

MALPRACTICE SEMINAR OUTLINE  
Wednesday, May 21, 2008  
Appellate Defenders, Inc.

I. Legal Malpractice.

- A. Standard of care: A lawyer has an obligation to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise under similar circumstances. (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308.) Malpractice is committed when attorney falls below standard of care if “their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake.” (*Unigard Insurance Group v. O’Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237.)
- B. Bad advice is not necessarily malpractice. As long as the advice given was based on an intelligent assessment of the problem after reasonable research was performed, bad advice is not malpractice. (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358.)
- C. Harmless error is not malpractice either. Plaintiff must prove that the error resulted in actual injury or loss. (*Alhino v. Starr* (1980) 112 Cal.App.3d 158, 176.) Client must prove that but for the attorney’s error a more favorable judgment would have been attained. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.)
- D. The elements of legal malpractice. In a legal malpractice action arising from a civil proceeding, the elements are
1. the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise;
  2. a breach of that duty;
  3. a proximate causal connection between the breach and the resulting injury; and
  4. actual loss or damage resulting from the attorney’s negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621.)

In a legal malpractice case arising out of a criminal proceeding, California, like

most jurisdictions, also requires proof of actual innocence. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545.)

II. Legal malpractice in criminal cases.

- A. The actual innocence requirement: A requirement even when plaintiff stands convicted. (*Wiley v. San Diego* (1998) 19 Cal.4th 532.)
1. Plaintiff sued his appointed public defender and the county for malpractice following his conviction for battery causing serious bodily injury. Prior to trial on the malpractice claim, the trial judge determined that plaintiff's innocence in the criminal matter was not an issue. The jury found for plaintiff, and defendants challenged the ruling on the issue of actual innocence. The California Supreme Court held that plaintiff must prove his innocence by a preponderance of the evidence in order to recover on the malpractice claim.
  2. A viable cause of action for attorney malpractice arising from a civil case requires (1) breach of a duty to use the skill, prudence, and diligence common to the profession, (2) a proximate causal connection between the breach and resulting injury, and (3) actual loss or damage. In civil actions, the focus is solely on the attorney's alleged error or omission; the plaintiff's conduct is irrelevant. (*Id.* at p. 536.) But in criminal cases, the client's own criminal act remains the ultimate source of the client's predicament; any harm suffered is principally due to the client's criminality. Thus, in addition to the elements of a civil cause of action for professional negligence, the clear majority of courts considering attorney malpractice in criminal cases require proof of actual innocence. These cases treat a defendant attorney's negligence as not causing the former client's injury unless the client proves that he or she did not commit the crime. (*Id.* at p. 536.)
  3. The public policy reasons for requiring proof of actual innocence are compelling:
    - a. Our legal system is premised in part on the maxim that a person cannot take advantage of his or her own wrong. Regardless of an attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of the defendant's own wrongdoing.
    - b. The attorney's breach of duty may warrant postconviction relief, which is adequately available in the criminal justice system, but it does not translate into civil damages that are intended to make the

plaintiff whole.

- c. Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury. There, the required nexus between the malpractice and harm is sufficient to warrant a civil action. Thus, the court said, “we therefore decline to permit such an action where the plaintiff cannot establish actual innocence.” (*Id.* at p. 539.)

B. Appellate Malpractice: *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351.

1. A criminal convict serving time for sex crimes involving a minor sued his former appellate counsel for legal malpractice. Plaintiff’s convictions included oral copulation with a minor, inducing a person under 17 to do model in the nude, and possessing photographs of a person under 17 engaging in or simulating sexual conduct. Plaintiff claimed counsel failed to raise all arguable issues on appeal and habeas corpus. Counsel argued issues on appeal but not an issue plaintiff wanted raised that the convictions were unjust because the acts forming the basis of his convictions “were not considered illegal in some states and most of the civilized world. He further claimed the age of consent is 15 in most countries, 14 in others and 12 in Spain.” (*Id.* at p. 1354.) Counsel did not represent plaintiff on habeas but did ghostwrite a petition, which plaintiff filed in superior court and the Court of Appeal. Plaintiff’s petition for review failed as was his federal habeas, federal appeal, and petition for writ of certiorari. (*Id.* at p. 1355.)
2. *Held.* The Court of Appeal granted summary judgment for defendant on three grounds.
  - a. There was no breach of the duty to raise arguable issues because counsel had no duty to raise plaintiff’s issues on appeal or to investigate possible bases for habeas relief. (*Id.* at pp. 1356-1357.) “In noncapital appeals, appointed counsel has no obligation to investigate possible bases for collateral attack on a judgment and no duty to file or prosecute an extraordinary writ believed to be desirable or appropriate by the defendant. (*In re Clark* (1993) 5 Cal.4th 750, 783, fn. 20; *In re Golia* (1971) 16 Cal.App.3d 775, 786.) Moreover, appellate counsel is not responsible for filing an actual frivolous appeal, nor is he required to contrive arguable issues. (*In re Smith* (1970) 3 Cal.3d 192, 198, 90.) The determination of whether appellate counsel was ineffective depends on whether counsel failed to raise an “arguable” issue,

that is, a “potentially successful contention.” (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 390-391, overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12.)”

- b. Plaintiff, as a criminal defendant, had no constitutional right to counsel in habeas proceedings, and consequently, no right to effective assistance of counsel. (*Miranda v. Castro* (9<sup>th</sup> Cir. 2002) 292 F.3d 1063, 1068; *Miller v. Keeney* (9<sup>th</sup> Cir. 1989) 882 F.2d 1428, 1432.) Therefore, counsel had no duty to preserve plaintiff’s right to federal habeas corpus review or to provide any assistance, advice or drafting in connection with the postconviction collateral proceedings. (*Redante v. Yockelson, supra*, 112 Cal.App.4th at p. 1357.)
- c. Plaintiff did not establish his actual innocence in a postconviction proceeding. (*Ibid.*)

C. Post-conviction relief requirement: *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194.

- 1. A criminal convict suing his former criminal attorney for malpractice must obtain postconviction relief in the form of a final disposition of the underlying criminal case as a prerequisite to proving actual innocence in the malpractice action against former defense counsel. Forms of relief are:
  - a. acquittal after retrial,
  - b. reversal on appeal with directions to dismiss the charges,
  - c. reversal followed by the government’s refusal to continue the prosecution, or
  - d. a grant of habeas corpus relief.
- 2. Public policy reasons in support of this requirement are similar to those described in *Wiley*.
  - a. The convicted criminal’s own conduct is deemed to be the sole cause of his or her indictment and conviction, whether by trial or plea. (*Id.* at p. 1203.)
  - b. Criminal defendants are afforded unique constitutional and statutory guarantees different than those afforded civil litigants.

Among those rights are the duties imposed on judges to assure that guilty pleas are knowingly, intelligently, and voluntarily offered, that there is a factual basis for the crime, and that the defendant's constitutional right to effective assistance of counsel has been honored. (*Ibid.*)

- c. The criminal justice system itself provides redress for errors and omissions of defense counsel through ineffective assistance claims on habeas or appeal. (*Ibid.*)
- d. The requirement of postconviction relief protects against inconsistent verdicts – such as a legal malpractice judgement in favor of a plaintiff whose criminal conviction remains intact – that would contravene a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. (*Id.* at p. 1204.)
- e. This requirement also promotes judicial economy. Many issues litigated in the effort to obtain postconviction relief, including ineffective assistance of counsel, would be duplicated in a legal malpractice action; if the defendant is denied postconviction relief on the basis of ineffective assistance of counsel, collateral estoppel principles may operate to eliminate frivolous malpractice claims. (*Ibid.*)
- f. Finally, requiring postconviction relief encourages representation of criminal defendants by reducing the risk of baseless malpractice actions. (*Ibid.*)

### III. Statute of Limitations.

#### A. California Code of Civil Procedure section 340.6, subdivision (a).

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

- (1) The plaintiff has not sustained actual injury;

- (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
- (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
- (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

B. Termination of attorney-client relationship.

1. Attorney-client relationship terminates when task has been completed. (*Panattoni v. Superior Court* (1989) 203 Cal.App.3d 1092.) Termination of relationship occurs when it happens by operation of law, withdrawal, discharge, or the mutual consent and agreement of the parties. (*Hensley v. Caietti* (1983) 13 Cal.App.4th 1165, 1170.)

C. Staying the malpractice action pending timely pursuit of postconviction relief.

1. Plaintiff must file malpractice action within statute of limitations. If plaintiff's conviction remains intact, court may stay malpractice suit during the period in which the plaintiff timely and diligently pursues postconviction remedies. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210-1211.)

IV. Avoiding legal malpractice

A. Define your role - managing client expectations.

1. Attorney's authority extends to making decisions on issue selection and strategy. (*Jones v. Barnes* (1983) 463 U.S. 745, 751-754; *In re Horton* (1991) 54 Cal.3d 82, 95, [defense counsel has complete control of defense strategies and tactics].)
2. Client's authority is to decide the basic goals of the appeal.
  - a. Whether to pursue or to abandon the appeal. (*People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for abandoning appeal].)
  - b. Whether to waive an issue because of possible adverse

consequence.

B. Communicate - majority of legal malpractice cases arise out of failure to communicate.

1. Keep clients apprised of key events
2. Explain reasons for your decisions.
3. Ethical duty of attorney to communicate with client.
  - a. Attorney's duty is to respond promptly to status inquiries of clients and to keep clients reasonably informed of significant developments. (Bus. & Professions Code, § 6068, subd. (m).)
  - b. Attorney must keep client reasonably informed about significant developments, including promptly complying with reasonable requests for information and copies of significant documents. (Cal. Rules Prof. Conduct, rule 3-500.)

C. Document your file.

1. Notes to file or confirming letters
2. Issues discussed with client
3. Issues researched and rejected and why

D. Don't miss deadlines.

1. Calendaring
2. Automatic email notification from COA.
3. Keep on top of caseload.

V. Duties of Appellate Counsel

- A. Right to effective assistance of counsel. Criminal defendants have the constitutional right to effective assistance of counsel, “acting reasonably within the range of competence demanded of attorneys in criminal cases. Not only does the Constitution guarantee this right, any lapse can be rectified through an array of postconviction remedies, including appeal and habeas corpus. Such relief is afforded even to those clearly guilty as long as they demonstrate incompetence and resulting prejudice, i.e., negligence and damages under the same standard of professional care applicable in civil malpractice actions.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1203.) These protections safeguard against convictions of the wrongly accused. They also support the principle that an individual who was convicted and has not obtained postconviction relief should not be permitted to shift responsibility for his or her predicament to former criminal defense counsel. (*Id.* at pp. 1203-1204.)
- B. IAC test. Constitutionally defective representation on appeal arises when attorney’s act or omission was objectively unreasonable and there was a reasonable probability that but for counsel’s error the appellant would have prevailed on appeal. (*Smith v. Robbins* (2000) 528 U.S. 259, 285 [120 S.Ct. 746, 145 L.Ed.2d 756, 780].) Ineffective assistance of counsel on appeal claims are examined under the two-prong test set out in *Strickland v. Washington* (1984) 466 US 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674, 694].) Namely, was there error and was it prejudicial.



C. Duty to raise arguable issues.

1. 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.)
2. 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. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 646; see also Code Civ. Proc, § 907.)
3. [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. . . .
4. [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, emphasis added, internal quotation marks omitted.)
5. *People v. Johnson* (1981) 123 Cal.App.3d 106, defined an arguable issue: [A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel’s professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the

issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment. (*Id.* at p. 109, emphasis added.)

- D. Duty to argue issues properly. (*People v. Taylor* (1974) 39 Cal.App.3d 495, 496. [appellate counsel failed to include authorities in support of contentions in “woefully inadequate” brief].)
  - E. Duty not to argue against client. (*People v. Barton* (1978) 21 Cal.3d 513, 519.)
  - F. Duty to obtain adequate appellate record (*People v. Barton* (1978) 21 Cal.3d 513, 519.) But where other portions of the record permit the reviewing court to fully consider and resolve the issue on appeal, there is no error. (*People v. Siegenthaler* (1972) 7 Cal.3d 465, 469.)
  - G. Duty to advise of adverse consequences. (*People v. Harris* (1993) 19 Cal.App.4th 709.) In this case defendant filed a habeas petition against former appellate counsel and alleged IAC for pursuing the appeal. Appellate counsel filed a brief alleging an error in credits. Court of Appeal remanded and also found, pursuant to respondent’s argument, that the trial court procedurally erred in striking a special circumstances allegation. On remand, the trial court declined to strike the special circumstances allegation this time and appellant received a life without parole sentence. (*Id.* at pp. 712-713.) In the habeas proceeding, the Court of Appeal found counsel not ineffective because counsel had fully advised appellant of the possible adverse consequences and appellant did not choose to abandon the appeal. (*Id.* at p. 715.)
  - H. Duty when error or prejudice depends on facts outside the record. Appellate counsel has no duty to investigate possible bases for collateral attack on judgment by way of habeas petition and no duty to file a petition. If counsel becomes aware of error that would support a habeas petition, counsel has an ethical duty to notify the client of habeas option or take other appropriate action. (*In re Clark* (1993) 5 Cal.4th 750, 783, fn. 20; *In re Golia* (1971) 16 Cal.App.3d 775, 786.)
- VI. What to do if threatened with suit or sued.
- A. Contact ADI.
  - B. ADI carries malpractice insurance that covers your appointment.