

WORKING WITH TRIAL COUNSEL

Trial counsel is a valuable resource to help flesh out the dry appellate record and understand nuances about your case. To this end, when first appointed to the case, it is good practice to communicate with trial counsel – ask her impressions of the case and about possible issues she feels merit appellate investigation. The [State Bar Website](#) has all California attorneys’ contact information.

Usually, after this initial positive communication, subsequent discussions about possible problems with the presentation of the case are easier for both participants. Once you begin reviewing the transcripts, you might discover possible ineffective assistance of counsel (IAC). (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) Trial counsel’s input is almost always necessary to evaluate an IAC claim. Because this IAC investigation can be fraught with emotional difficulty,¹ it is important to cultivate a good relationship with trial counsel early on in the case.

It is usually most conducive to a good working relationship to approach trial counsel in an open-minded, non-accusatory way. Consider the difference between these approaches:

“I want to confirm your tactical reasons for not objecting to the confession evidence.” (Gives counsel the benefit of the doubt, by suggesting you think there probably were reasons.)

versus

“I see an IAC issue here, because you failed to object to the confession.” (Puts counsel on the defensive immediately, by suggesting she “failed” in some way and you have already decided she was probably ineffective.)

It is also important to remember the focus of communications investigating possible IAC – the fact-specific issue at hand. In most cases, appellate counsel should not try to show trial counsel’s incompetence in a generalized sense. It is not appellate counsel’s job to demonstrate that trial counsel has no business practicing law. Very often, the reason an

¹Trial counsel could be embarrassed by her omission or nervous about her bar license status as a result of the reporting duties associated with judgments modified or reversed based, respectively, on “grossly incompetent representation” or “incompetent representation.” (Bus. & Prof. Code, §§ [6068, subd. \(o\)\(7\)](#) [self-reporting duty] and [6086.7, subd. \(a\)\(2\)](#) [court reporting duty].) Further, no one likes challenges to the quality of her work. Defensiveness is a common reaction.

IAC claim is necessary is to overcome a procedural hurdle for the client such as forfeiture. Something to keep in mind is that under the law, even if counsel did an excellent job overall, but counsel made one error that could have affected the outcome, an IAC claim is appropriate. Communicate to counsel that you understand this and are sympathetic.

In the majority of cases, trial counsel is cooperative and understands appellate counsel's job is to advocate for her client and investigate possible IAC claims. While trial counsel may not be happy with the investigation, she knows that it is her duty to cooperate. (See [State Bar Formal Opinion # 1992-127](#).) Not only should she speak with you or the person facilitating the IAC investigation, but she should also send you, upon request, the client's file. In criminal cases, it is counsel's duty to maintain the former client's file on request ([State Bar Formal Opinion # 2001-157](#))

Sometimes, trial counsel may be reluctant to speak with appellate counsel about the case. She may fail to return your many calls or may not answer your questions directly when you do speak. In this situation, it may be helpful to emphasize you are fighting the same battle, explain why a discussion is necessary, and send trial counsel the State Bar Formal Opinion # 1992-127 mentioned above and remind counsel about her duty to cooperate with successor counsel. Or sometimes, trial counsel is a busy public defender who does not have sufficient time to speak about the matter. If that is the situation, you could speak with trial counsel's supervisor and request time be set aside from trial counsel's work schedule for this important discussion.

If trial counsel continues to be uncooperative and unresponsive, send counsel a certified letter, with return receipt requested, including the State Bar Formal Opinion # 1992-127, ask for cooperation, and set forth all your prior attempts at obtaining cooperation. Counsel's failure to respond may be used to help establish the merits of a proposed habeas claim under *People v. Pope* (1979) 23 Cal.3d 412, 426 [where "counsel was asked for an explanation and failed to provide one" ineffective assistance of counsel may be established]. For further assistance on this topic, contact the ADI assigned attorney.

For further authorities on counsel duties, see the ADI web page, [Ethical Considerations in Appellate Practice](#).