

Final Steps in the Appellate Process: Issuance of the Opinion, the Remittitur and Transitioning Back to the Trial Court (rev. 2/22/2016)

Introduction

The remittitur is the final step in the appellate process. If neither rehearing nor review is granted, the Court of Appeal will issue its remittitur about 61 calendar days after the opinion has been filed. (Cal. Rules of Court, rule 8.272.) The issuance of the remittitur signals the end of the appellate court's jurisdiction. The matter is now properly back before the trial court, which must carry out the higher court's decision.

Unfortunately, without malice on the part of county clerks, remittiturs are often simply added to the stack of papers in a superior court file, without anyone realizing that further action by the trial court is necessary. **For this reason, it is appellate counsel's responsibility to take whatever steps are necessary to ensure a successful transition back to the trial court and implementation of the appellate court's order.**

First Things First!

Send your client a copy of the opinion! This fulfills your ethical obligation to keep your client informed of significant developments in the case. It is highly recommended that you *not* assume that the court has fulfilled this obligation for you. In fact, both the Third and the Fifth District's stated policy is that the opinion is sent to counsel (and CCAP if it is an appointed case), but *not* to the defendant/appellant. Thus, unless you inform your client that the opinion has issued, your client will not know that the appeal is all but over.

Your cover letter to the client on this occasion should impart either: 1) here is the opinion, advice that you will not be filing petitions, and relevant due dates for filing petitions in pro. per.; *or* 2) here is the opinion and advice that you will be filing certain petitions on the client's behalf. This mailing should also include the client's transcripts for the case if you are not continuing to represent him or her. (Unless another arrangement for mailing the transcripts has been previously agreed to, such as sending them to a family member for safekeeping.) See our "31 Things" article, "Client file & transcripts":

http://www.capcentral.org/procedures/case_manag/31things.asp

Mailing The Transcripts To An Inmate Client

Transcripts should be returned to the client/inmate via a service such as UPS or other similar service provider which provides both a tracking number and insurance as part of their service. "Tracking number" means you are given a package number and can track when it was

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delivered to the prison. UPS will not deliver to a Postal Box address; use the street address for delivery, which is listed in our Facilities Phone Directory under "Shipping Address." (See <http://www.capcentral.org/resources/phoneweb.asp>) The package or box of transcripts must be properly marked with the attorney's name, return address and "Confidential Legal Mail." The return address must match the address listed with the State Bar.

Chapter 5, Article 41 of the CDCR Dept. Operations regs "Inmate Mail" does not say that a box or package cannot be accepted for delivery from an attorney (there are restrictions on boxes from other sources). If a prison refuses a UPS delivery because of their interpretation of the regs, then call the prison litigation coordinator for that institution and ask for assistance. See also, Art. 41, sec. 54010.12.1 "Persons with Whom Inmates May Correspond Confidentially."

This advice is repeated in our article "Legal Mail Pitfalls," at: http://www.capcentral.org/procedures/client_matters/legal_pitfalls.asp

If The Case Has Been Affirmed

If the case has been affirmed, and the client has been serving the sentence imposed, the remittitur has little significance. However, if the client has been released on a stay or bail pending appeal, she or he should be informed well in advance of when the remittitur will issue and what to expect. The client may want trial counsel to file a motion to modify the sentence and, if that is a viable motion, appellate counsel should contact the trial attorney and/or coordinate efforts to ensure that is done. (See *In re Stallings* (1970) 5 Cal.App.3d 322, 329-331, discussing possible grounds for modification.) If you receive the remittitur but never received the opinion, act fast! Do you need to move to set aside the remittitur so petitions can be filed by either you or the client in pro. per.? If so, you will need to move as quickly as possible to recall the remittitur and reinstate the appeal, explaining the specific circumstances. See a sample motion in our online Motion Samples Book, under "R" for Recall Remittitur & Reinstate Appeal: <http://www.capcentral.org/resources/motion.asp>

If The Case Has Been Reversed – i.e., I Won, Now What?

Upon receiving the opinion, consider immediately the timing of the opinion, the length of your client's sentence, and what steps you need to take to get the case back to the superior court.

If the appeal has resulted in reversal entitling the client to release, appellate counsel should consider seeking a stipulation from the Attorney General for the immediate issuance of the remittitur. If deputy A.G. agrees, you will need to move as quickly as possible to draft the motion, get their signature, and file the motion in the Court of Appeal explaining the specific circumstances and need for it. See a sample motion in our online Motion Samples Book, under "S" for Stipulation for Early Issuance of Remittitur: <http://www.capcentral.org/resources/motion.asp>

If the A.G. will not agree to a stipulation, consider seeking a bail on appeal. See a sample motion in our online Motion Samples Book, under “B” for Bail on Appeal:

<http://www.capcentral.org/resources/motion.asp> Penal Code section 1272.1 sets forth three criteria for release on bail pending appeal. A win in the Court of Appeal makes two of the factors work in the client’s favor. First, if one has already received reversal from the Court of Appeal, in most cases, the likelihood that appellant would flee is remote. Second, it is easy to demonstrate the appeal “raises a substantial legal question which . . . is likely to result in reversal.” (Pen. Code, sec. 1272.1, subd. (c).) Since appellant has already prevailed on appeal, this factor has been readily demonstrated.

Generally speaking, if the case has been reversed when the remittitur issues, and depending on the nature of the win, appellate counsel might need to notify the superior court judge to get the case promptly calendared. Appellate counsel should also contact and coordinate with trial counsel. Rightly or wrongly, some superior courts take the view that it is the attorneys’ responsibility to get the case on calendar. The court clerk may or may not contact the attorneys to get the ball rolling. Consider the following situations:

If the win involves custody credit or other sentence modification which does not require appearance, appellate counsel might alert trial counsel and the superior court judge. Appellate counsel might also tell the client to check the prison face sheet in a couple of months to see if CDC received the amended abstract from the trial court.

If the remedy will require further court appearances and resolution of issues in the trial court, communication and coordination with trial counsel can be critical.¹ At the very least, appellate counsel should inform trial counsel of the reversal and ensure that an attorney will be protecting the client’s interests at the hearing.²

If the case has been reversed for a new sentencing hearing, appellate counsel should also transmit a copy of the opinion and the appellate record to trial counsel, along with any advice which will help further the goal of achieving a reduced sentence. Trial counsel should be reminded that the defendant is entitled to all the normal procedures and rights available at the time judgment is pronounced. (See *In re Cortez* (1971) 6 Cal.3d 78, 88.) Counsel should also communicate with the client about whether an updated probation report would present favorable

¹On this topic, please read *People v. Flores* (1988) 198 Cal.App.3d 1156, and ask yourself why three and one-half years passed between the appellate court’s remand for resentencing and the defendant’s return to the trial court?

²See *People v. Hill* (1974) 12 Cal.3d 731, 767-770 [appellate counsel did not appear at hearing after remittitur, and no attorney for appellant was appointed].

information and help in achieving the goal. (See *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744-745.)

If the case is remanded for the possibility of a new trial, appellate counsel should also promptly forward the a copy of the opinion and the appellate record directly to trial counsel. Sending the record to the client in prison will generally cause delay and frustration. In addition to the record, counsel may possess other information or evidence, collected over the course of the appeal, which may be helpful on retrial. Appellate counsel should forward this information and/or evidence to the client or trial counsel, as appropriate. If there were possible objections to evidence or motions which should have been made, and perhaps ought to be made at retrial, appellate counsel should discuss them with trial counsel.

There are time limitations for bringing a successful criminal appellant back to trial after issuance of a remittitur. Penal Code section 1382 requires that a criminal appellant be brought to trial within 60 days after the filing of the remittitur in the trial court. Some appellate counsel think if they do not notify the superior court when the case is sent back for retrial, their inaction might help prevent timely retrial. However, appellate counsel should keep in mind that the applicable time limits are subject to waiver and the other exceptions relating to statutory speedy trial rights. (*Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1.) Counsel should, as always, consider any advantages and disadvantages of contacting the superior court. But, at the very least, contact trial counsel.

If the case is sent back for possible plea withdrawal, appellant should be advised of the need to make a demand and the ways by which the demand might be communicated to the trial court. Also, the trial attorney and the superior court judge should be notified of the applicable time periods/limits. In theory, the best way for appellant to make a demand to withdraw his plea is through trial counsel. But if an unambiguous demand to withdraw is made to appellate counsel, appellate counsel must pass it on to the court.

The plea withdraw situation is the area where there have been the most serious mistakes and prejudices to the client. The appellant is often not brought to court, and often does not know how to enforce his rights. The time within which to withdraw his plea expires, and appellant loses the benefit of his win. For this reason, the plea withdrawal situation requires the most action and monitoring on the part of appellate counsel. This being said, if something nonetheless goes wrong, there may be a remedy, such as a motion to recall the remittitur or a writ procedure. In such a situation, the panel attorney should contact CCAP.

If an order to produce the client from state prison is required, counsel should make sure the superior court clerk has the client's inmate number and his or her current location at the Department of Corrections. Counsel should also make sure that any notices are also addressed to trial counsel and that counsel will appear to protect the client's interests.

When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.) "A failure to follow appellate directions can be challenged by an immediate petition for writ of prohibition or writ of mandate." (*Ibid.*)

Reversal Of Fines, Bail And Money Matters

If the case is reversed and dismissed, the defendant can exonerate bail and receive a refund on any fines already paid. (Pen. Code, sec. 1262; see also *Gonzales v. California* (1977) 68 Cal.App.3d 621.)

Clean Up Any Loose Ends In The Case

Finally, if you have promised the client you will be handling a post-appeal matter (such as filing a habeas, calling the trial attorney about re-sentencing, etc.) be sure to do it. You have ethically obligated yourself to follow through on behalf of your client. If you subsequently change your mind about doing it, be sure to inform your client about the status of your efforts, what you have concluded, and advise him or her of any applicable due dates. Attorneys may not abandon the client without sufficient and timely notice that they do not intend to follow through from an earlier communication, regardless of whether it is within the scope of the appointment.

Compensation

CCAP will recommend compensation for reasonable contact with trial counsel and the superior court regarding remittitur enforcement. However, the panel attorney's appointment includes no more than written and oral communication. If the panel attorney cannot get assurances that the matter will be handled locally, and travel to appear at the hearing on the remittitur is anticipated, the original appointment must be expanded. Panel attorneys should try to get trial counsel to commit to appearing, or try to get the superior court to agree to appoint counsel. If all else fails, contact your CCAP buddy on the case and review our Preauthorization Procedures:

http://www.capcentral.org/procedures/court_policies/preauthorization_procedures.asp

Conclusion

If you obtain a reversal in whole or in part, remember to take whatever steps are necessary to ensure that you keep your client informed and that the trial court implements the appellate court's order(s). **Promptly inform your client, the superior court and/or trial counsel.** And, if there is a hearing after remittitur in the trial court, make sure an attorney is there

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protecting the client's interests.