TO BRIEF OR NOT TO BRIEF: MARGINAL ISSUES

by Elaine A. Alexander, Executive Director
Appellate Defenders, Inc.
April 2008

One of the most important responsibilities of appellate counsel – perhaps the most important – is issue selection, which includes (1) identifying potential issues to raise, (2) assessing their legal merit, and (3) determining which issues, among those that are arguable, should be raised. This topic is treated extensively in the ADI California Criminal Appellate Practice Manual (ADI Manual), chapter 4, "On the Hunt: Issue Spotting and Selection."[1] The focus in this memo is primarily on the second phase, weighing the merits of issues. In particular, it looks at marginal issues – inherently weak ones – in the context of a case with no stronger issues. These cases require a judgment call as to whether the issues should be briefed on the merits or simply listed as unbriefed issues in a no-merit filing.[2] (E.g., *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; *In re Sade C.* (1996) 13 Cal.4th 952 [dependency]; *People v. Wende* (1979) 25 Cal.3d 436 [criminal]; see also *Smith v. Robbins* (2000) 528 U.S. 259; *Anders v. California* (1967) 386 U.S. 738.[3])

I. UNDERLYING CONCERNS

A. Strategic Considerations

Making a judgment call about marginal issues is especially tricky when counsel is able to find only such issues. If there are other, solid issues, counsel is often well advised to leave out the weak ones, even if they are theoretically arguable. (See ADI Manual, §4.69; *Jones v. Barnes* (1983) 463 U.S. 745, 751-754 [counsel has no duty to raise every

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[1] http://www.adi-sandiego.com/Articles/Manual2007/ManualOctober2007/Chapter%20Four%20-%20Issue%20Spotting.pdf.

[2] In some courts, including Division Three of the Fourth Appellate District, counsel in a dependency appeal must file a letter in lieu of a brief. (Sample at http://www.adi-sandiego.com/PDFs/sade%20c%20div%203.pdf.)

[3] See also *People v. Taylor* (2008) 160 Cal.App.4th 304 (no-issue mentally disordered offender appeals not subject to *Anders-Wende* requirement of court review of record for issues).

non-frivolous issue that client wants].) When only marginal issues are available, however, the question becomes one of filing a merits brief or a no-merit one.

In a criminal case, this decision entails a strategic judgment. Because the court will review the record for arguable issues, the client may be better off with a *Wende* brief, with its attendant court review, than with a merits brief raising only "loser" issues. (See *People v. McGee* (1978) 82 Cal.App.3d 127, 129 ["appellate counsel who eschews manufacturing issues where none exists achieves a real benefit for [the] client" – court's review of the entire record]; see also *People v. Wende*, *supra*, 25 Cal.3d 436, 442; *People v. Johnson* (1981) 123 Cal.App.3d 106, 111.)

Non-criminal cases present a contrast. Under *Sade C.* and *Ben C.*, the court is not required to conduct a review of the record. Unless the court voluntarily does so,[4] there is realistically no strategic advantage to the client in filing a *Sade C.* brief: the court will simply dismiss the appeal.[5] In those cases, any doubt about arguability should be resolved in favor of raising marginal issues.

But – and this is critical – the presumption in favor of arguability does not relieve counsel of the duty to make a professional judgment about that question in the first place. Counsel must make an objectively valid assessment of whether there is true "doubt" about arguability and not just act from a wishful desire to avoid a no-merit brief.

B. Ethical/Professional Considerations

Navigating the border between weak-but-arguable versus frivolous issues can be fraught with danger for counsel because it implicates competing ethical responsibilities.

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[4]At this time Fourth Appellate District divisions do not, as a matter of routine, engage in a such a review in dependency cases.

[5]The question whether the appellant must be given an opportunity to file a pro per brief in a *Sade C.* case is before the Supreme Court in *In re Phoenix H.*, S155556 (Court of Appeal opinion at 152 Cal.App.4th 157, superseded by grant of review, Oct. 10, 2007.) If the court finds such a right, a theoretical advantage of a *Sade C.* brief might be that it would give the client an opportunity to file a pro per brief. However, given the high level of professionalism on the appointed counsel panel, reinforced by an ADI staff attorney review of the record in potential no-merit situations, the odds that such an opportunity would yield more than a psychological benefit to the client are low indeed. (See *In re Sade C.*, *supra*, 13 Cal.4th 952, 990; *In re Angelica V.* (1995) 39 Cal.App.4th 1007, 1015.)

Counsel have the obligation both to advocate with zeal on behalf of their clients and to refrain from pursuing worthless claims.

The Supreme Court noted this dilemma in the lead case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 647:

> Counsel face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims. "[An] attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." (*Kirsh v. Duryea* (1978) 21 Cal.3d 303, 309.)

Statutory provisions, case law, and ethical codes reflect counsel's potentially conflicting responsibilities:

On the one hand, counsel must act as an uncompromisingly vigorous advocate. (*People v. Cropper* (1979) 89 Cal.App.3d 716, 720; ABA Model Rules of Prof. Conduct (ABA Model Rules), Canon 7, EC 7-1 ["the duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law"].) Failure to raise a critical assignment of error on appeal can amount to ineffective assistance of appellate counsel. (*People v. Lang* (1974) 11 Cal.3d 134; *People v. Stephenson* (1974) 10 Cal.3d 652, 661; *People v. Rhoden* (1972) 6 Cal.3d 519, 529; *In re Smith* (1970) 3 Cal.3d 192, 198; see Bus. & Prof. Code, § 6068, subd. (o)(7) [duty to report to State Bar "[r]eversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney"].)

On the other hand, counsel has a duty as an officer of the court not to pursue frivolous issues. (Bus. & Prof. Code, § 6068, subd. (c); ABA Model Rules, Canon 7, DR 7-10 [in representing client, a lawyer may not "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal

of existing law"].) Violation of this obligation can subject counsel to sanctions.[6] (See *In re Marriage of Flaherty*, *supra*, 31 Cal.3d 637, 646; see also Code Civ. Proc, § 907.)

For the most part, the law views counsel's dilemma with a sympathetic eye and encourages them to advance their clients' interests without fear of reprisal.

> The courts have . . . have rejected numerous attempts to hold attorneys liable for good faith decisions to assert their clients' claims. [Citations.]
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> The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of a fear of personal liability. To decide otherwise "would inject undesirable self-protective reservations into the attorney's counselling role," and prevent counsel from devoting their entire energies to their clients' interests. [Citation.] "If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not

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[6]It is possible for counsel in criminal, as well as civil, proceedings to be subject to sanctions for egregious conduct, including frivolous issues and writ petitions. (*In re White* (2004) 121 Cal.App.4th 1453, 1479 [habeas corpus: "This court may find a writ petition to be frivolous and order sanctions if we conclude the petition was prosecuted for an improper motive or the petition is indisputably without merit"]; *Jones v. Superior Court* (1994) 26 Cal.App.4th. 92 [omission of key facts in mandate petition]; *Gottlieb v. Superior Court* (1991) 232 Cal.App.3d 804, 813-815 [refiling of mandate petition after first denied]; Cal. Rules of Court, rules 8.276, 8.366.)

The prohibition against filing an appeal without merit (Code Civ. Proc, § 907) at issue in *Flaherty* arguably does not apply to criminal and juvenile cases. (See Pen. Code, § 1240.1, subd. (b) [duty to file appeal at client's request]; Cal. Rules of Court, rule 8.366 [exempting from criminal cases the provisions of rule 8.276(a)(1), sanctions for frivolous appeal]; *People v. Olson* (1989) 216 Cal.App.3d 601, 603-604 ["If this were a civil case we would unhesitatingly have utilized our power to curb the filing of frivolous appeals by imposing substantial monetary sanctions. Because this is an appeal of a criminal case, we are powerless to do anything about it"]; but see *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 739, fn. 16 [a writ case, but stating, in dictum: "an appellate court properly may impose sanctions in a criminal appeal, including sums necessary to reimburse the court for the cost of resources devoted to a frivolous appeal"; only cases cited are a criminal writ proceeding and a civil appeal].) In any event, this is rarely a problem for appointed appellate counsel, who handle but do not file appeals.

only authorized but obligated to present and urge his client's claim upon the court." [Citations.]

(*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 647; see also *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1357 ["entitled to assess which issues were potentially meritorious"]; *Oriola v. Thaler* (2000) 84 Cal.App.4th 397, 414 ["Litigants and attorneys . . . have a right to present issues that are arguably correct even if they do not ultimately prevail. . . . [T]he power to punish attorneys for prosecuting frivolous appeals should be used most sparingly to deter only the most egregious conduct," internal quotation marks omitted].)

There is, inevitably, a "but . . . " to this proposition. Conscious of their workload, courts have occasionally voiced frustration at having to deal with issues that stand no chance for success. (E.g., *People v. Craig* (1991) 234 Cal.App.3d 1066, 1068-1069, 1071; *People v. Rojas* (1981) 118 Cal.App.3d 278 [order denying rehearing]; *People v. Scobie* (1973) 36 Cal. App. 3d 97 [order denying motion to recall remittitur].) Since this sentiment is typically directed at counsel, it behooves us as attorneys to educate ourselves on the relevant legal standards.

II. DETERMINING WHETHER ISSUE IS ARGUABLE OR FRIVOLOUS

A. Case Law

In re Marriage of Flaherty, *supra*, 31 Cal.3d 637 addressed the question of sanctioning an attorney for bringing a civil appeal that the Court of Appeal had deemed frivolous. It noted that case law to date had not offered an adequate definition of "frivolous," resulting in inconsistent and highly subjective judgments. The court started from the premise that the court "has granted the attorney latitude to make reasonable choices among competing options" and that he or she should not be subject to second-guessing for a reasonable decision. (*Id.* at p. 648.) It endeavored to strike a balance that would punish only the most egregious conduct:

> [A]n appeal should be held to be frivolous only . . . when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit . . . .
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> [A]ny definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely

> unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals . . . . [T]he courts cannot be blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed.

(*Id*. at p. 650, internal quotation marks omitted.)

These principles have been fleshed out in other sanctions cases. *Westphal v. Wal-Mart Stores* (1998) 68 Cal.App.4th 1071, 1081, found that the issue raised "indisputably has no merit" and imposed sanctions. However, the court did acknowledge:

> Counsel and their clients have a right to present issues that are arguably correct. An unsuccessful appeal should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit . . . , involves facts which are not amenable to easy analysis in terms of existing law . . . , or makes a reasoned argument for the extension, modification, or reversal of existing law.

In sanctioning an attorney, the court in *In re White*, *supra*, 121 Cal.App.4th 1453, 1479-1486, found three habeas corpus petitions the attorney filed to have nothing but several dozen frivolous issues. This case alone could fill an unabridged dictionary on the meaning of "frivolous issue":

- Arguing ineffective assistance of counsel because appellate counsel "failed to ___," without completing the sentence.

- Numerous misrepresentations of fact: that the jury was given felony murder instructions, when it was not; that the court erroneously excused an African-American juror, when the juror in fact served; that the prosecution "planted" a certain witness, when no such person testified; that an instruction did not contain certain provisions, when it did; that the jury "imputed" to the defendant the acts of his accomplice, when the jury was instructed not to do so; that a client was subject to cruel and unusual punishment for an LWOP sentence, when in fact she had not received that sentence; etc.

- Misrepresentations of law: citing a case for the exact opposite of what it held; relying on Ninth Circuit cases specifically overruled by the United States Supreme Court before the petition was filed; etc.

• Repeating arguments virtually verbatim from prior pleadings that had already been denied.

The question or frivolous versus arguable issues has also been addressed outside the context of sanctions, sometimes in the process of admonishing counsel. In *People v. Craig*, *supra*, 234 Cal.App.3d 1066, the court found the issue raised to be frivolous, with "absolutely no record support for the contention":

> What is and is not an arguable issue depends both on the facts established in the record on appeal and on the state of the law. It is frequently a matter of opinion and therefore necessarily left to the professional judgment of counsel. However, that is not to say all issues are incapable of definitive classification. In some cases there may be issues on one extreme of the continuum which are indisputably arguable. On the opposite extreme of the continuum may be issues which are manifestly and indisputably not arguable. For want of a better description, the latter are "nonissues." This appeal involves a nonissue. It is unarguably not arguable. It is not merely frivolous, it is utterly hopeless.

(*Id*. at p. 1068.)

People v. Rojas, *supra*, 118 Cal.App.3d 278, 289, found it unnecessary to discuss issues "which either were not raised in the trial court or lacked even a modicum of support in the record," presumably finding them frivolous.

Another kind of frivolous issue was denounced in *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286 – one that "consistently has been rejected by every appellate district . . . . [¶] The time has come for appellate attorneys to take this frivolous contention off their menus." (As discussed below, however, counsel need not give up prematurely merely because there is some adverse law. If there is a reasonable possibility that another court, including the Supreme Court or a federal court, will rule differently, it may be appropriate to raise an issue that has previously been rejected, provided the adverse law is acknowledged and plausible reasons are given for a contrary rule.)

We note an "arguability" test of a different tenor, distinguishable from the present situation, discussing what issues must be raised to avoid ineffective assistance of appellate counsel. *People v. Von Staich* (1980) 101 Cal.App.3d 172, 175, finding no arguable issues requiring briefing in a *Wende* review, said: "[A]n arguable issue means an issue of sufficient substance that it is going to result either in a reversal or a modification of the judgment or is going to make new law." (See also *People v. Johnson*,

supra, 123 Cal.App.3d 106, 109 [rejecting contention that the court must review the record for additional issues even when counsel has raised a substantive issue; arguable issue must "have a reasonable potential for success" and must have potential to result in "a reversal or a modification of the judgment"].) This test arose in the context of debate on the duty to raise arguable issues and a concern that such cases as *In re Smith*, *supra*, 3 Cal.3d 192 and *People v. Rhoden*, *supra*, 6 Cal.3d 519 would mean that appellate counsel must raise any issue that is not frivolous. (See *People v. Scobie*, *supra*, 36 Cal.App.3d 97, 98-99.) That concern was resolved in *Jones v. Barnes*, *supra*, 463 U.S. 745, which found no such duty.

B. Characteristics of Arguable and Frivolous Issues

From the authorities discussed above, the basic contours of what might constitute an arguable or frivolous issue can be sketched.

One category of frivolous issue is the nonsensical kind – the complete nonissue. This kind does not parse logically, or it is based on an outright misunderstanding of the law, or it has no support in the record. Actual examples we have seen, all from a number of years ago, include:

- A brief relied on a series of old cases interpreting Rules of Court that had been repealed more than three decades ago.

- A brief raised as the sole issue the court's order restricting the scope of defense counsel's argument at trial. It failed to note that the case in which the order was made had ended in a mistrial; in the retrial at which the defendant was convicted and from which he appealed, the court did not issue the same order.

- A brief argued that the court abused its discretion in permitting the irrelevant and inflammatory testimony of a series of witnesses. These witnesses had not testified.

Fortunately, the exercise of normal care makes it easy for counsel to avoid these issues. Unfortunately, we do occasionally encounter even the obvious nonissue.

Another kind of frivolous issue is not facially absurd, but for various reasons cannot reasonably result in a favorable ruling beneficial to the client. This kind is much more difficult to identify than the nonsensical one; but that difficulty does not excuse failing to exercise judgment, nor does it turn a poor judgment into a good one.

Not infrequently counsel face a situation in which the *client* is demanding a non-arguable issue be raised. Counsel has an independent duty to assess the issue's arguability properly and neither must nor may raise an objectively unreasonable point merely because the client insists.[7] Nevertheless, counsel should respectfully explain to the client the decision not to raise the issue and endeavor to make it clear counsel is working zealously on the client's behalf.[8]

The ultimate test for an arguable issue is *whether a reviewing court could reasonably accept the argument and find the client entitled to some kind of relief, in light of (a) relevant law, (b) the facts in the case, and (c) applicable appellate standards for reviewing judgments.* If no reviewing court could reasonably do so, the issue is frivolous. All of these conditions for arguability must be satisfied.

1. Support in the law

First, the issue must take account of existing law. It may not ignore relevant cases, including a series of recent decisions decisively rejecting the point. (E.g., *People v. Hearon*, *supra*, 72 Cal.App.4th 1285, 1286 [re boilerplate argument on reasonable doubt instruction: "We regard the issue as conclusively settled adversely to defendant's position"].)

If there is no extant law to support the position, the brief must say so and offer credible reasons why the law should be as counsel urges. If the law is adverse, the argument must acknowledge that fact and may urge the law should be changed, provided there are plausible grounds to support the contention, based on cognizable legal principles, logic, and policy. (E.g., *People v. Feggans* (1967) 67 Cal.2d 444, 447 ["counsel serves both the court and his client by advocating changes in the law if

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[7]Counsel does not have a duty to raise even non-frivolous issues merely because the client wants them. (*Jones v. Barnes*, *supra*, 463 U.S. 745, 751-754.)

[8]In addition to invariable respect, a little creativity can come to the rescue. Many years ago a client insistently demanded that counsel raise the "fruit of the mind" issue. He did not explain what this was, but threatened charges of malpractice and ineffective assistance. Clearly manufacturing such a theory would be untenable and would result in a frivolous issue. Finally we suggested the attorney try to work in the phrase "fruit of the mind" somewhere in the brief, in the context of an actual issue, so he could show it to the client. The stratagem seemed to have worked: the client was happy, and the court did not have to answer an unintelligible contention, although it may have been puzzled by a peculiar turn of phrase counsel had employed in the brief.

argument can be made supporting change"].) If there is adverse Court of Appeal authority but the Supreme Court has not yet reached the issue, if the Supreme Court has given signals it is reconsidering a legal rule, or if there is a reasonable possibility of federal relief, it may well be appropriate to raise the issue, as long as counsel acknowledges the contrary law.

It is important whenever possible, for both appropriate issue assessment and persuasiveness, to look for fact-specific cases and to argue by analogy, not just general principles. Counsel must take particular care to read authorities carefully and discern the actual holding of cases. It can be very dangerous to use quotations taken in isolation as "the law." One of the most common defects in briefing is relying on general language from cases that facially seems to suggest one thing but when read in context means something quite different. We have seen counsel earnestly argue issues based on quotations that only partially explain the decision and do not embody critical nuances; when read in light of the entire decision, the issues as framed simply do not comport with the law.

2. Support in the facts

Second, the argument must be based on the facts in the record. The factual foundation must be set forth accurately, reflecting the truth, the whole truth, and nothing but the truth. It may not selectively assert certain relevant facts and ignore others. It may not rely on facts outside the record.

A good safety technique is always to check citations to the record after the brief is written, making sure they accurately and completely reflect the case. Nothing is more embarrassing than having opposing counsel or the court point out incorrect representations of the facts in one's brief.

3. Conformity with appellate standards for reviewing judgments

Third – and this is the area where many otherwise well argued briefs fall short – the issue must be reasonable in light of appellate principles for reviewing decisions: standards of review, standards of prejudice, presumptions, and rules concerning reviewability (forfeiture, mootness, standing, etc.). An issue is not arguable merely because in the absence of these standards something favorable could be said about the client's case. It is arguable only if the appellate court could reasonably order relief within the framework and constraints of the applicable standards. All of these matters are treated at some length in chapters 4 and 5 of the ADI Manual. We will review some of the basics here.

a. Standard of review (deference to decision below)

Standards of review concern the degree of deference the reviewing court must pay to the decision-maker below.

Issues of pure law, such as the interpretation of a statute or the legal correctness of a jury instruction, are reviewed de novo on appeal – i.e., the court will resolve the question independently of the judgment reached by the lower court. (See ADI Manual, §§4.48, 5.31.)

Other matters, however, are considered much more deferentially. As to those, the decision below will not be upset unless the decision-maker could not reasonably have made it. For instance, the trial court's judgment call on the conduct of the proceedings or the ultimate dispositional order (such as the sentence or the child's permanent plan) will be disturbed only if it is an abuse of discretion, meaning it is arbitrary, capricious, and unreasonable under established legal principles and policies; in other words, no court could reasonably have made such an order. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) It is not credible to ask for reversal merely because a different decision was possible or would arguably have justified. Counsel must show a different decision was necessary as a matter of law. (See ADI Manual, §§4.46, 5.29.)

Likewise, the trier of fact's conclusions will stand unless the appellate court, viewing the evidence in the light most favorable to the prevailing party, finds no substantial evidence in support of the judgment. The evidence must be reasonable, credible, or of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Its sufficiency depends on the burden of proof. The evidence is insufficient if, but only if, no reasonable trier of fact could have found the applicable burden of proof was met.[9] Counsel cannot credibly argue the evidence was insufficient merely because contrary evidence was presented, or unfavorable witnesses were impeached in some way, or a trier of fact might reasonably have reached a different conclusion about the implications of circumstantial evidence. Counsel must go further and show the evidence could not as a matter of law have supported the decision. (See ADI Manual, §§4.47, 5.30.)

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[9] *Jackson v. Virginia* (1979) 443 U.S. 307, 316 (beyond a reasonable doubt); *In re Jasmon O.* (1994) 8 Cal.4th 398, 423 (clear and convincing); *Lake v. Reed* (1997) 16 Cal.4th 448, 468 (preponderance); cf. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082, conc. opn. of Brown, J. (evidence sufficient under preponderance standard, but not under clearing and convincing one).

Arguing an issue governed by a deferential standard of review can be a formidable task. And failure to craft an argument within that framework is probably the most common cause of frivolous issues. We sometimes see a contention that ignores the standard – or gives lip service to it but then goes on to argue as if it didn't exist and the appellate court were free to make a de novo decision. To be effective (and non-frivolous), an argument under a deferential standard must explicitly state and then demonstrate, not only how the decision below might reasonably have been different, but why no reasonable decision-maker could have reached that conclusion. Unless an appellate court could reasonably accept that, the issue is simply not arguable.

b. Prejudice

An error is not reversible unless it is prejudicial. With very few exceptions, an issue will not be successful on appeal unless counsel can demonstrate to the court not only that there was error but also that it affected the outcome of the proceedings. (Cal. Const., art. VI, § 13; Pen. Code, §§ 1258, 1404; Evid. Code, §§ 353, 354.) In assessing this critical question, counsel must take account of the applicable standard of prejudice, asking, "What likelihood of prejudice must be shown to get a reversal or other relief?" Counsel must then weigh the facts of the case in light of this standard, asking, "Can a reasonable argument be made that the error was prejudicial?"

Although a few errors are reversible per se (see *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Rose v. Clark* (1986) 478 U.S. 570, 577-578; see ADI Manual, §4.51), the vast majority require an affirmative showing of actual prejudice. Those involving federal constitutional error are reversible unless the party favored by the error can show beyond a reasonable doubt it was not prejudicial. (*Chapman v. California* (1967) 386 U.S. 18; see ADI Manual, §4.52.) Other errors are considered harmless unless the appellant shows it is reasonably probable the error affected the outcome. (*People v. Watson* (1956) 46 Cal.2d 818; see ADI Manual, §4.53.)[10]

Appellate counsel may not slight considerations of prejudice. A great many appeals are disposed of because any error that occurred was harmless. For an issue to be arguable, counsel must be able to make a credible argument that the error was prejudicial.

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[10]"Reasonably probable" in this context does not mean a more than 50% chance, "but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics original; *Watson*, 46 Cal.2d at p. 837.)

If no such argument can be made (for example, there was a minor error and overwhelming evidence), the issue is likely frivolous.

c. Appellate presumptions

Most presumptions and principles on appeal favor the respondent. For starters, the judgment is presumed to be correct, and unless the contrary is affirmatively shown, the judgment will be affirmed. From this principle flow a number of generally applicable propositions: participants in a trial are presumed to have followed their duty; evidence is viewed in the light most favorable to the judgment; even if the court gave legally incorrect reasons for a decision such as admitting or excluding evidence, no error is found if legally correct reasons would require the same result; conflicts and silence in the record are generally resolved in favor of the decision below; error does not result in reversal unless it is prejudicial. (See particulars and supporting authorities in ADI Manual, §4.65.)

Again, counsel must accept and work within these presumptions. They must acknowledge them straightforwardly and explain why they do not foreclose relief in the case. If counsel cannot do this, the issue is likely frivolous. It does no good – and causes actual harm, in the form of wasted resources – to ignore the presumptions and later, inevitably, have to tell the client, "Sorry, but we lost."

d. Reviewability

An issue may not be reviewable on appeal because the appellate court has no power to review the decision or, if it has the power, almost always declines to exercise it. The ADI Manual looks at a number of such situations, including jurisdiction, mootness, standing, procedural prerequisites, invited error, the fugitive dismissal rule, previous resolution of the same matter, etc. (§§2.5 et seq., 4.34 et seq.)

Here we note briefly the obstacle that is by far the most common – forfeiture or waiver, a failure to assert the contention properly in the lower court. Usually, if the lower court has not had a chance to consider the issue or the opposing party has not had a fair chance to argue or introduce evidence on the subject, the issue will not be considered on appeal. Counsel may consider ways around this obstacle, such as arguing: the issue was obvious to all parties and the trial court, even without a formal objection; the issue was raised indirectly or substantially, even if not exactly as formulated on appeal; raising it would have been futile in light of other rulings by the trial court; the issue implicates fundamental due process; trial counsel rendered ineffective assistance in failing to raise it; or the law has since changed. (See more detailed discussion in ADI Manual, §5.27; see

also CCAP article, "Procedural Hurdles - Dealing with Waiver."[11]) If one or more of these arguments or some equivalent cannot credibly be made, counsel should seriously question whether the issue should be raised at all.

Finally, it bears emphasis that the principles for reviewing judgments on appeal outlined above – standards of review and prejudice, presumptions, and reviewability – are part of the framework within which appellate courts make decisions and within which counsel must operate. Counsel's job is to represent the client as a lawyer, not a cheerleader. It does no good to bemoan appellate principles as inconvenient or unfair, or to ignore them. They are there, and the courts will apply them. Counsel must incorporate them into their issue assessments and arguments, or else they will simply be wasting time and resources with no chance of helping their clients.

III. BRIEFING A WEAK ISSUE CREDIBLY

So far we have discussed assessing issues that are either inherently arguable or not. Sometimes, however, the issue is not "either-or": the way it is presented makes all the difference in whether it has a chance to benefit the client. If it is argued improperly, it may be utterly hopeless; but if it is framed and developed effectively, the issue can pass the threshold test – an appellate court could reasonably order relief based on it.

Frivolous issues based on ineffective briefing are of course of great concern to us, because they not only are wasteful of resources, but also actually deprive the client of a potential benefit. Happily, however, such problems are remediable. This section of the memo reviews some of the basic principles of effective briefing and particularly the art of presenting an apparently weak issue in an optimal way.

Chapter 5 of the ADI Manual deals extensively with briefing – from formal requirements, to the principles of good practice, to the art of persuasiveness. Counsel would do well occasionally to review its contents to get a refresher course or to improve an area of possible weakness. In this section we will look at some ways of salvaging a weak issue, turning it into one that has a reasonable, if not high, chance of benefiting the client.

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[11] http://www.capcentral.org/resources/criminal/prescriptions_wavier_assert.aspx .

A. Defining the Issue Optimally: Thinking Outside the Box

Sometimes an issue can be made credible by reframing it to avoid insuperable legal or even logical obstacles. Creativity and flexibility are key. A fairly standard general contention, such as insufficient evidence or abuse of discretion, for instance, may look as if it is merely second-guessing the decision-maker below, thus running afoul of the deferential standard of review applicable to such decisions. Shifting to a narrower focus on what the defect was can come to the rescue.

For example, an insufficiency of the evidence point is often foreclosed because it is not credible to urge that no rational trier of fact could find the burden of proof was met; but the brief may be able to show how the trier's conclusion was affected by evidentiary or procedural errors or was based on an incompletely developed factual picture. Abuse of discretion likewise can be very hard to establish, but sometimes the record allows a discretionary judgment call to be cast as failure to exercise discretion or to understand the scope of discretion, or other legal errors.

Obviously these adjustments are highly case-specific. The point stressed here is to come to grips with the reality of one's position. If "something" seems to be there, but one way of putting the issue just doesn't make it, counsel should neither push on and raise it anyway, nor give up prematurely, but should take the time to consider alternative ways of approaching the problem.

B. Taking Account of How the Respondent Might Answer

Law schools train attorneys to be able to take either side of an issue – and with good reason. Even though in later practice most attorneys may focus consistently on one side or another, they can be effective only if they thoroughly understand the pros and cons of their position. They must first think through its weaknesses. If there is a conclusive objection to it that cannot be answered in one way or another, the issue is frivolous. If not, counsel must consider how the likely objections can be met.

It is important to undertake this analysis at the outset. If the probable responses to the issue are strong and difficult to answer, it is a good idea to look for ways of reframing the issue so as to sidestep the foreseeable problems.

The fact that counsel at least should think this matter through at the start does not mean the opening brief must actually discuss every possible objection to a contention. Chapter 5, §5.37, of the ADI manual discusses the strategic pros and cons of anticipating and heading off the respondent versus waiting for rebuttal.

C. Arguing *Within* the Standards of Review, Prejudice, Etc.

As pointed out above, nothing contributes more swiftly to the creation of a frivolous issue than ignoring the standard of review, prejudice, presumptions, and reviewability and pressing on as if they didn't exist. Counsel must acknowledge them and then pitch the argument to show why they are met in this case.

For a sufficiency of the evidence argument, for example, counsel must review all of the evidence, stating it in the light most favorable to the judgment, and then must demonstrate why no reasonable of trier of fact could reach the conclusion it did. Thus counsel must say circumstantial evidence on a point not only could have been read differently but as a matter of law had to be read differently. Counsel must not only show a witness was impeached or gave conflicting stories, but go on to argue explicitly that the testimony was inherently incredible, so that no one could reasonably believe it. That additional step converts the matter from a trial argument on the facts to a legal issue on appeal.

The same step must be taken in arguing abuse of discretion. It is not enough to criticize the decision and argue another one would have been justified. The brief should refer expressly and repeatedly to the standard of review and outline the argument in terms of why no reasonable trial court could have made the decision.

It is often helpful in dealing with deferential standard of review issues to use fact-specific cases in the argument. Even if there are few favorable cases in the area, counsel should endeavor to distinguish the unfavorable ones. Counsel can also seek indirect support in cases that at least are arguably analogous or that are based on principles favorable to the client's position.

D. Aiming for Persuasiveness

In the pressure of a busy practice and in the face of discouragingly infrequent victories, it is all too easy to fall into bad habits, mechanically churning out arguments that look a lot like another – very standard contention, cut-and-paste boilerplate law, then mere repetition of the facts. When you have weak issues to begin with, this kind of brief runs a grave risk of producing a sure "loser," extinguishing the client's already-low chances of relief. Mechanical briefs tend to share these characteristics:

- In content, they may have very little original analysis, make only feeble if any attempts to argue from analogy, and show few signs of critical thought as to how the contention could be answered and what might be said to avert or rebut such

response. This kind of defect hurts even a strong argument and will often be fatal to a marginal one.

- In tone, assembly-line briefs may be "flat," conveying no sense of conviction. It looks as if counsel yielded to the temptation to put covers on a hastily produced document, then get on to the next case, with little effort at true advocacy, meaning a determined effort to make the case "special" and compelling and persuasive.

Chapter 5, §5.83 et seq., explores the art of crafting a persuasive argument in some detail; a few points are highlighted here. As outlined in the Manual, the main requisites of persuasive briefing include:

- C*redibility* (accuracy, objectivity, reasonable good judgment, and professionalism).

- *Effective use of the written word* (clarity and conciseness, tailoring to the audience, relentless revision, confidence of tone, strong writing techniques, technical correctness).

In general, advocacy means crafting arguments with the goal of persuasion, not just filing, in mind. The writing needs to carry a sense of assurance and commitment: if you don't sound in the least persuaded yourself, how can you persuade a skeptical court?

That decidedly does not mean loss of objectivity. As attorneys we need adequate detachment in order to generate credibility for the client's position, make wise judgments, and work skillfully within the system, using legal language and analysis effectively to get our audience, the court (a group of experienced professionals themselves), to follow our lead.

Persuasiveness does mean: you care about your client and your client's case; you communicate that caring to the court; you consciously make an effort to get the court to care, too. Keep in mind the image of an assembly-line decisional process for "routine" cases at our overworked courts, and make it a goal to get everyone to agree this case really deserves special attention.