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Lecture

Ethical Considerations in Criminal Appeals

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ETHICS AND PROFESSIONALISM IN CRIMINAL APPELLATE PRACTICE

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INTRODUCTION

Students of legal ethics are often disappointed. I can recall a certain excitement at being in the first group of aspiring lawyers in California to be required to pass an examination in professional responsibility as part of the bar exam. In those post-Watergate days, the need for the ethical education of lawyers seemed self-evident. The lack of any meaningful course offerings in legal ethics in my law school had me looking forward to preparing for the new professional responsibility part of the exam, which we were allowed to take several months before the general exam.

My hope of finally receiving a grounding in legal ethics was quickly dashed by the bar review preparation for the exam. About the only thing now I can remember about the course, and the exam that followed, was its curious fixation on exactly what you could put on your business card, and how large the print could be.

Perhaps the problem was that the exam focused excessively on the California Rules of Professional Conduct. The California Rules of Professional Conduct were aptly described by Justice Friedman in *Jeffrey v. Pounds* (1977) 67 Cal.App.3d 6, 12: "As an educational instrumentality, the California Rules of Professional Conduct are singularly uninspiring.

They intermix fundamental tenets of ethical obligation with a turgid mass of superficial do's and don'ts, comparably to strewing the Ten Commandments among the interstices of the Internal Revenue Code."

I don't know what is covered these days by the professional responsibility exam. But whatever its current coverage, I doubt that it goes in depth on a lot of topics relevant to criminal appellate defense practitioners.

In the practice of criminal appellate defense, virtually every thing we do has an ethical component or consideration: the communication we have (or don't have) with our client, what we argue and how we argue. There are broad areas of behavior fairly clearly governed by basic principles like the duty to advocate zealously for the client, to keep the client's confidences inviolate, and the duty of loyalty toward the client. But of course, there are situations in which broad principles point in different directions. For example, in deciding whether a particular issue should be argued, the duty of zealous advocacy may collide with the duty to refrain from making frivolous arguments. Resolution of these ethical dilemmas require careful analysis of the situation at hand, plus analysis of the potentially conflicting ethical considerations.

In this presentation, I have tried to keep the overall organization simple by putting most material into three categories: (1) the duty to communicate with and properly advise the client, (2) the ethical consideration concerning what to argue, and (3) the ethical consideration concerning how to argue. I also have some miscellaneous items in the catch

all "everything else" category.[1] I have tended to spend more time on the broader ethical considerations that govern most practitioner's daily, routine behavior, because, after all, that is most of what we do. I also think that concentration on ethical problems or dilemmas, without a good grounding in ethical basics, can lead to the sense that legal ethics should only be a matter of concern in the "unusual" situation. My own sense from twenty-four years of practice is that devotion to ethical basics is a prerequisite to a successful practice, that is, to a mode of lawyering that serves the interests of the clients within the legal framework in which we operate.

[1] I would be committing an ethical violation if I were not to acknowledge that the materials herein were based on materials originally prepared by both SDAP Assistant Director Dallas Sacher and myself.

I. DUTY TO COMMUNICATE WITH AND PROPERLY ADVISE CLIENT.

A. Sources

(1) Business and Professions Code, section 6068, subdivision (m), defining attorney's duties: "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to whether the attorney has agreed to provide legal services."

(2) Rules of Professional Conduct of the State Bar of California, Rule 3-500: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Rules of Professional Conduct are binding upon all members of the State Bar. (Bus. & Prof. Code, sec. 6077.)

(3) "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, 904.)

B. Inform and Advise Client Globally Before Opening Brief is Filed.

(1) Nature of appellate process.

(2) Remedies available: emphasize that most involve return to trial court for either new trial or new sentencing hearing, but usually no risk of increased sentence, under *People v. Henderson* (1963) 60 Cal.2d 482, construing the state constitutional double jeopardy clause. Keep your eye on case pending in California Supreme Court. *People v. Hanson*, S078689, concerning the scope of the state constitutional double jeopardy protection with regard to an increase in fines at a resentencing.

(3) Any potential risk for greater sentence, such as that created by an "unauthorized sentence," which is subject to correction at any time, and which pursuit of the appeal may make more likely to be discovered. Examples:

(a) Dismissals under Penal Code section 1385 of prior conviction

allegations or sentencing enhancements with no statement of reasons in the minutes .

(b) Offenses which were run concurrent or 1/3 consecutive which must receive mandatory consecutive or mandatory full term consecutive punishment. Examples: Penal Code section 667.6 (violent sex offense); 12022.1 (on bail enhancement); 1170.12 (Three Strikes Law).

(c) Excessive presentence credits granted.

(4) Professional advice regarding the relative benefits versus risks to pursuing appeal: Need to assess chance of prevailing on issues, what benefit will derive from prevailing on appeal, what nature of risks are, give best judgment on how to minimize risk, or whether risks are not prudent to run. But remember, client makes final decision on whether to run the risk. (*Jones v. Barnes* (1983) 463 U.S. 745, 751, accused has ultimate authority to make certain fundamental decisions regarding case, including taking of an appeal.)

(5) Obtain informed, express consent of client to attack plea, or to run any significant risk: Client attacking plea must be informed that upon voiding of plea, all charges will be reinstated, client exposed to maximum possible sentences on all counts of conviction, prior sentence does not limit.

(6) Must obtain informed consent to abandon appeal. (*Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053; unauthorized abandonment of a criminal appeal is "a serious matter, warranting substantial discipline.") Must inform appellant that abandonment of appeal is irrevocable, and that no collateral relief available if issue could have been raised on appeal and was not.

(7) Overall goal: to insure client understands options available through appellate process, and is given sufficient correct advice to make informed decisions on aspects of appeal which are under client's control.

C. Inform And Advise Locally During Appeal.

(1) Keep client informed by sending copies of EOT's, briefs, opinion,

petition for rehearing and/or review.

(2) Respond promptly to client letters, and take collect calls from prisoners.

(3) Promptly inform client if you are not going to petition for rehearing or review, send transcripts and explanation on how client can petition in pro per. California Supreme Court accepts pro per petitions for review, though some Court of Appeal districts do not accept pro per rehearing petitions.

(4) If opinion is favorable, insure by communication with trial counsel and/or client that relief ordered is granted.

D. Duty To Keep Client Confidences.

Source: Business and Professions Code section 6068, subdivision (e): Duty of attorney "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

In the practice of appellate law, there are relatively few opportunities for violation of the attorney client privilege. Yet I have observed occasional violations in declarations supporting requests for extension of time. This has usually come up when the appellant has told the attorney something that necessitates some further inquiry, necessitating the extension request.

In this situation, do not divulge specifics. It is always possible to divulge that communication has occurred, which causes the need for further action, without divulging the actual content of the communication.

A related problem is divulging in an extension request that counsel has been unable to find any arguable issues or that efforts are being made to persuade the client to abandon.

II. ETHICAL CONSIDERATIONS CONCERNING WHAT TO ARGUE

(A) Duty to Be Zealous Advocate, but Also to Refrain from Making Frivolous Arguments

. (1) 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.)

Appointed counsel is not to "consider the burden on the [appellate] court in determining whether to prosecute an appeal." (*Id*., at p. 443.) 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.)

(2) All counsel have "obligations to the judicial system to refrain from prosecuting frivolous claims." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 647.) Definition of frivolous claim "totally and completely devoid of merit." (*Id*., at p. 649.) *People v. Craig* (1991) 234 Cal.App.3d 1066, 1068 defines as "unarguably not arguable."

If case lacks any arguable issue, counsel must either get consent of client to abandon, or file a *Wende* brief.

No limits test, all depends on record in case and applicable law. Fact that current law is against your position is no basis, if there is reasonable basis to argue current authority is mistaken, or to advocate for a change in the law. (*People v. Feggans* (1967) 67 Cal.2d 444, 447.)

(3) Frequent cause of frivolous issues:

(a) Misunderstanding of record or unsupported factual assumption from record. See *People v. Craig*, *supra*, 234 Cal.App.3d 1066, in which record showed only that one probation officer told another that probation would be terminated in Trinity County if Shasta County sentenced defendant to prison. Claim that defendant relied on representation of probation officer when making plea ruled utterly frivolous due to lack of any record evidence that anyone told defendant anything about treatment in other county.

(b) Inadequate analysis or research fails to disclose existence of controlling adverse authority. Example: briefing of issue raised by Penal Code section 995 motion, when no prejudice at trial, with no recognition of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519.

B. Client's Wishes Versus Counsel's Responsibility to Make Best Tactical Decision Regarding Which Issue or Issues to Brief.

In all cases, appellate counsel should solicit his client's opinion as to the nature of the issues to be raised on appeal. In so doing, counsel should proceed with an open mind and should engage in a meaningful dialogue with his client. However, following the period of consultation, it is counsel, not the client, who must make the ultimate decision as to which issues will be raised.

In this regard, it is first necessary to establish that there is a distinction between the constitutional role of counsel and his ethical role. Pursuant to *Jones v. Barnes, supra*, 463 U.S. 745, it is settled that appellate counsel does not have a "constitutional duty to raise every nonfrivolous issue requested by the defendant." (*Id.*, at p. 746.) At the same time however, it is also the view of the American Bar Association that appellate counsel has an ethical responsibility to raise those nonfrivolous issues suggested by the client. (*Id.*, at p. 753, fn. 6.)

In its Standards for Criminal Justice, the ABA takes the position that the client has the authority to make the decision as to whether to "press a particular contention on appeal, . . ." (ABA Standards for Criminal Justice (2nd ed. 1980) Comment to Standard 21-3.2, pp. 21-42.) In my view, the ABA position cannot withstand scrutiny under California law.

In California, it is well settled that counsel has the authority to make all of the tactical decisions in a case except for those "fundamental" choices which only the defendant can make. (*People v. Frierson, supra*, 39 Cal.3d 803, 813.) Importantly, with the exception of capital cases, counsel has the power to choose those defenses which will be raised at trial. (*Ibid.*) By analogy, the identical rule should apply to the issues to be raised on appeal.

Without doubt, appellate issues (like defenses at trial) must be carefully crafted to fit the facts of the case. Moreover, the experienced appellate attorney (like the veteran trial lawyer) is in a much better position to make a

determination as to the likelihood that a particular claim will prevail. Given this indisputable truth, appellate counsel must have the freedom to determine the nature of the issues to be raised on appeal.

Notwithstanding the foregoing analysis, it is important to note the contrary view expressed by Justice Brennan. According to Justice Brennan, it is counsel's role "to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." (*Jones v. Barnes, supra*, 463 U.S. 745, 763 (dis. opn. of Brennan, J.).) Thus, in the interests of ensuring a trusting relationship between attorney and client, it is Justice Brennan's opinion that the attorney should defer to the client's decision as to the issues to be raised. (*Id.*, at pp. 761-762.)

Obviously, counsel has a duty to treat his client and his opinions with great respect. At the same time, however, counsel's highest duty is to zealously strive for the best possible result for the client. Thus, it is unethical for counsel to act as a mere "`mouthpiece' for the client, . . ." (ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Comment to Standard 4-1.1, p. 4-9.) Indeed, counsel best represents his client by relying on his own trained professional judgment.

"The lawyer's value to each client stems in large part from the lawyer's independent stance, as a professional representative rather than as an ordinary agent. What the lawyer can accomplish for any one client depends heavily on his or her reputation for professional integrity. Court and opposing counsel will treat the lawyer with the respect that facilitates furthering the client's interests only if the lawyer maintains proper professional detachment and conduct in accord with accepted professional standards." (ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Comment to Standard 4-1.1, p. 4-9.)

Generally speaking, I would suggest that any nonfrivolous issues requested by the client should be briefed, unless it is counsel’s professional judgment that addition of the issue would hurt the client’s interest by undercutting a stronger argument, or inordinately lengthening the opening brief.

C. The Ethics Of Raising An Appellate Issue Which Would Be Meritless If The Record On Appeal Were Complete.

One of the primary rules of appellate practice is that the reviewing court may not consider matters outside the record on appeal. (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397.) Thus, in the ordinary case, appellate counsel need not be concerned about matters which do not appear in the record. However, upon occasion, a situation will arise which creates a grave ethical dilemma. In order to investigate this problem, the following hypothetical will be useful.

At trial, the defendant is charged with rape. In her testimony, the victim testifies that she did not consent to intercourse. At the same time, the victim admits that she engaged in consensual kissing with the defendant, gave him a lengthy back rub in her bedroom, and did not unequivocally say she did not consent. Consistent with this evidence, the defendant testifies that he believed that the victim wished to have sexual intercourse with him.

As is readily apparent, the foregoing facts constitute substantial evidence in support of a *Mayberry* defense (i.e. the defendant reasonably believed that consent had been given). (*People v. Williams* (1992) 4 Cal.4th 354, 360-362; *People v. May* (1989) 213 Cal.App.3d 118, 127.) Nonetheless, the record reveals that the court did not instruct on the defense. Insofar as an instruction on the defense must be given by the court sua sponte (*May*, *supra*, 213 Cal.App.3d at p. 124), appellate counsel is in the admirable position of having a strong issue to raise.

Nonetheless, prior to briefing the issue, appellate counsel contacts trial counsel in order to discuss the case. During their conversation, appellate counsel notes that he will be raising the *Williams* issue. In consternation, trial counsel advises appellate counsel that he specifically told the judge during the instructional conference that he did not want a *Williams* instruction for the tactical reason that he wanted to rely solely on the defense of actual consent. Apparently, the parties neglected to place the instructional conference on the record.

Given this scenario, counsel is faced with a difficult problem. On the face of the record, a meritorious legal issue is available. However, had the instructional conference been made part of the record, the issue would vanish. (See *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; defense counsel is entitled to make the reasonable tactical choice that certain instructions not be

given.) In light of these circumstances, the question is whether counsel may ethically brief the *Williams* issue.

In my view, the answer to this question turns on an analysis of whether it is "consistent with truth" to raise an appellate issue which would be meritless if the record on appeal was complete. (Business and Professions Code section 6068, subd. (d).) In this regard, it is essential to note that the concealment of material facts is ethically proscribed. (*Davidson v. State Bar, supra*, 17 Cal.3d 570, 574.)

Raising the issue might be viewed as akin to the presentation of evidence known to be false. The presentation of false evidence is strictly proscribed (*Nix v. Whiteside* (1986) 475 U.S. 157, 167-169; Rules of Professional Conduct of the State Bar of California, rule 5-200(A); counsel shall employ "such means only as are consistent with truth.")

On the other hand, I would also note that the resolution of the issue is not starkly clear. In this regard, the following counterargument might be considered.

As is noted above, the appellate court and counsel are limited to the record on appeal. (*Merriam, supra*, 66 Cal.2d at pp. 396-397.) In addition, with respect to instructions which must be given by the court sua sponte, the defendant cannot be said to have waived the claim unless the record affirmatively shows "that counsel made a conscious, deliberate tactical choice between having the instruction and not having it." (*Cooper, supra*, 53 Cal.3d at p. 831.)

Viewed from this perspective, it might be argued that counsel is entitled to raise the *Williams* issue since the record on appeal does not preclude the claim. In this regard, counsel might defend his actions based on the analogy that a trial attorney has no duty to advise the government about an inculpatory witness who is known only to the defense.

III. ETHICAL CONSIDERATIONS CONCERNING HOW TO ARGUE.

A. Duty of Respect to Tribunal.

(1) Source: Business and Professions Code section 6088, subdivision (b), duty of attorney "To maintain the respect due to the courts of justice and judicial officers." Courts have "inherent power to punish for contempt of court." (*In re Buckley* (1973) 10 Cal.3d 237, 247.) Code

of Civil Procedure, section 1209 lists acts or omissions which may constitute contempt of court, including "Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." Applies to written documents submitted to court, as well as oral presentations. (*In re Buckley*, *supra*, 10 Cal.3d at p. 248.)

(2) What is Prohibited: Statements which are "insolent, offensive, insulting and [which] inpugn[] the integrity of the court." (*Ibid*.)

Examples: "This Court obviously does not want to apply the law." (*Buckley*). Where defense counsel implied a different rule was being applied to him than the prosecution, and did so in a loud, disorderly manner, after being warned about his manner, contempt upheld. (*In re Grossman* (1972) 24 Cal.App.3d 624.)

(3) Vigorous Advocacy Is Permitted. In *Raiden v. Superior Court* (1949) 34 Cal.2d 83, contempt annulled when at motion for new trial, attorney stated that a prior order of the court "defeated the ends of justice." And in *Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, contempt annulled when attorney for person accused of improperly communicating with jurors during a trial was denied right to cross examine jurors and responded by asking the court four times whether it wanted a fair investigation, and then asking judge whether his client was under arrest. Counsel ruled to be permissibly persistent: "The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements." (*Id*., at p. 795.)

See Justice Mosk's dissent in *Buckley*, in which he argues that Gallagher's "persistent inquiries about a fair investigation indirectly implied that the court was conducting an unfair investigation, yet he was exonerated. His comment was remarkably comparable to petitioner's statement in the instant case that 'This court obviously doesn't want to apply the law,' a similar implication that the court was conducting an unfair trial." (10 Cal.3d at p. 261.)

(4) Accusations of Bias - protected if made as part of motion to disqualify judge for cause, not protected if made to vent anger, or if factual basis demonstrably false.

In *Holt v. Virginia* (1965) 381 U.S. 131, attorney A refused to answer judge's questions. When OSC issued, attorney A files disqualification motion and motion for change of venue. Attorney B, representing A, reads change of venue motion, which alleges the judge was "acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge." Attorneys A & B both held in contempt. USSC reversed: right to disqualify judge for cause is rendered null if attorney making allegations can be held in contempt. See also *In re Little* (1972) 404 U.S. 533, in which contempt levied against pro per for saying court was biased and had prejudged the case was reversed. See also *State Ex Rel. Oklahoma Bar Assoc. v. Porter* (Okla. 1988) 766 P.2d 958, holding attorney could not be disciplined for an extrajudicial statement accusing judge of racist leanings, because accusation had factual basis and was protected by First Amendment.

But see *In re Ciraolo* (1969) 70 Cal.2d 389, in which defense counsel submitted an affidavit in support of a disqualification motion, which was determined to be factually false. *Ciraolo* upheld contempt, as attempt to deceive court. But see also *In re Westfall* (Mo. 1991) 808 SW 2d 829, upholding a public reprimand of attorney for calling appellate decision "less than honest" in its reasoning and accusing judge of distorting logic to arrive at preconceived opinion. Comments deemed "reckless, false."

(5) Professionalism counsels that goal should be to attack the ruling and the rationale, not the integrity of the tribunal, absent substantial grounds to do so in the context of a motion to disqualify for cause or request for recusal.

Insinuation of bias rarely advances client's interest, more a venting for counsel. Unlikely to persuade judge (s)he's biased, have better chance by sticking to merits.

Mode of expression may become the issue, distracting court from merits of issue. Also, exposes counsel to punitive sanctions and professional discipline.

B. Duty To Disclose Adverse Authority, And Not To Cite Depublished Cases

(1) Source: Rules of Professional Conduct, Rule 5-200: "In presenting a

matter to a tribunal, a member: . . . (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision; (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional . . ."

Ethical duty requires no knowing misleading of court through misstatement of law or citation of overruled authority. Professionalism requires sufficiently thorough and effective research to discover all pertinent law, including adverse decisions, and to check the validity of all cited authority, to prevent inadvertent misstatements of law.

(2) Source: California Rules of Court, rule 977: "(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b). (b) [Exceptions] Such opinions may be cited or relied on: (1) when the opinion is relevant under the doctrine of law of the case, res judicata, or collateral estoppel, or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." See also Rule 976(c)(2): "an opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect."

Attorney General frequently lets Court of Appeal know if prior Court of Appeal opinion in Defendant's favor has been depublished.

Response: criticize Attorney General for violation of Rule 977, point out that under Rule 979(e), "An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court, of the correctness of the result reached by the decision or of any of the law set forth in the opinion."

IV. MISCELLANEOUS ADDITIONAL ETHICAL CONSIDERATIONS

A. Problem of the Disappearing Client

Upon occasion, appellate counsel will be called upon to represent a client with

whom he has lost touch. Typically, this situation will arise when a defendant has been granted probation and has disappeared.

Once counsel realizes that he has no clue as to his client's whereabouts, he must confront the dilemma of whether he has a duty to advise the court that he lacks knowledge of his client's location. It is my view that counsel does not have a duty to advise the court about his client's disappearance.

At the outset, I begin with the premise that defense counsel's highest duty is to act as a zealous advocate on behalf of his client. As the Supreme Court has observed, appellate counsel "must play the role of an active advocate, rather than a mere friend of the court . . . ." (*Evitts v. Lucey* (1985) 469 U.S. 387, 394.) Thus, unless there is an express statutory or ethical rule which requires counsel to advise the court about his client's disappearance, counsel should take only those actions which are consistent with the prosecution of the appeal.

In this regard, it is essential to note that California recognizes "the 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.

Notwithstanding the foregoing principles, it is simultaneously true that an appellate court has the "discretion" to dismiss an appeal if it learns that the defendant cannot be found. (*People v. Buffalo* (1975) 49 Cal.App.3d 838, 839.) Thus, in a case where defense counsel advised the court that his client was incommunicado in New Zealand, the court dismissed the appeal since the defendant had "deliberately . . . severed all involvement on his part in the . . . appeal." (*People v. Brych* (1988) 203 Cal.App.3d 1068, 1076.) Importantly, the *Brych* court reached this result while acknowledging that the defendant had "lawfully emigrated from the United States" after completing his sentence. (*Id.*, at p. 1075.)

In short, the contours of the ethical dilemma are clear. On the one hand, counsel has a manifest "ethical duty" to prosecute the appeal. (*Brych, supra*, 203 Cal.App.3d at p. 1076.) On the other hand, counsel is on notice that appellate courts have the discretionary authority to dismiss appeals when it

becomes aware that the whereabouts of the defendant are unknown.

Given these conflicting principles, the determinative question is whether counsel's silence in this situation constitutes the concealment of a material fact which would mislead the court. (Business and Professions Code section 6068, subd. (d); *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574; the concealment of a material fact is unethical.) Phrased as a question, is it misleading to refrain from advising the court that it has the discretionary authority to dismiss a case? In my view, it is not.

In this regard, I would offer an analogy to civil law. Pursuant to Code of Civil procedure section 583.410, et seq., a court has the discretion under certain circumstances to dismiss a case if it is not diligently prosecuted. Notwithstanding this authority, one would look in vain for any case or rule of ethics which would require the plaintiff's attorney to sua sponte advise the court of those facts which might lead to a discretionary dismissal. Given this reality, no reason appears why a criminal appellate lawyer should have a different duty.

In short, there is no doubt that an appellate court continues to have jurisdiction over a case even though the defendant's whereabouts are unknown. To the extent that counsel has a continuing "ethical duty" to pursue an appeal on behalf of his missing client (*People v. Brych, supra*, 203 Cal.App.3d 1068, 1076), it would appear that counsel violates his responsibilities by advising the court that it has viable grounds for a discretionary dismissal.

B. The Duty of Court Appointed Counsel When He Learns That His Client Is Not Indigent.

Pursuant to Penal Code section 1240, an indigent defendant is entitled to the appointment of counsel on appeal. However, the Court of Appeal will occasionally err and appoint counsel when a defendant has sufficient funds to retain an attorney. Thus, the question arises as to whether appointed counsel may continue to represent a non-indigent defendant.

Without doubt, the answer is no. As was held in *People v. Nilsen* (1988) 199 Cal.App.3d 344, "if appointed counsel becomes aware of a significant change in a [previously indigent] defendant's financial circumstances, he has a duty as an officer of the court to disclose that fact to the court. [Citations.]" (*Id.*, at p. 351.) This is so because counsel would engage in a fraud upon the court by remaining silent. (*Id.*, at pp. 351-352.)

In short, appointed counsel has a clear ethical duty to refrain from the representation of a non-indigent client. Thus, when there is a change in a client's financial status, counsel should have the client fill out the Judicial Council's financial form. In this way, the appellate court can then make an informed determination as to whether counsel's appointment should be vacated.

C. Appointed Counsel May Not Accept Compensation From A Source Other Than The State.

Based on the truism that you get what you pay for, many indigent defendants believe that their appointed attorney will do a better job if he is provided with additional compensation. Thus, some defendants or their family members will offer to slip some cash to appointed counsel. Under these circumstances, appointed counsel is ethically precluded from accepting the proffered compensation.

In this regard, when the court appoints counsel, it is presumed that the client is "unable to afford" the payment of fees. (Penal Code section 1240, subd. (a).) Given this implicit finding by the court, it would appear that any fee obtained from the client would be an illegal one. (Rules of Professional Conduct of the State Bar of California, rule 4-200(A); a lawyer may not collect an illegal fee.) This is so because the client is presumed to be incapable of paying for legal services. (See *Hall*, *supra*, section 7:23, p. 183.)
As a final note on this point, it should not be overlooked that disciplinary or

criminal action could be taken against a court appointed attorney who improperly takes a fee from a client. (See *Friedman v. United States* (5th Cir. 1979) 588 F.2d 1010, 1016; court appointed lawyer was subject to disciplinary action for extorting $400 from his client.) Thus, counsel would be well advised to resist all attempts to ply him with additional compensation.

D. Counsel Has A Duty To Report Ethical Violations Committed By Self, Other Attorneys And Judges.

Under existing California law, an attorney must report his own misconduct to the State Bar. (Business and Professions Code section 6068, subd. (o).) However, there is no provision which requires counsel to make the same report when he has knowledge of ethical violations committed by other attorneys or by judges. Notwithstanding this omission in California law, it is my view that counsel nonetheless has a duty in this regard.

While it is not binding on California lawyers, the ABA Model Rules of Professional Conduct specifically provide that an attorney has an obligation to report acts of misconduct. In this regard, rule 8.3 provides in relevant part:

"(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

"(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

As has often been said, the law is an important profession insofar as attorneys and courts wield enormous power over laypersons. Given this power, it is easy for the unscrupulous to oppress the powerless. Given this reality, it is incumbent upon each individual attorney to police the judicial system. By failing to do so, an attorney necessarily becomes a silent accessory to the lowering of the ethical standards by which we are bound.