Only by having the right tools packed can we ensure a successful ascent in writing the opening brief.

B. Client Communication.

1. Introduction.

Given the academic feel of appellate work, it can be easy to forget that our primary duty is diligent and vigorous advocacy on behalf of our clients. SDAP's approach to this responsibility, as noted on our website, is that expressed in *Von Moltke v. Gillies* (1948) 332 U.S. 708:

> Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed

> more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

(*Id.* at pp. 725-726, fn. omitted.)

Our responsibility begins from the time we are appointed. And while our advocacy itself is a vital component of this duty, so too is the method and frequency of our communications with the client. Indeed, this responsibility is codified in California Rules of Professional Conduct, rule 1.4, subdivision (a)(3), which provides that an attorney "shall keep a 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." (See also Bus. & Prof. Code, § 6068, subds. (m) – (n).) SDAP itself views client communications as an integral part of our work. Thus, we request copies of client communications just as we do with any documents filed with the court.[1]

2. Initial Communications.

Every panel attorney I spoke with extolled the necessity of communicating with the client as soon as possible. As stated by Sol Wollack, "[f]irst impressions are important when it comes to establishing a solid attorney-client relationship." Accordingly, Sol is reticent in waiting even two to three weeks before contacting the client. Jeff Glick put it another way: "I find a lot of clients don't understand the process,

[1] Client communications should not be sent to SDAP in multiple defendant cases.

and now that they're sitting in jail or prison and reality is setting in[,] a lot of them start to get anxious[.] … I want them to know that someone is going to try to help them."

Each of the panel attorneys I spoke with indicated that he or she sent some sort of Introduction Sheet along with the first letter. These handouts typically lay out the appellate process for the client, answering many of the most likely questions or concerns. Courtney Shevelson notes that this practice can prevent confusion or excessive questions down the road. SDAP has a sample available on our website. Attachment "A" to this article is another fantastic example utilized by Candace Hale. In particular, I think this example provides all the necessary information in a clear, readable format for our clients.

In the initial letter itself, counsel should introduce him- or herself and give the client an update on the case's status (i.e., whether the record has been filed yet and how long it may take to read). Two things that Jeff Glick includes "no matter what[,] are to ask them to tell me anything they think might be important for me to know about their case, and to let me know if they get moved to a different facility." Jennifer Peabody includes "a release for the client to sign and return, authorizing me to talk to trial counsel and obtain his [or her] file." Alan Siraco does the same. While such a release is not mandatory – indeed, trial counsel is obligated to respond to our requests (see Rules of Prof. Conduct, rule 1.16, subd. (e)(1); *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950) – this approach is a good one. It is not uncommon for trial attorneys to ask for such a release before speaking with us. By obtaining such a waiver in advance, we can get the relationship with trial counsel off on the right foot. Additionally, as observed by Alan, by

having the client sign such a waiver, we are able to confirm contact with the client from the onset of the case.

Additionally, Julie Schumer warns the client against speaking to others about his or her case, and Jennifer is sure to ask the client where he or she wants copies of briefs to be sent. The latter point is particularly important in cases with highly sensitive facts, especially sex cases involving children. (See California Rules of Court, rule 8.360(d)(2) [brief must be sent to the defendant unless he or she "requested in writing that no copy be sent"].) Further, I like to advise the client that he or she will receive the transcripts once I complete my work on the case. By informing the client of this at the case's outset, I can help to stave off client requests for copies of the transcripts while the appeal is pending. If the client eventually makes such a request, I tell them, at most, I can copy the record for them, though I will need reimbursement for the costs. If the client is requesting a specific document – as opposed to the whole record – then I usually have no problem providing it to them without seeking reimbursement.

Finally, my colleague Lori Quick noted one problem unique to cases involving guilty or no contest pleas. In such cases, it is common for the client to want to plead his or her innocence to appellate counsel. Accordingly, at the outset of such a case, it may be worthwhile to advise the client that issues relating to guilt or innocence cannot be raised on appeal, particularly when counsel below never filed a motion to withdraw the plea. While this information is typically included in many standard Introduction Sheets sent by appellate attorneys, it can be beneficial to include this explanation in the body of the letter itself. I may even put this information in bold, as I do with all particularly

important information in my letters. This approach is not something I commonly see, but it works well for me since I tend to be overly verbose. If the client decides to ignore much of my letter, the sentences in bold provide a quick snapshot as to what is most important.

3. General Considerations for Follow-Up Communications.

After the initial communication, we are obligated under California Rules of Professional Conduct, rule 1.4to advise the client of all significant developments in the case. At the very least, we need to provide the client with copies of all briefs and petitions, motions, and the court's opinion.

Given our clients' custodial situations, written correspondence is our most common form of communication. To ensure confidentiality, our envelopes and letters should be marked "Confidential Attorney-Client Communication." Additionally, I have seen CDCR return correspondence when "Attorney-at-Law" is not listed as part of the return address. Accordingly, counsel would be well-advised to include this title on his or her envelopes.

When I started at SDAP, our wise Executive Director Dallas Sacher advised me to respond to every client letter within 24 hours. Even if the client did not ask a specific question, Dallas believed that confirming receipt of the client's letter was important. This approach is a good one, allowing the client to feel that his or her concerns are being addressed and that I am diligently working on the case. While not adopting this policy per se, Sol Wollack echoes the sentiment underlying this practice, observing that "the best way to minimize the number of difficult clients is to be communicative, answer their

many questions, and keep them constantly informed about the status of their case." When little will be happening on the case for several months, Sol advises the client of this in advance, explaining the reason for the delay.

Even if counsel adopts Dallas's approach as a general rule, there are exceptions. At any given time, I usually have at least one client who calls or writes constantly, often to discuss topics that we have previously addressed. The panel attorneys I spoke to about this topic each had their own stories and advice about such clients. Nearly all of them advised that when the client is writing constantly – Jennifer Peabody, for example, had one client who wrote over 100 letters, and Courtney Shevelson had another whose letters cumulatively totaled 250 to 300 pages – they will not respond to every single letter. Instead, they will wait a few weeks and respond to several letters all at once. In these situations, I will advise the client, politely, that he or she is writing frequently and, so that I may devote more time to brief-writing, I have opted to respond to several letters all at once. Additionally, if the client continually asks about the same issue, it is perfectly appropriate to refer them to prior letters if no additional explanation is needed.

A second type of difficult client is the individual struggling with mental health issues. This can manifest itself in several different forms. Sometimes, the client is perfectly respectful in tone, though the content of the letter makes clear that he or she is suffering from delusions, hallucinations, or general confusion. I have one client whose letters run the gamut from totally coherent to writing them as a completely different persona. During one calendar year, I had three separate clients who all had delusions relating to the Kennedy family. With these clients, the approach I take is not too different

from what I do with all my clients. I respond politely and directly to their concerns, doing my best to show respect towards their situations. I certainly never denigrate the unbelievable portions of their letters.

More problematic are the abusive clients. Sol Wollack had one client who was convicted of murder "and it was clear from his correspondence that he would have liked to kill me, as well." Candace Hale has had clients who "misunderstand[] my warm approach for something else, and send me sexually suggestive messages and/or pix." I had one out-of-custody client who was so displeased with my performance that she emailed every attorney at my old law firm, advising them of what an incompetent attorney I am and how they should be embarrassed that I ever worked for them.

The key with such clients is patience. Candace "tr[ies] to stay steady in … these situations, not write out of reaction, and put myself in their positions as best I can." Jennifer Peabody has achieved more success with these clients by speaking on the phone with them "to build trust and express empathy." Sol adopts a mindset that I use in all my communications, imagining that any letter he writes may show up as an exhibit in a pro per habeas petition or State Bar complaint. "No matter how nasty or accusatory the client's tone, I try very hard to stay professional in my own tone," he writes. In short, as our clients' advocates, it is imperative that we adopt a respectful tone, no matter how our client is behaving. Your SDAP buddy is always willing to provide advice in these situations.

In addition to respectful communication, we also must be sure that we are clearly communicating with the client. Many of our clients come from limited educational

backgrounds, and it is imperative that we keep this in mind in our correspondence with them. Personally, I adopt an approach commonly employed by newspapers – that is, writing at a middle-school reading level. Candace Hale's Introduction Sheet attached as Attachment "A" is a good example of this.

Clear communication is particularly important when the client faces adverse consequences and must decide whether to abandon his or her appeal or go forward with filing a brief. In these situations, the client must be advised what he or she risks by appealing. For example, it is not sufficient to state that the appellate court may impose additional fines; we should articulate the precise amount. Additionally, the client needs to be made aware of the issues that could be raised in an opening brief and the probability of their success. If the alternative to abandonment is a "no issue" brief, then the client should be advised whether review will be done pursuant to *People v. Wende* (1979) 25 Cal.3d 436 or *People v. Serrano* (2012) 211 Cal.App.4th 496 with a clear and detailed explanation as to what issues were considered and why they are frivolous. It is worth noting that while we can provide advice as to whether he or she should abandon the appeal, this is a decision that ultimately must be made by the client. (*People v. Harris* (1993) 19 Cal.App.4th 709, 715.)

In some cases, counsel may need to employ the services of a translator to ensure adequate communication with a client. In the Sixth District, counsel may utilize a translator without preapproval so long as the fees total less than $250. Once the translator's services exceed this amount, then permission must be sought from the Court of Appeal. A sample motion for translation fees is available on the SDAP website.

It has become increasingly common for appellate counsel to forego the necessity of a translator by using Google Translate. This is a wonderful tool, but it is prone to mistakes. Hence, counsel should only use it for very short and simple communications, if at all. The list of translators approved by the Judicial Council can be found here: https://www.courts.ca.gov/35273.htm.

4. In-Custody Clients.

With some clients, written correspondence may be insufficient, whether due to mental illness, lack of education, or a difficult personality. If the client is in custody, a confidential phone call or client visit may be necessary if counsel does not feel that the client is adequately comprehending important information provided in the written correspondence. The first step in arranging either of these is to contact the litigation coordinator at the prison where the client is housed. To avoid the difficult-to-navigate prison phone lines, counsel can use the following webpage to find the direct line to the litigation coordinator at each facility: http://www.cdcr.ca.gov/Ombuds/litigation.html.

Confidential phone calls are permitted under California regulations (see Cal. Code Regs., tit. 15, § 3282), though the individual facility has discretion in allowing or prohibiting such a call. Some facilities may mandate a formal written request explaining why such a call is necessary and requiring counsel to fill out CDCR form 106-A. Other facilities may be less rigid. Regardless of an individual prison's practices, before counsel seeks to visit a client, a confidential phone call should be explored as a potential alternative. The litigation coordinator should serve as the point person in making this request.

Under the statewide compensation guidelines, prison visits involving round-trip travel over fifty miles require preapproval by the appellate project. They are permitted in extraordinary circumstances when written and telephonic communication has proven insufficient for counsel to comply with his or her ethical duties. Most commonly, these visits are allowed when the client is facing an adverse consequence and must determine whether to proceed with his or her appeal. Again, counsel should contact the facility's litigation coordinator to arrange the visit. The facility will need to run a background check before authorizing the visit, and so counsel should attempt to arrange the visit as soon as possible. More flexibility is permitted when the client is housed locally, though counsel may still want to seek SDAP's permission prior to the visit.

In-custody clients frequently contact appellate counsel about seeking bail on appeal. Pursuant to Penal Code section 1272, this discretionary decision is vested with the trial court. Because of this, we commonly recommend that, if a panel attorney believes bail may be appropriately requested in a particular case, he or she should contact trial counsel to litigate the motion in court. In the one circumstance where I sought bail on appeal – a People's appeal where the prosecution was appealing from the grant of a new trial and the client had remained in custody for over four years for a crime he likely did not commit – I ghostwrote the motion for trial counsel who then argued it in court.

Penal Code section 1272.1 sets forth the considerations in determining whether bail should be set. These include: (1) whether the defendant is likely to flee (based on community ties, his or her record of appearance, and the severity of the sentence); (2) whether he or she poses a danger to the community; and (3) whether the defendant is

likely to prevail on appeal. (Pen. Code, § 1272.1.) Because of this final factor, counsel may want to wait until the opening brief is filed before requesting bail; by doing so, the opening brief can be attached to show the merits of the appeal. If bail is denied by the trial court, then counsel may apply for relief in the appellate court. (Cal. Rules of Court, rule 8.312(b).) Please contact SDAP if you would like a sample bail motion to utilize in a specific case.

Only one of the panel attorneys I spoke with had ever sought bail on appeal. Courtney Shevelson, however, was asked to make such a request by the appellate court itself. There, the client had repeatedly written to the court to demand bail on appeal. On its own motion, the court ordered a bail hearing in the appellate court in front of a three-judge panel. The parties were required to submit briefing, with supporting documentation, beforehand. Ultimately, bail was granted! While Courtney indicated that he was somewhat embarrassed by the whole situation, it shows that seeking bail on appeal may not be as hopeless as we think.

Less commonly, counsel may want to seek compassionate release on appeal. This is appropriate when the client is terminally ill and has a possible placement when released. Pursuant to Penal Code section 1170, subdivision (e), a court may recall a prisoner's sentence if (1) the Director of the Department of Corrections or Board of Parole Hearings supports the release; (2) the prisoner has an incurable condition likely to result in death within six months; and (3) release would not pose a risk to public safety. It does not apply to a defendant sentenced to death or life without parole. (Pen. Code, § 1170, subd. (e)(2)(B).) The denial of such a request is appealable as an order after

judgment affecting the prisoner's substantial rights. (*People v. Loper* (2015) 60 Cal.4th 1155, 1162-1163.)

Finally, in-custody clients will frequently write to complain about their mistreatment in prison. In these circumstances, counsel should advise the client that such issues cannot be litigated on appeal, and he or she should file an administrative complaint with the prison itself. Often, I direct the client to the Prison Law Office for more guidance on this subject.

5. Out-of-Custody Clients.

Communicating with out-of-custody clients presents different considerations. On the one hand, counsel is not limited only to letters as the primary method of communication. Instead, phone calls, emails, text messages or in-person visits may be appropriate. Emails or text messages can be particularly helpful to provide very short updates to the client. The greatest challenge with out-of-custody clients is locating them. Courtney Shevelson indicated to me that it is common to never locate or hear from these clients. Indeed, this is something I have experienced in many of my own cases.

Sometimes, however, we ethically need to hear from the client before proceeding with the case. Many panel attorneys I spoke with about this topic stated that they commonly start with trial counsel to obtain updated information or past addresses for the client. If this proves unsuccessful, then tracking down a close friend or family member of the client, or reviewing contact information in the probation report or police reports, can also be useful. If each of these leads runs dry, counsel should feel free to contact his or her SDAP buddy for more ideas. Contacting the client's probation officer or parole

agent should be a last resort and only utilized in exceptional circumstances. As noted by Alan Siraco, contacting such individuals inevitably draws their attention to the client, who may or may not be complying with the conditions of his or her release.

C. Communicating with the Client's Family.

In some cases, communication with the client's family can be important. Reasonable time spent doing this can be billed on line 23 of the fee claim as "Other Communications." Family communication that facilitates communication with the client should be billed on line 1 of the fee claim as "Client Communication." Before engaging in any detailed discussions about the case, counsel should receive the client's express permission to do this, preferably in writing. We have attorney-client privilege with the client, and sometimes they may not want us to engage in a dialogue with their family, particularly in factually-sensitive cases. Absent express permission from the client, all we can generally disclose to the family is the case's status.

As noted by Courtney Shevelson, diligent communication with the client's family can serve several purposes. First, it lets the client know that appellate counsel cares. And second, family members can serve as worthwhile conduits of information to quickly relay a message to the client. Indeed, Alan Siraco notes that "it is in my client's interest to have family support if he is to survive imprisonment."

Nearly all the panel attorneys I spoke with about this topic indicated that some limits need to be set. For example, both Jeff Glick and Jennifer Peabody typically ask the family to select one individual as the primary contact person. This can help to prevent numerous family members from bombarding counsel with questions. Candace Hale,

Jennifer Peabody, and Julie Schumer typically inform the family that they prefer communication via email. This is both quicker and preserves a record as to what was said. If the family starts communicating constantly – Jennifer had one family member who emailed 45 times in a single day – it can be worthwhile to set limits on the frequency of communication – for example, one email a week or one phone call a month. Candace will often email the family her Information Sheet to provide them a procedural overview as to what will occur.

As with our client communications, patience is important. Julie, Candace, and Jeff all expressed the belief that, as with our clients, the families are often scared and anxious about what is happening. Candace relayed the following story, which I have copied in full:

> One distracted mother who was not a first-language English speaker called me constantly, haranguing me and driving me NUTZ. Finally[,] I found myself feeling extremely irritated at her. I could hear it in my voice. I asked her to hold on a moment. I stopped, took a big deep breath and made a shift. When I came back, I said "Mrs X, believe me, I understand how frantic you feel. I understand how horrible it is to have your son being held for something he didn't do. I understand that you feel I am your only chance, and if you cannot get me to do something, you will never see him free again. I am so sorry." I really felt that way, and my voice probably showed my deep emotion. Maybe we both sniffled a little. I paused. "But I need you to understand something. An appeal is not a second trial. The things you are asking me to do belong to a new trial. I do not have the right to do them in the appeal. If we were successful in the appeal and your son got a new trial, we would tell the public defender all these things, and maybe he would get a better result. But I cannot do them." And a miracle occurred! She heard me! She said no one had ever explained that before (I had). My stopping and really feeling her side, then communicating from that place cleared a path for her to actually hear what I was saying. And a second miracle occurred — she never called again.

In short, appellate counsel should try to convey the same empathy to the client's family as he or she does to the client.

D. Communicating with Trial Counsel.

The necessity of communicating with trial counsel will vary, depending on the nature of the case and counsel's own practices. Some panel attorneys rarely communicate with trial counsel; others do so in nearly every case. Sol Wollack indicates that he seeks to speak with trial counsel even before reviewing the record, hoping to establish a rapport with counsel if he later needs to broach the subject of ineffective assistance of counsel. He states that "[e]ven if I have no specific reason for calling trial counsel early in the case, I make one up. I might ask if there were any *Batson/Wheeler* motions, or significant pretrial events for which I need to obtain transcripts. Or I might say that I'm interested in hearing what they believe the appellate issues to be."

Other panel attorneys do not contact trial counsel until reviewing the record, mainly so that they can talk more intelligently about the case. Jeff Glick, for example, takes this approach, preferring to call the attorney to "get better information…[and] establish a relationship with counsel."

Nearly every panel attorney I spoke with about this topic believed that communicating via phone was preferable to email. Each of them also revealed that because of trial attorneys' busy schedules, email frequently led to a greater likelihood that counsel would respond. And while it can be more difficult to build up a rapport via email, Candace Hale still tries to do so in her emails, initially communicating by finding

something positive to say, "like congratulating them on a good result[,] great briefing or closing argument[,] or strong preservation of the record."

Once appellate counsel undertakes an ineffective assistance of counsel investigation, the primary means of communication should occur via email. Some public defender's offices require this. Nonetheless, such emails provide us with a better record of the investigation we did, while also preventing trial counsel from changing his or her version of events. I learned this lesson the hard way. In my very first habeas investigation, I spoke with trial counsel initially on the phone, which I memorialized in a written memorandum. His answers strongly indicated that he was ineffective. By the time trial counsel drafted his declaration, he completely changed his version of events, and I was left filing my own declaration to contradict what he was saying. This discrepancy was a primary reason the petition was denied. Needless to say, I now communicate exclusively via email for purposes of investigating ineffective assistance of counsel. (See also Sacher, *The Investigation and Presentation of a Petition for Writ of Habeas Corpus in the Sixth District*, available at www.sdap.org/r-habeas.html.)

E. Record Review.

After receiving the record on appeal, counsel should make every effort to promptly review it, preferably within the first 40 days so that any augment requests can be made as soon as possible.

While there is no right or wrong way to review a record, each panel attorney I spoke with largely adopted the same approach as to the order in which they review it. Initially, they all read the entirety of the Clerk's Transcript (CT). As stated by Jeff Glick,

"the CT gives me a preview of which issues or motions might be important, or sound like they might have legal merit. I also think seeing how everything unfolded helps with context, and in understanding what trial counsel was trying to do and why." Candace Hale and Alan Siraco like to review the CT first so that they can easily tell whether anything important is missing from the Reporter's Transcript (RT).

Many of the panel attorneys draft their statements of the case before reading the RT from beginning to end. Some panel attorneys identified a single exception to reviewing the RT chronologically. If there is an issue that was heavily litigated at trial, they may first focus on the RT's from those proceedings. Courtney Shevelson advises that if any audio recordings are admitted as evidence, he will be sure to seek out a copy of the actual recording, observing that reading the transcripts do not often provide the necessary context or importance of the recording. In at least one case, this proved critical for Courtney in having the appellate court determine that the client's confession was improperly admitted. Indeed, as part of my own record review process, I also recommend reviewing copies of any important surveillance videos that were admitted. Rather than attempting to get a copy of the recording from the trial court – something that many of them are unwilling to do – panel attorneys should seek copies of the recordings from trial counsel.

Given my status as a Millennial, I was surprised that I was one of the few attorneys who took my record notes by hand. My reasoning for this is two-fold. First, I tend to review records both at home and at the office; hence, I find it easier to keep a written log of my notes, instead of sending the notes back and forth between my work

and home computers. Second, I tend to remember details of the case better when I am forced to summarize the transcript in handwritten notes. When taking notes on the computer, I often include way more details than necessary. By doing this, I am less apt to think about the import of certain facts since I include so many of them.

Admittedly, in the few cases where I have taken computerized notes, I have found them much more organized when I start my briefing. This practice is employed by many of our panel attorneys. As Jeff Glick notes, this "makes searching easier later on, particularly in big record cases." While I find lengthy notes to be cumbersome to work with, Sol Wollack prefers this level of detail, revealing that it is not uncommon for him to take 250 pages of typewritten notes. As issues start to reveal themselves, counsel can re-organize their notes by subject matter, with all relevant details on an issue located together. Some take their notes as bullet points, while others, like Alan Siraco, take them "in rough paragraph, narrative form."

Regardless of how an attorney takes notes, each panel attorney I spoke with about this topic keeps track of potential issues and missing items from the record as he or she is doing the record review. Some start making a "Potential Issues" list as they are reviewing the record. Others put stars or asterisks next to items in their notes that may relate to research leads down the road. After record review is complete, these attorneys draft up a formal list of issues with citations to the record.

Some attorneys have additional methods for organizing their thoughts. "If the case is complex," Jennifer Peabody "may make charts identifying the players, [and] their relevance to the case." Courtney Shevelson makes file folders relating to issues he will

likely be raising on appeal, copying excerpts of the record and placing them in the relevant folders.

Finally, panel attorneys take different approaches when drafting their statements of facts. For some, this occurs immediately after they finish reviewing the RT, even if augments are still pending. The benefit of this approach is that the facts of the case are fresh in their minds. For others, myself included, the statement of facts is not drafted until counsel has identified the issues to be raised on appeal. In adopting this approach, counsel can tailor the facts to the issues, lengthening or shortening portions of the statement as relevant.

For additional advice on record review, I recommend reviewing *Zen and the Art of Issue Spotting*, written in 2004 by my colleagues Dallas Sacher and Bill Robinson. Included as part of the article is an extensive discussion on other techniques for record review. It is located here: http://www.sdap.org/r-criminal.html.

F. Perfecting the Record on Appeal.

1. The Normal Record on Appeal and Record Omission Letters.

After finishing the record, counsel should promptly draft any record omission letters or motions to augment. The former pertains to missing portions of the normal record on appeal as listed in California Rules of Court, rule 8.320.[2] In most cases, subdivisions (b) and (c) will dictate the normal record on record. For counsel's reference, these provisions provide:

[2] California Rules of Court, rule 8.407 governs the normal record in delinquency and dependency cases.

(b) Clerk's transcript

The clerk's transcript must contain:

(1) The accusatory pleading and any amendment;

(2) Any demurrer or other plea;

(3) All court minutes;

(4) All jury instructions that any party submitted in writing and the cover page required by rule 2.1055(b)(2) indicating the party requesting each instruction, and any written jury instructions given by the court;

(5) Any written communication between the court and the jury or any individual juror;

(6) Any verdict;

(7) Any written opinion of the court;

(8) The judgment or order appealed from and any abstract of judgment or commitment;

(9) Any motion for new trial, with supporting and opposing memoranda and attachments;

(10) The notice of appeal and any certificate of probable cause filed under rule 8.304(b);

(11) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 2.1040;

(12) Any application for additional record and any order on the application;

(13) And, if the appellant is the defendant:

(A) Any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments;

(B) If related to a motion under (A), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;

(C) Any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term;

(D) The probation officer's report; and

(E) Any court-ordered diagnostic or psychological report required under Penal Code section 1203.03(b) or 1369.

(c) Reporter's transcript

The reporter's transcript must contain:

(1) The oral proceedings on the entry of any plea other than a not guilty plea;

(2) The oral proceedings on any motion in limine;

(3) The oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;

(4) All instructions given orally;

(5) Any oral communication between the court and the jury or any individual juror;

(6) Any oral opinion of the court;

(7) The oral proceedings on any motion for new trial;

(8) The oral proceedings at sentencing, granting or denying of probation, or other dispositional hearing;

(9) And, if the appellant is the defendant:

(A) The oral proceedings on any defense motion denied in whole or in part except motions for disqualification of a judge and motions under Penal Code section 995;

(B) The closing arguments; and

(C) Any comment on the evidence by the court to the jury.

The most common items missing from records include: notes to or from the jury, motions in limine, transcripts of audio or video recordings, and documents used to prove prior convictions. If the trial court amends or recalls the judgment while an appeal is pending, the trial court clerk must file an augmented record of these proceedings. (Cal. Rules of Court, rule 8.340(a); see also Cal. Rules of Court, rule 8.410(b)(2) [juvenile cases].) This is rarely done, and so counsel should stay in contact with trial counsel about such proceedings.

If any part of the normal record is missing, a record omission letter should be sent to the trial court, with an electronic copy sent to the appellate court and Attorney General through TrueFiling. This procedure is governed by California Rules of Court, rule 8.340(b)(1), which provides:

> If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires to be included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript-as an augmentation of the record-to all those who are listed under (a)(1).

Juvenile appeals are governed by similar provisions. (Cal. Rules of Court, rules 8.410(a), 8.416(d)(1).) A sample record omission letter can be found on SDAP's website. In the Sixth District, the time for filing a brief will be tolled once an omission letter is filed. Most commonly, counsel will have 15 additional days to file the opening brief once the omitted record is filed.[3]

[3] When filling out fee claims, counsel should be advised that time spent drafting record omission letters should be billed on Line 5, "Other Motions," and *not* Line 4, "Augment."

Counsel should also note that, pursuant to California Rules of Court, rules 8.320(e) and 8.407(e), exhibits are considered part of the record on appeal. However, most exhibits are not part of the normal record as specified in California Rules of Court, rule 8.320. Most often, appellate counsel should attempt to get copies of the exhibits from defense counsel or, alternatively, the deputy district attorney. If counsel only needs a few exhibits – and these things are not physical items or recordings – SDAP may be able to get copies from the trial court. If these methods fail, counsel can file a motion requesting the court of appeal to call up an exhibit. (Cal. Rules of Court, rule 8.224(d).) If counsel refers to exhibits not already called up in the briefing, he or she should file a transmittal letter, a sample of which can be found on SDAP's website. California Rules of Court, rule 8.224(b) governs this procedure.

2. Augmenting the Record.

Appellate counsel may determine that the appellate record requires augmentation to include materials that are not commonly part of the normal record on appeal. In the Sixth District, the expectation is that a motion to augment will be filed within 40 days of the filing of the record. Because of this, counsel is advised to conduct their initial review of the record as soon as possible. As with record omission letters, the time for filing the opening brief is tolled once an augment motion is filed.

While the trial court must automatically comply with a request for an omitted record, an augmented record will only be produced if the appellate court issues an order. (See Cal. Rules of Court, rule 8.155(a)(1).) Accordingly, as indicated in the sample augment motion on SDAP's website, counsel must provide good cause as to why the

augmented record is necessary for purposes of appeal. (*People v. Hagan* (1962) 2013 Cal.App.2d 34, 39-40.) Most commonly, augment motions are filed to receive copies of opening statements as well as portions of voir dire. Counsel is advised to describe the requested documents with as much specificity as possible so that the clerk is not left guessing as to what should be included in the augmented record.

If appellate counsel hopes to prevent a delay in the case, he or she should personally obtain copies of the requested documents and attach them to the augment motion; then, if the request is granted, there will be no need for the clerk to track down the documents. (See Cal. Rules of Court, rule 8.155(a)(2).) When counsel makes such a request, he or she should be able to authenticate the validity of the documents, either through personal knowledge or that of the trial attorneys. In the Sixth District, an unconformed copy will generally be accepted if it is authenticated in counsel's declaration.

SDAP is well aware that many panel attorneys have been suffering from significant delays in receiving omitted and augmented records from Santa Clara County. We have been working with the trial and appellate courts to help alleviate some of these problems. If appellate counsel has a question or concern about a delay in a case, counsel should contact their SDAP buddy to develop strategies in solving this problem. In rare cases, we have filed motions to find the clerk in contempt. An example of such a motion is attached as Attachment "B." While the Sixth District has not yet granted any of these motions, the records have magically appeared shortly after the motions were filed.

3. Motions for Settled Statements.

Settled statements are necessary to replace unavailable portions of the record. In the Sixth District, a settled statement is preferably initiated by filing a motion in the appellate court, which, in granting the request, will order the trial court judge and attorneys to draft the statement. A settled statement can be requested, for example, to detail what occurred at unreported bench conferences (*People v. Pinholster* (1990) 1 Cal.4th 865, 922) or to improve the audio in sound recordings (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440-441). Sol Wollack and Jennifer Peabody settled the record to receive copies of Powerpoint presentations used by prosecutors during their closing arguments. Additionally, Sol has employed this approach when the parties waived the reporting of voir dire and to obtain copies of emails sent between the parties and the judge. Jennifer also settled the record as to documents relied upon by the trial court to sentence her client to life without the possibility of parole. And when investigating a *Batson/Wheeler* denial, Jeff Glick settled the record when the trial court lost the jury questionnaires for all but the seated jurors. He received copies of defense counsel's questionnaires, which the prosecutor agreed were true and correct copies. Sample motions are available on the SDAP website.

G. Other Motions.

1. Introduction.

Appellate counsel may have occasion to file a variety of other motions over the course of his or her representation. While this section does not constitute a

comprehensive overview of all such motions, it does include some of those most commonly filed.

2. Extensions of Time.

The most common motion is a request for an extension of time. Typically, counsel should not seek more than two or three extensions except in very long-record cases. The requests should explicitly detail what counsel has already done in the case and why the brief has not yet been filed. In the Sixth District, the court will eventually order that no further extensions are permitted absent exceptional circumstances. Once the court has made such an order, counsel should be sure to file the brief within thirty days and should not contemplate filing any additional requests. On occasion, the court will deny an extension request. For this reason, SDAP recommends that counsel not slip into default time early in the case; if an extension request is denied, the court will allow the brief to be filed within the thirty day default period.

3. Dealing with Appealability Problems.

There is no constitutional right to appeal from an order or judgment in criminal cases; instead, the right is statutory. (*People v. Mazurette* (2011) 24 Cal.4th 789, 792.) Most of the appeals that we handle stem from guilty pleas or jury trials and are authorized by Penal Code section 1237, subdivision (a).

On occasion, however, a notice of appeal will be filed based on a nonappealable order, and so counsel should determine at the case's onset if there are any problems relating to the case's appealability. SDAP itself will attempt to note this when categorizing cases and typically will not assign out such cases to panel attorneys.

Frequently, the Sixth District will uncover this problem itself and issue an order requesting counsel to explain why the appeal should not be dismissed. If the client is attempting to appeal from a nonappealable order, counsel should advise him or her of any alternative remedies. If the client seeks to challenge the denial of a petition for writ of habeas corpus, for example, then he or she should be advised to file a new petition with the appellate court.

Sometimes, the appellate court will not notice an appealability problem on its own, and counsel will be obligated to file a "no issue" brief. If this occurs, appellate counsel should not seek to mislead the court in the statement of appealability, but he or she should also not argue against the client. If such an instance arises, contact your SDAP buddy for advice on how to phrase the statement of appealability.

More common is the existence of an appellate waiver at the time a client pled. In the Sixth District, this frequently occurs in cases from Monterey County. This does not automatically result in a "no issue" brief. Instead, it will limit the available issues on appeal to those occurring after the waiver is entered, typically to those occurring at sentencing. (See, e.g., *People v. Pannizon* (1996) 13 Cal.4th 68, 80; *People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

4. Motions to Transfer.

Sometimes, the appellate court may not have jurisdiction over an appeal since it does not stem from a "felony case." Particularly with the passage of Prop. 47, the issue of the appellate court's jurisdiction has been more frequently litigated.

A "felony case" is "a criminal action in which a felony is charged and includes a criminal action in which a misdemeanor or infraction is charged in conjunction with a felony." (Pen. Code, § 691, subd. (f).) California Rules of Court, rule 8.304(a)(2) provides that "[a] felony is 'charged' when an information or indictment accusing the defendant of a felony is filed or a complaint accusing the defendant of a felony is certified to the superior court under Penal Code section 859a."

In essence, the appellate court only has jurisdiction over cases where a felony is charged by information or certified complaint. For example, a trial court's appellate division properly had jurisdiction over a case where the defendant was originally charged by complaint with felonies; after the preliminary hearing, however, the magistrate reduced each charge to a misdemeanor under Penal Code section 17, subdivision (b)(5), and so no felony charge was ever certified to the superior court. (*People v. Nickerson* (2005) 128 Cal.App.4th 33, 38.) In contrast, an appellate court would have jurisdiction when a defendant is charged by information with at least one felony, even if he later pleads to only a misdemeanor charge.

If counsel believes that the appellate court does not have jurisdiction over a case, then he or she should move to have the appeal transferred to the appellate division. Such a motion is attached as Attachment "C." The rules regarding jurisdiction are well-defined, and the Sixth District will not typically decide a case if it believes that the appellate division has jurisdiction. (See Cal. Rules of Court, rule 8.1002(3) [providing that the appellate court has discretion to hear a misdemeanor appeal to settle an important

question of law].) Thus, in order to achieve a quick resolution of the appeal, it is best to move to transfer the case as early as possible.

5. Motions to Consolidate.

On occasion, counsel may be representing a client on appeal when another notice of appeal is filed on his or her behalf. This can happen when counsel is representing a client on appeal after a guilty plea or jury trial, and a decision on a new appealable order is subsequently rendered – for example, if a violation of probation is found true, or if a contested restitution hearing is held. This can also occur if appellate counsel brings a credits motion with the trial court during the pendency of an appeal. If the motion is denied, then a subsequent notice of appeal should be filed.

SDAP attempts to have the same panel attorney handle subsequent appeals for current or former clients. In cases where two notices of appeal are filed as to the same trial court case – or where separate notices of appeal are filed as to different trial court cases in which the defendant was sentenced together – appellate counsel should move to have the cases considered together for purposes of briefing, oral argument, and decision. While counsel can technically request that the cases be consolidated into one appeal, the Sixth District does not typically grant such requests. Practically speaking, it is of no import to the client whether the cases are formally consolidated or whether they are just considered together. In the latter circumstance, counsel should be sure that the case numbers from both appeals are included on any filings. A sample motion is attached as Attachment "D."

6. Motions for Return of Property.

Clients will sometimes request appellate counsel to seek the return of property seized by law enforcement. Even though an appeal is currently pending, a request for the return of property can and should be litigated in the trial court since it is deemed a collateral matter unrelated to the judgment on appeal. (*People v. Hopkins* (2009) 171 Cal.App.4th 305, 308.) If such a request is denied, it can be raised in the appellate court via a petition for writ of mandate. (*Ibid*.)

Items that were admitted as exhibits at trial will be retained by the trial court until the case has been final for 60 days. (Pen. Code, § 1417.5.) Then, the clerk must notify any parties who possessed or owned the exhibits to make application to the court for their release. (*Ibid*.) If the item desired by a client was admitted as an exhibit, counsel should inform the client that the court will retain it until the case is final; then, counsel should assist the client in making an application to have it released to him or her. With that said, some items can never be returned to the client, including embezzled money (Pen. Code, § 1417.5), guns, deadly weapons, and drugs (*People v. Lamonte* (1997) 53 Cal.App.4th 544, 551, citations omitted).

Items that were not admitted into evidence can be returned to the client during the pendency of an appeal. This is technically done via a nonstatutory motion, though Penal Code section 1417.6 – which governs the return of items that were admitted into evidence – has been deemed applicable. (*Lamonte, supra*, 53 Cal.App.4th at pp. 549, 553, citation omitted.) Property must be returned unless the possession or use of it is prohibited by law *and* it constitutes an instrumentality of the crime. (Pen. Code, § 1417.6.)

Accordingly, movie projectors involved in the screening of obscene movies had to be returned since they were "designed for and capable of use for lawful purposes." (*Porno, Inc. v. Municipal Court* (1973) 33 Cal.App.3d 122, 124-125.) Indeed, a "court may not refuse to return legal property to a convicted person to deter possible future crimes," so long as a defendant is not legally prohibited from possessing the item. (*Lamonte, supra*, 53 Cal.App.4th at p. 551.)

Both Julie Schumer and I have had some of our more colorful professional experiences attempting to have property returned to our clients. In my case, I was representing a disbarred lawyer who was convicted of numerous counts of unauthorized practice of medicine for illegally running toenail fungus removal centers around the state. My client sought the return of several lasers that had been seized from his centers. They were not admitted into evidence, and I assisted in their return since the client was not prohibited from possessing them in all circumstances. Mainly, he wanted to sell them to help pay his restitution.

Julie Schumer's story is an interesting one:

> My most notable motion was in a case some years back in Contra Costa County where my guy was convicted of a burglary. He had previously been in state prison where he had been issued a glass eye to replace a missing eye. The burglary was of a second story apartment in Richmond. He fled by jumping out a second story window and in the process lost the glass eye. The eye had a number on it which of course identified him and led to his capture and ultimate conviction in my case. The issues on appeal were worthless. He had not been given the eye back as it was a court exhibit. He asked me could I somehow get him the eye because the state was not going to give him a second one. I wound up doing some kind of made up motion in Superior Court to get the exhibit released to me. I figured it was the least I could do for him and it would be a real service to him. The DA by the way did not object to this after I browbeat him into it.

> At first he thought I was crazy. So the Court ultimately signed an order releasing the exhibit to me and I went down to the exhibit room in Martinez and retrieved it. It sat on my kitchen counter that night and my kids…were aghast. I shipped it to the prison where this client was and he was very happy!

Both my case and Julie's show that even in the most hopeless cases, we may have something we can do to assist the client.

7. Perfecting the Notice of Appeal.

It is somewhat surprising how often we see cases in which problematic notices of appeal are filed. At SDAP, we attempt to carefully review the notices of appeal before assigning out cases. If possible, we will correct any deficiencies ourselves or notify the assigned panel attorney of the problem and the steps that should be taken to correct it.

If the problem is discovered before the notice of appeal's filing deadline, then counsel should seek to file either an "amended" or "supplemental" notice of appeal and label it as such. How I personally label the new notice of appeal depends on the nature of the problem. If there is something directly wrong with the original notice – for example, if the appeal states it is from an order after judgment, when it actually stems from a guilty plea – then I will title my filing as an "amended" notice of appeal. On this notice, I typically specify that the new notice is intended to supersede and replace the prior one.

If something is left out of the original notice, then I will label my filing as a "supplemental" notice of appeal. I take this approach when I want to add to the original notice but do not wish to replace it. Very commonly, for example, a notice will specify that the client seeks to challenge the plea and a certificate of probable cause is sought. The notice does not state that the defendant wishes to challenge the sentence imposed. If

all I hope to do is ensure that sentencing issues can be raised, I am reticent to re-check the box requiring a certificate of probable cause, particularly if the certificate has already been granted. Hypothetically, doing so would allow the trial court to deny the request and create confusion as to whether issues requiring a certificate could be raised on appeal. Accordingly, I usually title such notices as "supplemental" and specify that the new notice is being filed in addition to the original notice and is not intended to supersede or replace it.

Correcting the notice of appeal is more problematic when the 60 day deadline has expired. In such circumstances, we must file a motion with the appellate court to get permission to file a new notice of appeal or to have the original notice deemed "constructively filed." SDAP has done many of these motions in a variety of circumstances; please feel free to contact us, and we can send you samples depending on the facts of your case.

Below are some common issues we see with notices of appeal that may require correction:

(1) The notice of appeal does not appear timely. Pursuant to California Rules of Court, rule 8.308(a), the notice of appeal must be filed within 60 days from the date of the order or judgment being appealed. This is typically based on when the trial court receives the notice. (Cal. Rules of Court, rule 8.308(a).) An exception to this rule is the "prison mailing" rule. (Cal. Rules of Court, rule 8.25(b)(5).) Under this rule, a notice of appeal is deemed timely if it was delivered by the incarcerated client to custodial officials within 60 days of the

judgment. (*In re Jordan* (1992) 4 Cal.4th 116, 130.) Sometimes, a notice of appeal will be filed by the clerk even if it does comply with these rules. If counsel discovers this, then a motion to have it deemed "constructively filed" should be made, so that the client does not risk having the appeal dismissed. If counsel must investigate when the notice of appeal was given to prison officials, he or she should contact the litigation coordinator at the facility for appropriate documentation. Counsel should seek relief from default in circumstances where the notice of appeal is not timely, but it can be shown that this was through no fault of defendant – i.e., he was belatedly advised of his right to appeal, and he acted diligently upon learning of this right.

(2) There is concern whether the notice of appeal adequately preserves certain issues. This commonly occurs in guilty plea appeals. If a defendant seeks to challenge the validity of his plea, then a certificate of probable cause is required under Penal Code section 1237.5 and California Rules of Court, rule 8.304(b). If such a request is made and denied, then a writ of mandate should be filed with the appellate court within 60 days from the denial. (*In re Brown* (1973) 9 Cal.3d 679, 683, superseded by statute on other grounds.) If a certificate is granted, then *any* noncertificate issues can be raised on appeal; the list provided in the certificate request does not restrict raising any such issues. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1174.) Similarly, if a notice of appeal is filed as to any issue not requiring a certificate of probable cause – i.e., the sentence imposed or the denial of a suppression motion – then any other

issue not requiring a certificate can also be raised. (*People v. Jones* (1995) 10 Cal.4th 1102, 1112-1113.) A problem arises, however, if the notice of appeal is operative as to an issue not requiring a certificate of probable cause, and counsel wants to raise an issue that requires one, or vice versa. In such circumstances, counsel should file a new notice of appeal (if the 60 day deadline has not expired) or seek relief from default (if it has).

(3) The notice of the appeal should list the date of the judgment that is being appealed. An argument can be made that if the date is omitted, the appellate court may still consider the appeal if the notice otherwise clearly indicates the order that is being challenged. (Cf. Cal. Rules of Court, rule 8.304(a)(4) [notices of appeal should be liberally construed in favor of their sufficiency]; see also *People v. Lloyd* (1998) 17 Cal.4th 658, 665.) Still, it is a better practice to attempt to cure this defect.

(4) California Rules of Court, rule 8.304(a)(3) requires that the notice of appeal be filed by either the defendant or the defendant's attorney. On occasion, a third party will attempt to file and sign it. While an authorized agent may be permitted to do this in some circumstances (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853-854), counsel should investigate this when any third party has signed the notice. Any appropriate relief should be requested.

Other problems with the notice of appeal may come up, and the aforementioned issues should not be deemed a comprehensive list. Counsel should ensure that any

problems are dealt with prior to filing the opening brief. By doing so, counsel can prevent a later dismissal if the Attorney General or appellate court notices the error.

H. Conclusion.

In sum, competent performance on an appellate case is not solely based on the briefing done by counsel. As indicated above, counsel retains numerous responsibilities upon appointment. By diligently performing these duties, counsel can ensure an effective relationship with his or her client, while also preventing any problems down the road.