

APPELLATE DEFENDERS, INC.
555 WEST BEECH ST.
SUITE 300
SAN DIEGO, CA 92101-2939

(619) 696-0282

Automated Attendant: (619) 696-0284

Fax: (619) 696-7789
www.adi-sandiego.com

January 27, 2005

TRIAL ATTORNEY'S NAME
ADDRESS

RE: *People v.* _____
Court of Appeal #
Orange County Superior Court #

Dear Mr. _____:

Enclosed find the petition for writ of habeas corpus filed in Mr. _____'s case. Unfortunately, I never heard from you after our short telephone conversation on December 15, 2004, after which you indicated you would call me back.

As you can see by reviewing the petition, there are two main issues raised – *Brady* error and ineffective assistance of counsel. Even though this later issue is raised, I am writing this letter to urge you to keep Mr. _____'s confidences.

THE ATTORNEY DUTY OF CONFIDENTIALITY REQUIRES YOU NOT TO REVEAL CLIENT CONFIDENCES OR SECRETS UNTIL THE TRIAL COURT DETERMINES THE SCOPE OF MR. _____'S WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AFFECTED BY MR. _____'S PETITION.

An attorney has a duty of confidentiality not to reveal client confidences and secrets. (Bus. & Prof. Code, § 6068, subd. (e); Rutter Group, California Practice Guide: Professional Responsibility, (1997) Chapter 7, p. 7-2.) This duty is broader than the attorney-client privilege, which applies when information is sought through discovery or testimony. (Evidence Code sections 954 and 958; see also Zacharias, "Privilege and Confidentiality in California", (1994) 28 U.C. Davis L.Rev. 367.)

Confidences and secrets are not just that information which Mr. _____ told you during your representation of him, but they include ALL other information gained in your professional relationship representing Mr. _____ which would be embarrassing or likely detrimental to him if revealed. (Rutter Group, California Practice Guide: Professional

People v. _____
Court of Appeal #
January 27, 2005
Page 2

Responsibility, (1997), Chapter 7, pp. 7-3, 7-5, 7-6.) Even matters of public record can be client secrets if the attorney learned of the matter during his representation of the client. For example, an attorney has not duty to reveal the existence of his client's prior convictions, even though the existence of those prior convictions is public record. (California State Bar Formal Opinion no. 1986-87.)

Thus, an attorney must not do anything to breach the trust reposed in him or her by the client. (California State Bar Formal Opinion No. 1986-78.) Arguably, any out-of-court communication with the Attorney General or District Attorney about Mr. _____'s case violates your statutory duty not to reveal client confidences and secrets. Revelation of attorney-client secrets and confidences should only be made in court, after the court has determined the scope of the waiver made by Mr. _____'s ineffective assistance of counsel claim. (See *In re Gray* (1981) 123 Cal.App.3d 614, 616 [waiver of privilege goes only to information relevant to issue raised].) Such a claim is not a waiver of the duty to maintain all attorney-client confidences and secrets, but a waiver to maintain only those confidences and secrets which are necessary to the resolution of the ineffective assistance of counsel claim. An attorney should wait for a judicial determination of the parameters of the waiver before revealing any client confidences or secrets. (See *In re Scott* (2003) 29 Cal.4th 783, 811-814.)

Accordingly, as Mr. _____'s counsel, I request that you refrain from speaking with the Attorney General or others about Mr. _____'s secrets and confidences until ordered to do so by the court. (See *Durdines v. Superior Court* (1999) 76 Cal.App.4th 247; Cal. Rules of Court, rule 4.551.)

Sincerely,

Cindi B. Mishkin
Staff Attorney
APPELLATE DEFENDERS, INC.