

Initial Steps in Handling a Criminal Appeal

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This article discusses the obligations of counsel in the initial phase of the appeal, immediately following appointment of counsel. Those steps include reviewing the notice of appeal for completeness, determining whether a certificate of probable cause is necessary to perfect certain appellate issues, and other initial considerations such as bail, the non-English speaking client, potential adverse consequences, and abandonment/abatement decisions.

The appeal is typically perfected and the initial steps described in this article are taken before appointment of appellate counsel. However, appellate counsel should be sensitive to the limitations imposed by the failure to preserve an issue for appeal, the process by which certain limitations may be removed, and the steps to obtain the client's release pending the appeal.

The transition of the case from trial counsel to appellate counsel is a delicate one. Appellate counsel can assure a smooth transition and best serve the client's interests by assessing what has been done, communicating with the client about the goals for the appeal, and taking the necessary steps consistent with those goals. This frequently requires appellate counsel to consider matters the client has already discussed with trial counsel. For this reason, it is important to seek input from former counsel. As part of the initial case classification, CCAP staff attorneys may also have considered the initial steps, and may be consulted.

A. Notice of Appeal

The right to appeal in a criminal case is circumscribed by statute and the California Constitution. (Cal.Const., art. VI, § 11; Pen. Code, § 1235.) An appeal is initiated by

filing a notice of appeal with the clerk of the superior court within 60 days from rendition of the judgment or challenged order. (Cal. Rules of Ct., rule 8.308(a).) The appeal may be taken from the final judgment, which is defined to include an order granting probation, an insanity commitment, or an addiction commitment. The defendant may file a general notice of appeal, simply appealing from the judgment following a jury or court trial or a contested probation revocation. (Pen. Code, § 1237, subd. (a).) This notice does not require any specification of issues, and counsel on appeal is not limited to any designation of issues by trial counsel. There is a further right to appeal orders made after judgment which affect the substantial rights of the defendant. (Pen. Code, § 1237, subd. (b).)

There are additional technical requirements when a criminal defendant wishes to appeal following a plea of guilty or no contest or an admitted violation of probation. For a complete discussion of this subject, including certificates of probable cause and lists of appealable and non-appealable issues after guilty pleas, see the training materials on Handling Rule 8.304 [formerly 30(b)] appeals.

B. Detecting Errors in the Notice of Appeal and Relief from Default

Appellate counsel must be able to recognize defects in the notice of appeal which need to be corrected in order to reach an appellate issue. This includes untimely notices, as well as notices which are timely but otherwise defective. For a complete discussion on detecting and correcting errors in the notice of appeal, see the training materials on Handling Rule 8.304 [formerly 30(b)] appeals.

C. Bail or Stay Pending Appeal

1) Bail

The setting of bail pending appeal of a misdemeanor conviction is a matter of right. (Pen. Code, § 1272, subd. (2).) Release after a felony conviction, however, is within the trial

court's discretion. (Pen. Code, § 1272, subd. (3).)

Appellate counsel should first consider whether a client wants or would qualify for release pending appeal, and whether or not it is in the client's best interests. If the client is released on bail, he generally will not receive credit against incarceration time. In addition, the cost of bail may be high, and the issues on appeal may be such that a return to custody is certain to be for at least the same period of time as the appeal might take. Other factors also influence the decision to make an application for bail, release on own recognizance or stay pending appeal. For example, although the client may ask that such a motion be made, a secondary realistic limitation is the availability of property or funds to post as surety should an amount of bail be set. Counsel should not make any assurances or commitments to the client regarding bail or stay pending appeal until counsel has gathered the relevant information and has consulted with a CCAP staff attorney.

CAVEAT: Although there undoubtedly will be cases where a bail motion is appropriate, the relatively high volume of other cases, along with the degree of showing necessary, militate against the court's granting such motions in the majority of cases. As a result, careful consideration should be given to the appropriateness of a bail motion and the likelihood of success before preparing or presenting an application for bail.

A motion for bail, release, or stay pending appeal, must be made in the first instance in the trial court. Any application to the Court of Appeal must demonstrate that a proper application was made in the trial court and unjustifiably refused. (Cal. Rules of Court, rule 8.312(b); see sample Motion for Bail on Appeal.) Trial counsel should be the first resort because he or she has the unique advantage of possessing the information necessary to make the motion. This includes not only the statutory guidelines of Penal Code section 1272.1, but also other information which would influence the exercise of discretion by the trial court. For example, the client may have failed to appear at some

point in the proceedings and counsel may remember the reason given to the court and the disposition of any bench warrant. Also, in all likelihood, trial counsel will be familiar with the trial judge's philosophy on such matters and the information which would be most influential.

The matter is best resolved by trial counsel making the proper application even if it was not made earlier. If the motion was made earlier and denied, then appellate counsel should consider whether the trial court properly exercised its discretion and made the appropriate findings.

To qualify for release, a defendant convicted of a felony must demonstrate by clear and convincing evidence that he or she is not likely to flee and that he or she does not pose a danger to any other person or to the community. (Pen. Code, § 1272.1, subds. (a) & (b).) Factors relevant to the flight inquiry include ties to the community (such as employment, family ties, property holdings and length of residence), record of appearances, and the severity of the sentence the appellant is facing. There is the further requirement that the appeal not be taken for the purpose of delay and that it raise a substantial legal question which, if decided in the defendant's favor, is likely to result in reversal. This requires the court to find that the issues to be raised on appeal present "close questions." A "close question" is one that requires more substance than a finding that the issue is "not frivolous." (Pen. Code, § 1272.1, subd. (c).)

Although release after a felony conviction is within the trial court's discretion, the discretion is not unbridled and a reasoned determination requires a brief statement of reasons in support of an order denying a motion for bail on appeal. (Pen. Code, § 1272.1, subd. (c).) The statement must be of sufficient specificity to permit meaningful review. (*In re Podesto* (1976) 15 Cal.3d 921, 937-938.) The relief on application to the appellate court is frequently no more than an order that the trial court conduct a new hearing on the application and, if it is denied, support the denial by a record which will afford

meaningful appellate review.

If trial counsel is unwilling to make the application and appellate counsel is at such a distance from the court that appearance for the motion would be difficult, there are two other possibilities for covering the court appearance. First, the panel attorney can inquire whether the trial court will permit a telephonic appearance. If that option is not available, then the panel attorney should contact a CCAP staff attorney about associating a local member of the CCAP panel to make any required court appearances. (See sample Request for Associate Counsel & Associate Counsel Agreement.) If all else fails and the panel attorney will need to appear on the motion, prior travel approval should be sought in the Third and Fifth Districts.

If bail was granted before the client surrendered to serve the sentence or if the sentence is a county jail term as a condition of probation, there may be a possibility of a modification of the sentence at the conclusion of the appeal even following affirmance. (*In re Stallings* (1970) 5 Cal.App.3d 322, 329-330, overruled on other grounds in *People v. Cookson* (1991) 54 Cal.3d 1091, 1100.) The client should be cautioned that this possibility for sentence reduction is a rare event, but the possibility may motivate the client to do well while the appeal is pending. Before advising the client, counsel should research whether modification is legally permissible.

2) Stays

Typically, stays are addressed in the first instance in the trial court. (Pen. Code, § 1243.) When requesting a stay from the Court of Appeal (such as dependency Welf. & Inst. Code, § 300 cases, or in a criminal case involving an unconstitutional probation condition), counsel should specify the current status of the case and identify in detail the need for the stay. The court needs to establish relative priorities for its cases and determine whether overtime work should be expended on a true emergency. If the request for a stay accompanies a writ petition or other pleading, the cover of the petition or the

outside page of the pleading should clearly indicate in bold capital letters, “STAY REQUESTED,” followed by the date and the event(s) to be stayed (e.g., “STAY REQUESTED of the juvenile court hearing of ___ and all other proceedings in ___ County case number ___”). Where the stay is part of a writ application, it should be billed as part of the writ proceedings. Where the stay is made only in conjunction with the appeal, it is part of the appeal for billing purposes.

3) Relevant Compensation Considerations for Motion Work

A motion for bail pending appeal is considered part of the direct appeal; however, appointed counsel should be cautious about the number of hours expended on such a motion. For example, the courts will typically question why counsel needs to travel the length of the state to appear in superior court on such a motion. The Third and the Fifth Districts emphasize that travel expenses will not be paid without prior written application and preauthorization.

Two hours for preparing a bail application is reasonable. Time over this limit would be warranted for unusual circumstances which should be explained in an attachment to the claim form. While prior approval of the courts is not required before appointed counsel pursues a bail motion, before doing so the attorney should confer with the designated CCAP staff attorney.

For hearings, it is strongly recommended that counsel consider alternatives, including asking the local public defender or trial counsel to file the bail application or make appearances in the trial court or for similar assistance which can save travel expenses and time. Appearance for the motion in the superior court is not expected unless other alternatives were explored and not available.

When seeking preauthorization for travel time and expenses to appear on bail motions,

counsel should indicate in the application whether the court permits a telephonic appearance and, where such appearances are permitted in law and motion matters, indicate the reason this method cannot be used. (See Preauthorization Policies & Steps in Appointed Counsel Cases in the Third & Fifth District.) Appointed counsel may not commit the appellate court to payment for services by others, such as the local public defender or trial counsel.

The bottom-line is that work in this area should be limited to preparation of written pleadings unless the local public defender or trial counsel refuses to assist with the motion. As with other travel related expenses (other than oral argument), such expenses will not be paid without prior written preapproval from either court.

D. Representing a Non-English-Speaking Client

In a number of cases, the clients are not fluent in English. When representing such a client, it is counsel's responsibility to communicate with the client in his or her native language. Accordingly, letters to the client will have to be translated into the client's language. Moreover, when complex matters are to be discussed, it may be necessary to retain an interpreter for the purpose of interviewing the client in person or over the telephone. In the Third and Fifth Districts, prior approval for translator services must be obtained. In both courts, CCAP is authorized to process translator requests that do not exceed \$300 per case. (See policy for obtaining Preauthorization for Interpreter Expenses.)

E. Potential Adverse Consequences

Upon being appointed to represent a defendant who is appealing a conviction, counsel's duty to the client includes ascertaining whether his or her client runs the risk of being

harmful by proceeding with the appeal. Thus, it is incumbent upon counsel to become well-versed on the subject of adverse consequences. Although the subject is quite complex, see the article Handling Rule 8.304 [formerly 30(b)] Appeals for a discussion of a few examples of common adverse consequences.

G. Abatement Following Death of Client

For a discussion of this subject, see the article on Abatement. (See also, sample Motion for Abatement of Proceedings.)