



## Alerts

### California Court: Attorney's Failure to Cite Known Adverse Authority Violated Duty of Candor To Court

March 11, 2022

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*People v. Williams*, (Cal. Ct. App., Feb. 24, 2022, No. B311161) 2022 WL 556906

#### Brief Summary

A California appellate court held that it is a violation of the duty of candor for an attorney to prosecute an appeal while failing to cite known authority that the court has no jurisdiction to entertain the appeal.

#### Complete Summary

A criminal defendant who was sentenced in 1996 to 35 years to life in prison attempted to file a "Petition for Modification of Sentence (Pursuant to P.C. 1170 (d)(1))." The trial court denied defendant's petition, explaining the petition was "denied as untimely." The defendant filed a notice of appeal, and he was later appointed counsel through the California Appellate Project. Defendant's counsel filed an opening brief and a sworn declaration of counsel stating it was made "IN SUPPORT OF REQUEST THAT THIS COURT FOLLOW THE PROCEDURES SET FORTH IN PEOPLE v. SERRANO."

The court then conducted its own research to confirm it had jurisdiction to decide the appeal. Independent research revealed published authority - never cited in the opening brief - holding that a reviewing court has no jurisdiction to entertain an appeal of a Section 1170 ruling of the type here because it is a non-appealable order. (*People v. Chlad*, 6 Cal.App.4th 1719, 1725-1726 (1992)). The court then directed counsel to submit a letter brief addressing: "(1) whether, consistent with the holding in [*Chlad*], the appeal is taken from a non-appealable order, and (2) whether the absence of a citation to *Chlad* (or other authority to the same effect) in the opening brief constitutes a violation of the Rules of Professional Conduct."

Counsel submitted a response that the court stated was "remarkable both from what it says, and what it does not." Counsel did not contend that *Chlad* was distinguishable or should not be followed, nor did it assert *Chlad* was unknown to counsel or that the absence of a citation was attributable to mistake, inadvertence or administrative error. Instead, counsel attempted to argue that: (1) he personally made no affirmative representation in the opening brief and

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(2) he only stated the basis "of his client's belief that the appeal was proper, as required by this Court." Counsel further argued that including a "statement in the brief that the ruling appealed from is not appealable or a statement citing case law holding that a given ruling is not appealable would be equivalent to stating that the appeal is frivolous," which would be inconsistent with his duties as a defense attorney who does not seek to withdraw from representation.

The court began its discussion by describing Rule 3.3(a)(2), which prohibits an attorney from (1) failing to disclose to (2) a tribunal (3) legal authority in this State that is (4) known to the lawyer to be directly adverse to the position of the client and (5) not disclosed by opposing counsel. Here, all elements were satisfied.

The court stated that whether or not counsel made an affirmative representation the order was appealable was irrelevant because Rule 3.3(a)(2) prohibits a lawyer from *knowingly* failing to disclose adverse authority, not just from making affirmative representations that are inconsistent with such authority. Counsel is responsible for the content of briefs he files and cannot evade responsibility by stating it was his client's belief that the appeal was proper. Further, counsel's assertion that the court follow the procedures set forth in *Serrano* represented to the court that counsel believed the court had the jurisdiction that permitted following those procedures.

Next, the court made clear that the duty of candor trumps the duty to refrain from arguing against his client. Adverse authority must be cited, but a lawyer is free to marshal arguments to persuade a court to reach a contrary conclusion. What cannot be done is to prosecute an appeal that counsel knows a reviewing court has no jurisdiction to decide while refraining from citing known, applicable law that would reveal the jurisdictional flaw.

The court stated that counsel serves both the court and his client by advocating changes in the law if arguments can be made supporting change. But where there is in fact no argument that the court has jurisdiction to hear and decide an appeal, it is appropriate for counsel to withdraw from representation. Here, counsel made no attempt to withdraw.

Ultimately, the court followed its own research which revealed the trial court's denial of defendant's petition was a non-appealable order. The court thus dismissed the appeal for lack of jurisdiction. The court also stated that any such future violation of this kind may warrant disciplinary review by the State Bar or other corrective action.

## Significance of Decision

This decision illustrates the importance of citing adverse authority where the authority is not otherwise brought to the attention of the court by another party. Once adverse authority is cited, counsel is free to argue that the case is somehow distinguishable or poorly reasoned such that the court should not follow it.

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*Serrano* directs that in criminal appeals arising from proceedings other than the first appeal of right, an appointed attorney who finds no arguable issues "should (1) inform the court he or she has found no arguable issues to be pursued on appeal and (2) file a brief setting out the applicable facts and the law." *Serrano*, 211 Cal.App.4th at 503. Upon receipt of such a brief, a reviewing court following the *Serrano* procedure will inform the defendant that he or she may personally file a supplemental brief. If such a brief is filed, there is authority holding that a reviewing court must then evaluate any arguments presented in that brief and issue a written opinion that disposes of the trial court's order on the merits. *People v. Cole*, 52 Cal.App.5th 1023, 1040 (2020). On the other hand, if no supplemental brief is filed, the court "will then either retain the appeal or dismiss it on [its] own motion." *Serrano*, 211 Cal.App.4th at 503.