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CAUTION: Attorneys Must Not Forget Their Duty of Candor

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Every attorney has been faced with wanting to advocate for a clients' position while balancing a reported decision undercutting or rejecting a potential argument. In *People v. Williams*, (Feb. 24, 2022, No. B311161) ___ Cal.App.5th ___ [2022 Cal. App. LEXIS 147, at *1], the Second District Court of Appeal recently went out of its way to remind attorneys their Duty of Candor requires “adverse on-point authority must be cited, but a lawyer is free to marshal arguments to persuade a court to reach a contrary conclusion.”

In *Williams*, the Court reviewed a criminal defendants' decades-later application to vacate a sentence under Penal Code section 1170(d)(1) because the Los Angeles County District Attorney changed its sentencing guidelines. The Trial Court denied the application, the criminal defendant appealed, and appellate counsel was appointed.

The appointed attorney filed an Opening Brief under *People v. Serrano* (2012) 211 Cal. App.4th 496, 503 which allows an attorney who finds no arguable issues to “(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.” The attorney, however, did not cite a 1992 decision holding the Section 1170(d)(1) ruling was a non-appealable order.

While the Court of Appeal located the authority and dismissed the appeal, the Court went out of its way to criticize the handling attorney. The Court reminded counsel Rule of Professional Conduct, Rule 3.3(a)(2) requires a lawyer shall not “fail to disclose to the tribunal[] legal authority in the controlling jurisdiction known[] to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel....”

The attorney offered two arguments for failing to cite the directly contrary authority: “[F]irst, that he personally made no affirmative representation that the order appealed from is an appealable order

such that this court has jurisdiction. And counsel contends, second, that he need not make this court aware of applicable authority under the circumstances because disclosing authority that the appeal is taken from a nonappealable order is tantamount to a concession that the appeal is frivolous, which he cannot concede without withdrawing from the representation.”

Rejecting both contentions, the Court made clear the lawyer can (and must) fulfill his/her duty to both his/her client and the Court because “the two duties are readily reconciled because the duty of candor is one of disclosure, not acquiescence. That is to say, adverse on-point authority must be cited, *but a lawyer is free to marshal arguments to persuade a court to reach a contrary conclusion.*”

As an example, the Court suggested the lawyer could have addressed the nonappealability by adding an introductory clause stating: “Although there is authority finding a similar order nonappealable [Citation], this court should decline to follow that authority and permit the appeal to proceed as one taken from an order after judgment affecting substantial rights.”

While the Court declined to sanction the appointed attorney, it cautioned “[a]ny such future violation, in the view of this court, may warrant disciplinary review by the State Bar or other corrective action.”