



Federal Bar Association

Seventh Annual Ethics, Competence, and Elimination of Bias All-Day MCLE Event

**January 26, 2021
9:00 a.m. to 3:35 p.m.**

9:00am-10:00am

*Competence in the
Era of COVID-19 (Ethics)*

**Michael Crowley, Charles Berwanger,
Edward McIntyre**

San Diego County Bar Association Ethics Committee

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Ethical Duties to Protect Electronically Stored Client Confidential Information from Disclosure to Third Parties



Charles Berwanger
January 26, 2021

Introduction

- The American Bar Association reports in October 2019 that **26%** of laws firms experience security breaches.
- Of those **9%** required that contact be made with clients and law enforcement authorities.
- The news is even more grim for mid-sized firms (10-49 attorneys) which report that **42%** of them suffered a security breach.

The State Bar of California Standing Committee on Professional Responsibility and Conduct – Formal Opinion No. 2020-203

What are a lawyer's ethical obligations with respect to unauthorized access by third persons to electronically stored confidential client information in the lawyer's possession?

Lawyers who use electronic devices which contain confidential client information must assess the risks of keeping such data on electronic devices and computers, and take reasonable steps to secure their electronic systems to minimize the risk of unauthorized access. In the event of a breach, lawyers have an obligation to conduct a reasonable inquiry to determine the extent and consequences of the breach and to notify any client whose interests have a reasonable possibility of being negatively impacted by the breach.

California Rules of Professional Conduct and Business and Professions Code

- 1.1. Competence
- 1.4(a)(3). Client Communication
- Business and Professions Code section 6068(m)
- 1.6. Attorney Client Privilege
- Business and Professions Code 6068(e).
- 5.1. Responsibility of Managerial and Supervisory Lawyer
- 5.2. Responsibility of Subordinate Lawyer.
- 5.3. Responsibility Regarding Nonlawyer Staff.
- 8.4. Misconduct.

A close-up photograph of a smartphone lying on a laptop keyboard. The phone's screen is illuminated with a green glow and displays a background of binary code (0s and 1s). Overlaid on the screen is a large, bold, red stamp that reads "TOP SECRET" in a stylized, blocky font. The text of the slide is centered over the phone's screen.

Ethical Duties to Protect Electronically Stored Client Confidential Information from Disclosure to Third Parties

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2020-203**

ISSUE: What are a lawyer’s ethical obligations with respect to unauthorized access by third persons to electronically stored confidential client information in the lawyer’s possession?

DIGEST: Lawyers who use electronic devices which contain confidential client information must assess the risks of keeping such data on electronic devices and computers, and take reasonable steps to secure their electronic systems to minimize the risk of unauthorized access. In the event of a breach, lawyers have an obligation to conduct a reasonable inquiry to determine the extent and consequences of the breach and to notify any client whose interests have a reasonable possibility of being negatively impacted by the breach.

AUTHORITIES

INTERPRETED: Rules 1.1, 1.4, 1.6, 5.1, 5.2, and 5.3 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068(e) and 6068(m).

Civil Code section 1798.82.

INTRODUCTION

Data breaches resulting from lost, stolen or hacked electronic devices and systems are a reality in today’s world. There are important ethical concerns when data breaches happen to lawyers and law firms since such events may involve the potential loss of, or unauthorized access to, confidential client information^{2/} and, thus, may require a lawyer to take certain remedial steps to protect the client.

In Cal. State Bar Formal Opn. No. 2015-193, the Committee on Professional Responsibility and Conduct (“Committee”) discussed lawyers’ ethical obligations when dealing with e-discovery. In

^{1/} Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

^{2/} The phrase “confidential client information” in this opinion includes not only attorney-client privileged communications, but more broadly all client information protected from disclosure under Business and Profession Code section 6068(e)(1) and rule 1.6.

Cal. State Bar Formal Opn. No. 2010-179, the Committee discussed ethical issues that arise when a lawyer accesses confidential client information on a laptop over public Wi-Fi or a home Wi-Fi network. In both opinions, the Committee adopted an approach that posed questions lawyers should consider in order to comply with the duties of competence and confidentiality. In light of ever-changing technology, the Committee concluded that an ongoing engagement with that evolving technology in the form of security issues to consider and reconsider was preferable to a “bright-line” or categorical approach.

This opinion extends that analysis to a broad range of cyber risks associated with the use of electronic devices and systems that contain confidential client information and connect to the internet and, thus, are theoretically accessible to anyone with an internet connection.

STATEMENT OF FACTS

Attorney A

Attorney A’s laptop is stolen. Attorney A did not store confidential client information on the laptop, but only used the laptop to access such information remotely. Also, the laptop could not be accessed without biometric authentication. Attorney A’s law firm also installed software on the laptop that allowed it to be remotely locked down and erased. As soon as Attorney A realizes that the laptop has been stolen, Attorney A contacts law firm’s IT department and receives confirmation almost immediately that the laptop has been located, locked down, and wiped clean.

Attorney B

At the end of a busy day, Attorney B realizes that Attorney has lost Attorney’s smartphone. Attorney B regularly uses the smartphone to email and text clients and to access certain practice management software applications related to clients. The smartphone is only protected by a 4-character password and not any biometric security system. Attorney B does not have any software installed on the smartphone that allows it to be remotely tracked, locked down, and/or wiped clean.

Before going to bed, Attorney B remembers that Attorney left the smartphone in a tote bag at the restaurant where Attorney had dinner with a friend. Attorney B immediately calls the restaurant, but it is closed. Attorney B goes to the restaurant when it opens the next morning and retrieves Attorney’s bag and smartphone which, the manager tells Attorney, was locked in a cabinet overnight. Nothing appears to be missing and the smartphone is still in the pocket of the bag where Attorney had left it.

Law Firm C

Law Firm C is a four member firm specializing in corporate law. Law Firm’s receptionist routinely receives emails sent to the firm (rather than to a specific attorney or staff member) and routes them to the appropriate person. Just before the end of the business day, the

receptionist receives an email from a business purporting to be Law Firm’s IT provider. The email looked entirely genuine and asked the receptionist to click on the attachment to allow the firm to do routine maintenance on Law Firm’s server. Receptionist did so which resulted in ransomware being installed on Law Firm’s network, immediately locking up the Law Firm’s computers, and displaying a message demanding that a sum of money be transferred electronically by cryptocurrency to unlock Law Firm’s computers. Law Firm C pays the ransom and regains access to its data. In consultation with security experts, Law Firm C determines that no client information was accessed and none of the matters being handled by Law Firm are negatively impacted by the delay.

Attorney D

Attorney D is outside counsel for a life sciences technology company (“Company”) for whom Attorney has been working on obtaining several very important patents. While on vacation, Attorney D goes to a coffee shop to check personal and work emails. Attorney D’s laptop is not encrypted. Instead of using a virtual private network or personal hotspot to connect to the internet, Attorney accesses the shop’s public Wi-Fi network. Unknown to patrons or coffee shop staff, a hacker has set up a fake internet portal that resembles the one provided by the coffee shop. Attorney D does not realize that Attorney actually logged on to that fake Wi-Fi network.

Attorney D returns to the same coffee shop the next day and notices a sign warning patrons about the fake Wi-Fi. After returning to the office the following week, Attorney D has the law firm’s technology team examine the laptop. The technology team concludes that someone had accessed certain files on the laptop related to Company’s patents while Attorney D was connected to the fake Wi-Fi network. Since Attorney D did not review those files on that day, it appears reasonably likely that an unauthorized user had done so.

DISCUSSION

A. Duty of Competence and Confidentiality

The duty of competence (rule 1.1) and the duty to safeguard clients’ confidences and secrets (rule 1.6 and Bus. & Prof. Code, § 6068(e)) require lawyers to make reasonable efforts to protect such information from unauthorized disclosure or destruction. The threshold requirement is for lawyers to have a basic understanding of the “benefits and risks associated with relevant technology.” Cal. State Bar Formal Opn. No. 2015-193; see also Comment [8] to ABA Model Rule 1.1.^{3/} This general principle requires lawyers to have a basic understanding of

^{3/} Although the California rules do not include a Comment similar to Comment [8] of ABA Model Rule 1.1, the Committee cited to that Comment in support of the Committee’s analysis in Formal Opn. 2015-193. At the time this opinion was published, the Board of Trustees has adopted for submission to the California Supreme Court for approval, a new Comment [1] to rule 1.1 which states: “The duties set forth

the risks posed when using a given technology and, if necessary, obtain help from appropriate technology experts on assessing those risks and taking reasonable steps to prevent data breaches which potentially can harm clients.^{4/} The threshold obligation to understand the risks is satisfied by learning where and how confidential client information is vulnerable to unauthorized access. This inquiry must be made with respect to each type of electronic device or system as they have been or are incorporated into the lawyer's practice.

For example, computer systems can be breached by inadvertently clicking on a link in a seemingly legitimate "phishing" email or text message or by installing an unvetted software application which can install malicious software on the system. Portable electronic devices can be accessed if security precautions, such as passwords, are disabled or inadequate. Data on a laptop computer can be accessed if the laptop is connected to a public or other inadequately secured network and if the data is not properly protected. And the threats vary and widen as data thieves develop their attack strategies and as technologies develop. Thus, lawyers must understand how their particular use of electronic devices and systems pose risks of unauthorized access, they must be knowledgeable about the options available at any given point in time to minimize those risks (including how best to store or control access to said information), and they then must implement reasonable security measures in light of the risks posed. In addition, because law firms are frequent targets, law firms should consider whether rule 5.1 requires law firms to prepare a data breach response plan so that all stakeholders know how to respond when a breach occurs.^{5/}

ABA Formal Opn. No. 18-483 (Lawyer's Obligations After an Electronic Data Breach or Cyberattack) provides a useful list of competence-based duties that explain the requirement of "reasonable efforts" in addressing the potential for inadvertent disclosure of confidential client information due to a data breach:

- The obligation to monitor for a data breach: "lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data." *Id.* at p. 5.

in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."

^{4/} This Committee recognizes that while lawyers are not required to become technology experts and master the complexities and deficiencies of the security features of each technology available, lawyers owe clients a duty to have a basic understanding of the protections afforded by the technology used in their practice. If a lawyer lacks the necessary competence to assess the security of the technology, the lawyer must seek additional information, or consult with someone who possesses the necessary knowledge, such as an information technology consultant. (Cal. State Bar Formal Opn. Nos. 2012-184, 2010-179.)

^{5/} ABA Formal Opn. No. 18-483 at pp. 6-7, and the ABA Cybersecurity Handbook, identify various considerations in developing a data breach response plan.

- When a breach is detected or suspected, lawyers must “act reasonably and promptly to stop the breach and mitigate damage resulting from the breach.” *Id.* at p. 6. A preferable approach is to have a data breach plan in place “that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion.” *Id.* at p. 6.
- ~~Investigate and determine what happened: “Just as a lawyer would need to assess~~ which paper files were stolen from the lawyer’s office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach.” *Id.* at p. 7.

The duty to make reasonable efforts to preserve confidential client information does not create a strict liability standard nor does the duty “require the lawyer to be invulnerable or impenetrable.” ABA Formal Opn. No. 18-483 at p. 9. The precise nature of the security measures that attorneys are expected to take depends on the circumstances. But, as the ABA has noted, “a legal standard for ‘reasonable’ security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a ‘process’ to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.” *Id.* (quoting from the 2017 ABA Cybersecurity Handbook at p. 73).

“Reasonable efforts” are those which are reasonably calculated under the circumstances to minimize particular identified risks. For example, when law firm personnel work on client matters remotely, the law firm must ensure that all data flowing to and from those remote locations and the firm’s servers or cloud storage is adequately secured. The particular method or methods selected (VPN, encryption, etc.) will reflect the firm’s due consideration of the risks, the relative ease of use of different security precautions, time that would have to be spent training staff, and the like. Some security precautions are so readily available and user-friendly (such as the ability to locate and lock down portable devices in the event of loss or theft), that failure to implement them could be deemed unreasonable. Others will require a deeper assessment.

Finally, in law firms with subordinate lawyers, the lawyers with management or supervisory responsibilities should be aware of their obligations under rules 5.1 and 5.3. Rule 5.1(a) requires lawyers with “managerial authority in a law firm [to] make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act.” Thus, lawyers with managerial authority within a law firm must make a reasonable effort to establish internal policies and procedures designed to protect confidential client information from the risk of inadvertent disclosure and data breaches as a result of technology use, which includes monitoring the use of technology and office resources connected to the internet and external data sources. ABA Formal Opn. No.

18-483. The law firm should also consider whether they are required to proactively establish protocols for responding to and addressing potential data breaches. Rule 5.1(b) requires supervisory attorneys to ensure that subordinate attorneys within the firm comply with the rules and policies and procedures established by the firm. And rule 5.3 makes these principles applicable to non-lawyer staff.

~~Thus, part of the risk assessment process should include reasonable efforts to ensure that all~~ firm members appreciate the risks involved in keeping confidential client information on electronic systems and the steps that the firm’s managers have implemented to minimize the risk of unauthorized disclosure. Because the risk-assessment process is on-going, particularly with the introduction of new technologies and new threats, this duty would require managers and supervisors to establish ongoing and evolving protective measures with respect to the use of its technology, and regularly monitoring the same, and to keep subordinate lawyers and staff up to date as new measures are implemented.

However, under rule 5.2, subordinate lawyers have independent ethical obligations to protect confidential client information as part of their duty of competence. Thus, subordinate lawyers should not blindly follow firm technological rules that are unreasonable or rely on the absence of a firm rule where there should be one. See Comment to rule 5.2.

B. Duty of Disclosure

Rule 1.4(a)(3) and Business and Professions Code section 6068(m) require attorneys to keep their clients^{6/} “reasonably informed about significant developments” relating to the attorney’s representation of the client. Neither rule nor case law define what events qualify as “significant.” (See, e.g., Tuft et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2018) Ch. 6-B, § 6:128, acknowledging that what is “significant” under these provisions varies with each client’s needs and the nature of the representation.) Nevertheless, the relevant authorities have uniformly concluded that the misappropriation, destruction, or compromising of confidential client information, or a cyber breach that has significantly impaired the lawyer’s ability to provide legal services to clients, is a “significant development” that must be communicated to the client. See, e.g., ABA Formal Opn. No. 18-483 at p. 10; New

^{6/} This opinion focuses on current clients and does not address the duty of disclosure owed to former clients. For discussion concerning a lawyer’s duty to notify a former client of a data breach, compare ABA Formal Opn. No. 18-483 at pp. 13-14 (declining to impose a duty to notify a former client under the Model Rules of Professional Conduct, while noting that data privacy laws, common law duties of care and contractual arrangements with clients may give rise to such a duty) and Maine Professional Ethics Commission Opinion No. 220 “Cyberattack and Data Breach: The Ethics of Prevention and Response” issued on April 11, 2019 (opining, based on its interpretation of Maine’s Rules of Professional Conduct, Rule 1.9, that “a former client is entitled to no less protection and candor than a current client in the case of compromised secrets and confidences. A former client must be timely notified regarding a cyberattack or data breach that has, or may have, exposed the client’s confidences or secrets.”)

York State Bar Association Ethics Opn. No. 842 (2010) (involving a data breach of a cloud storage provider); ABA Formal Opn. No. 95-398.

ABA Formal Opn. No. 18-483 describes a “data breach” as a “data event where material client confidential information is misappropriated, destroyed, or otherwise compromised, or where a lawyer’s ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.” ABA 18-483 at p. 4.^{7/} Thus, not all events involving lost or stolen devices, or unauthorized access to technology, would necessarily be considered a data breach. Consistent with their obligation to investigate a potential data breach, however, lawyers and law firms should undertake reasonable efforts, likely through the use of individuals with expertise in such investigations, to ascertain, among other things, the identity of the clients affected, the amount and sensitivity of the client information involved, and the likelihood that the information has been or will be misused to the client’s disadvantage. This will assist in determining whether there is a duty to disclose. If the lawyer or law firm is unable to make such a determination, the client should be advised on that fact. *Id.* at p. 14.

Lawyers and clients may also differ as to what events would trigger the duty to disclose. The key principle, however, in considering whether the event rises to the level of a data breach, is whether the client’s interests have a “reasonable possibility of being negatively impacted.” ABA 18-483 at p. 11. Certainly disclosure is required in situations where a client will have to make decisions relevant to the breach, such as the need to take mitigating steps to prevent or minimize the harm, or to analyze how the client’s matter should be handled going forward in light of a breach. When in doubt, lawyers should assume that their clients would want to know and should err on the side of disclosure.

C. If Disclosure to Clients is Required, When and What Must be Disclosed?

In all cases involving a data breach, disclosure to clients must be made as soon as reasonably possible so that the affected clients can take steps to ameliorate the harm.^{8/} For example, affected clients might want or need to change passwords and modify or delete online accounts. However, it may be reasonable for the lawyer, through the use of a security expert, to attempt to ascertain the nature and extent of the potential breach prior to communicating this information to the client. The more that is known related to the breach, including exactly what information might have been accessed, the better the response plan. Given the obligation to preserve client confidences, secrets and propriety information, it is appropriate to assume that

^{7/} The Committee believes this description is useful in understanding what constitutes a data breach for the purpose of this opinion and discussion, and has adopted the same approach here.

^{8/} Lawyers and law firms should also consider notifying insurance carriers as soon as possible of any circumstances giving rise to a potential breach to put the carrier on notice. While typically such acts are only covered by specific Cyber Coverage policies, not Lawyer’s Professional Liability (LPL) or Commercial General Liability (CGL) policies, these policies typically have fairly short time limits within which notice must be given.

reasonable clients would want to be notified if any of that information was acquired or reasonably suspected of being acquired by unauthorized persons.

With respect to the details of a required disclosure, the attorney “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions” as to what to do next, if anything. (Rule 1.4(b)). “In a data breach scenario, the minimum disclosure required to ~~all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of~~ its information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed.” ABA 18-483 at p. 14.

Lawyers may also have notification obligations under Civil Code section 1798.82 and federal and international laws and regulations such as HIPAA and the EU General Data Protection Regulation.

D. The Factual Scenarios

Although Attorney A’s laptop is stolen and it could be used to access confidential client information, the risk of unauthorized access to such information was mitigated by Attorney A and law firm’s policies for addressing these types of cyber risks. First, Attorney A did not store confidential client information on the laptop, but only used the laptop to access such information remotely. Second, Attorney A had a biometric security system on the laptop reducing the chances that it could be hacked by an unauthorized user. Third, Attorney A’s law firm had the ability to quickly and easily locate, lock, and wipe clean the laptop, almost guaranteeing that there was no unauthorized access to any confidential client information. Under these facts, where there is no evidence of unauthorized access or harm, Attorney A would not have a duty to disclose to any client the fact that Attorney lost the laptop.

Attorney B’s temporary loss of a smartphone, under these circumstances, is unlikely to be considered a data breach, particularly if Attorney B can obtain assurances from the restaurant owner/staff that only the restaurant had access to it and that no one accessed the phone’s contents after Attorney B left. Because it does not appear that the data on Attorney B’s phone was misappropriated, destroyed, or compromised, the temporary loss of the phone is unlikely to constitute a significant development and no duty to disclose would likely be triggered.

Under these circumstances, however, Attorney B and Attorney B’s law firm should consider whether it should require all law firm attorneys to have stronger passwords, or use biometric security systems on firm issued smartphones, or if the law firm should prohibit their attorneys from accessing client data, including emails, on the attorneys’ personal smartphones. The firm should also consider requiring all smart phones used for firm matters to have software installed to locate, lock, and wipe devices if they are lost or stolen, and specific protocols for managing such scenarios. Next time, Attorney B may not be so confident in Attorney’s assessment that no client data was accessed, particularly if the phone is one day stolen. For example, it is possible that Attorney B’s cell phone provider could have locked down the phone remotely, but Attorney B did not consider this option or look to the law firm for advice on handling this

situation. Finally, when electronic devices are temporarily lost or misplaced, the law firm should consider whether its policies should include requiring its IT team to examine those devices once the device is recovered in order to determine whether any unauthorized access took place.

The situation of Law Firm C involves a common entry point for hackers: malware attached to a seemingly legitimate email, also referred to as “phishing.” Given the ubiquity of this method of ~~gaining access, solo practitioners and firms must consider implementing reasonable~~ precautions, such as staff and attorney trainings warning of this risk and protocols for handling incoming emails. Law Firm C has certainly been inconvenienced by the cyber breach, but the firm has confirmed that none of its clients were actually or potentially harmed because no confidential client information was accessed, and the short delay did not impair the firm’s attorneys from continuing to provide necessary legal services to its clients. Therefore, the firm would not be required to disclose the incident. On the other hand, if the consultant could not preclude actual or potential unauthorized access, a risk of client harm remains and disclosure would be required.

Attorneys who keep confidential information on their devices ought to be aware that accessing public Wi-Fi or other unsecure networks may open another access point for hackers. This is illustrated by Attorney D’s exposing confidential information to anyone with the ability to electronically “eavesdrop” on the Attorney’s keystrokes. Attorneys who work on client matters remotely must consider the risks of harm and take reasonable precautions, as discussed above, to prevent unauthorized disclosure. Cal. State Bar Formal Opn. No. 2010-179 at p. 6 (discussing the use of a laptop in unsecured and secured settings). Attorney D’s failure to secure their online communications exposed confidential information to a hacker and it is unknown if, or to what extent, the hacker would or could use such information. It is this Committee’s view that Attorney D risked violating the duties of confidentiality and competence by using a public wireless connection without taking appropriate precautions, such as the use of encryption, a VPN or other protective measures. (Cal. State Bar Formal Opn. No. 2010-179.)

Since the law firm was able to confirm the unauthorized access of confidential client information, Attorney D and the law firm must notify the client, Company, as soon as possible. Although it is unknown if or how the hacker might use the information, because of the sensitive nature of the information to Company’s business, the misappropriation would constitute a significant development and require appropriate notice to the client. “[D]isclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.” ABA 18-483 at p. 14.

Once a disclosure is made, Attorney D and the law firm can evaluate with Company the likelihood that the information will be used by the hacker and may decide to speed up the timeline for obtaining the relevant patents related to the information that was inadvertently disclosed to mitigate potential harm.^{9/} Of course, the event would also require Attorney D and the law

^{9/} In addition, because Attorney D’s handling of confidential client information may constitute an error giving rise to a potential malpractice claim, Attorney D and law firm should also consider whether a

firm to take appropriate remedial steps in terms of evaluating the firm's policies related to attorney's accessing firm devices from unsecured locations. It should also consider reinforcing policies requiring attorneys to promptly address any irregularities or suspicions related to potential data breaches with the firm's technology officers as soon as they are discovered.

CONCLUSION

The use of computers and portable electronic devices by lawyers is now ubiquitous and has increased the risk of client confidential client information being accessed by unauthorized users. Lawyers must assess the risks involved in the use of electronic devices and systems that contain, or access, confidential client information and to take reasonable precautions to ensure that that information remains secure. This duty extends to law firms whose managers must make a reasonable effort to establish internal policies and procedures designed to protect confidential client information from the risk of inadvertent disclosure and data breaches as a result of technology use, to monitor such use, and to stay abreast of current trends and risks. The creation of a data breach response plan may also be required to identify the risks posed to the firm's then-current use of technology and feasible precautions.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

conflict of interest has arisen between the law firm and client such that the law firm should also comply with rule 1.7 in disclosing this significant development to client. (See also Cal. State Bar Formal Opn. No. 2019-197).



The State Bar of California

Rule 1.1 Competence

(Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.



The State Bar of California

Rule 1.4 Communication with Clients (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;
 - (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and
 - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.



The State Bar of California

Rule 1.6 Confidential Information of a Client (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.
-
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:
- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Comment

Duty of confidentiality

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to

refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know* that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,* a lawyer must not reveal information protected by Business and Professions Code section 6068, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these rules, or other law.

Narrow exception to duty of confidentiality under this rule

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code section 6068, subdivision (e)(1). Paragraph (b) is based on Business and Professions Code section 6068, subdivision (e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068, subdivision (e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by section 6068, subdivision (e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is

likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[5] Neither Business and Professions Code section 6068, subdivision (e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by section 6068, subdivision (e)(1) as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this rule.

Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by section 6068, subdivision (e)(1) are the following:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes* the lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action — such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused — the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) must be no more than is reasonably necessary to prevent the criminal act*

[8] Paragraph (d) requires that disclosure of information protected by Business and Professions Code section 6068, subdivision (e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons* who the lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to

the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b);
- (6) the lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and
- (7) the lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code

section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within ~~paragraph (b), or even choose not to inform a client until such time as the lawyer~~ attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship

[11] When a lawyer has revealed information protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person* from the risk of death or substantial* bodily harm, the lawyer must withdraw from the representation. (See rule 1.16.)

Other consequences of the lawyer's disclosure

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by this rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law

[13] This rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code section 6068, subdivision (e)(1) recognized under California law.



The State Bar of California

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act.

- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the rules or State Bar Act. However, a lawyer

remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules.



The State Bar of California

Rule 5.2 Responsibilities of a Subordinate Lawyer (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.*
 - (b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.
-

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.



The State Bar of California

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants (Rule Approved by the Supreme Court, Effective November 1, 2018)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

**NEW RULE OF PROFESSIONAL CONDUCT 5.3
(See Former Rule 3-110 Discussion)
Responsibilities Regarding Nonlawyer Assistants**

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Rule As Issued For 90-day Public Comment

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

The following is a summary of proposed rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).²

¹ The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

² The Executive Summaries for proposed rules 5.1 and 5.2 are provided separately.

Proposed rule 5.3 adopts the substance of ABA Model Rule 5.3. Proposed rule 5.3 is very similar to proposed rule 5.1. The major difference is that proposed rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services, whereas proposed rule 5.1 applies to the supervision of lawyers. Proposed rule 5.3(a) requires that managing lawyers make "reasonable efforts to ensure" the law firm has measures that provide reasonable assurance that a nonlawyer's conduct is compatible with the professional obligations of the lawyer. Paragraph (b) requires that a lawyer who directly supervises a nonlawyer make "reasonable efforts to ensure" the nonlawyer's conduct is compatible with the professional obligations of the lawyer, whether or not the nonlawyer is an employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for the conduct of a nonlawyer under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the nonlawyer, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There is one comment to the rule. The comment states the policy underlying the rule and explains the lawyer's obligation in complying with the rule.

National Background – Adoption of Model Rule 5.3

As California does not presently have a direct counterpart to Model Rule 5.3, this section reports on the adoption of the Model Rule in United States' jurisdictions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants," revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf

Thirty-four jurisdictions have adopted Model Rule 5.3 verbatim. Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3. Six jurisdictions have adopted a version of the rule that is substantially different from Model Rule 5.3. Only one jurisdiction has not adopted a version Model Rule 5.3: California.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 5.3 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. An omitted asterisk for a defined term was added.

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 3. Professions and Vocations Generally (Refs & Annos)
Chapter 4. Attorneys (Refs & Annos)
Article 4. Admission to the Practice of Law (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 6068

§ 6068. Duties of attorney

Effective: January 1, 2019
Currentness

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney’s knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Credits

(Added by Stats.1939, c. 34, p. 355, § 1. Amended by Stats.1985, c. 453, § 11; Stats.1986, c. 475, § 2; Stats.1988, c. 1159, § 5; Stats.1990, c. 1639 (A.B.3991), § 4; Stats.1999, c. 221 (S.B.143), § 1; Stats.1999, c. 342 (S.B.144), § 2; Stats.2001, c. 24 (S.B.352), § 4; Stats.2003, c. 765 (A.B.1101), § 1, operative July 1, 2004; Stats.2018, c. 659 (A.B.3249), § 50, eff. Jan. 1, 2019.)

Notes of Decisions (294)

West’s Ann. Cal. Bus. & Prof. Code § 6068, CA BUS & PROF § 6068

Current with all laws through Ch. 372 of 2020 Reg.Sess.

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FEDERAL BAR ASSOCIATION
JANUARY 26, 2021

*Ethical Obligations When
Lawyering in Difficult Times*

**Special Issues for Criminal
Defense Counsel**
By Michael Crowley

Michael L. Crowley, biography

Founder and lead attorney of the Crowley Law Group, Mr. Crowley has been practicing criminal law for more than 30 years and is a Criminal Law Specialist, certified by the State Bar of California's, Board of Legal Specialization for more than 25 years. He practices in both state and federal criminal courts and was named Criminal Defense Lawyer of the Year by the Criminal Defense Bar Association of San Diego in 2005. He has served on the San Diego County Bar Association's ethic's committee for more than 10 years and is a lecturer on business ethics at San Diego State University.

Today, he leads a team of lawyers who specialize in all areas of criminal practice areas from DUIs to white collar crime including appellate law. Additionally, Mr. Crowley has spent the past 20 years as an adjunct law professor at California Western, Thomas Jefferson and University of San Diego law schools, teaching Legal Skills, Constitutional Law, Constitutional Litigation, Criminal Motions, and California Evidence.

He is a past president of both the San Diego Criminal Defense Lawyer's Club and the Criminal Defense Bar Association. He has co-chaired the 9th Circuit Judicial Conference of Lawyer Reps, and the county bar's Federal Court's committee, chaired the Lawyer Referral and Information Service. He is currently a member of the San Diego County Bar's Ethics Committee and previously a commissioner on the state bar's Criminal Law Advisory Commission. He is a regular writer, speaker and lecturer on criminal law and ethics issues.

Mr. Crowley graduated from California Western School of Law, *cum laude* in 1984 where he was executive editor of California Western Law Review and the author of an award-winning article in the same publication. He graduated from the University of South Florida in 1974 with bachelor degrees in Journalism & Political Science before working as a newspaper reporter which included covering crime and the courts.

At the beginning of the pandemic, we were immediately we are cut off from our clients for the most part:

Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Rule 1.6 Confidential Information of a Client

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

B&P 6068 It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate (free or safe from injury or violation) the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

"Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers--one at a time. In my view, the Court's opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role. I would not do it."
Kaley v. United States, 571 U.S. 320, 358 (2014)

ABA Opinion No. 06-441 (2006): "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation" states:

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

The above ABA Opinion is California law per *In re Edward S.* (2009) 173 Cal. App. 4th 387, 411 where the appellate court dealt with an overloaded public defender who fell on his sword and admitted case that overload denied him the ability to be effective. The E.S. opinion states the ABA Opinion is fully in accord with California rules, but may also be statutorily required: "The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated." (*Id.* at 413-414.)



Caution

As of: January 19, 2021 7:57 PM Z

In re Edward S.

Court of Appeal of California, First Appellate District, Division Two

April 27, 2009, Filed

A118547

Reporter

173 Cal. App. 4th 387 *; 92 Cal. Rptr. 3d 725 **; 2009 Cal. App. LEXIS 645 ***

In re Edward S., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. EDWARD S., Defendant and Appellant.

California, which sustained a petition alleging that he came within the provisions of [Welf. & Inst. Code, 602](#) and denied appellant's motion for a new jurisdictional hearing. Appellant had been found guilty of one of two alleged attempts to commit a lewd or lascivious act with a child under the age of 14 and of annoying or molesting a minor.

Prior History: [***1] Superior Court of Humboldt County, Mendocino County, No. JV060084, Christopher G. Wilson, Leonard J. LaCasse, Judges.

[In re E.S., 171 Cal. App. 4th 1219, 90 Cal. Rptr. 3d 564, 2009 Cal. App. LEXIS 311 \(Cal. App. 1st Dist., 2009\)](#)

Core Terms

molestation, jurisdictional hearing, investigate, continuance, credibility, public defender, juvenile, sexual, district attorney, ineffective, caseload, declaration, funding, reasons, records, sex, defense counsel, psychological, corroborate, probation, resources, inspect, cases, uncle, polygraph test, offenders, daughter, phone, reasonable probability, cross-examination

Case Summary

Procedural Posture

Appellant minor sought review of a judgment of the Superior Court of Humboldt County, Mendocino County,

Overview

Appellant's newly appointed counsel sought a new jurisdictional hearing on the ground that appellant was denied the effective assistance by former counsel during the jurisdictional proceedings in another county. The court of appeal held that the performance of former counsel was deficient in that counsel failed to investigate potentially exculpatory evidence, sought an inadequate continuance based on a mistake of law, and failed to move for a substitution of counsel knowing that he was unable to devote the time and resources necessary to properly defend appellant. The court found that the trial court's failure to assign any significance to, or even to mention, former counsel's lengthy and detailed admission of his own deficiencies and explanation of the reasons that he failed to provide appellant the diligent advocacy to which appellant was constitutionally entitled was inexplicable. The court concluded that former counsel's deficient performance prejudiced appellant within the meaning of Strickland. The case had to be considered a close one because there was no eyewitness or physical evidence and the matter turned almost entirely on credibility.

Outcome

Michael Crowley

The court reversed the judgment and remanded the matter to the juvenile court with directions to conduct a new jurisdictional hearing.

claim that counsel's assistance was so defective as to require reversal of a conviction consists of two prongs. First, the defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance has been shown to be deficient, the defendant is entitled to relief only if it can additionally be established that he or she was prejudiced by counsel's deficient performance. As to these issues, the defendant bears the burden of proof.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

[HN3](#) **Effective Assistance of Counsel, Trials**

[HN1](#) **Criminal Process, Assistance of Counsel**

Under both [U.S. Const., 6th Amend.](#), and [Cal. Const., art. I, § 15](#), a criminal defendant has the right to the assistance of counsel. The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its results. Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance. Specifically, it entitles his or her to the reasonably competent assistance of an attorney acting as his or her diligent conscientious advocate. Under this right, the defendant can reasonably expect that in the course of representation his or her counsel will undertake only those actions that a reasonably competent attorney would undertake. But he or she can also reasonably expect that before counsel undertakes to act at all, counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a decision, his or her action—no matter how unobjectionable in the abstract—is professionally deficient.

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, and a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation. California case law makes clear that counsel has an obligation to investigate all possible defenses and should not select a defense strategy without first carrying out an adequate investigation.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

[HN2](#) **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

[HN4](#) **Effective Assistance of Counsel, Trials**

The test to determine whether a criminal defendant's

Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN5](#) **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

One of the tests of whether counsel has provided effective representation is whether he or she effectively supplied to a defendant those skills and legal knowledge that courts can reasonably expect from any member of the bar.

Criminal Law & Procedure > Trials > Continuances

[HN6](#) **Trials, Continuances**

[Welf. & Inst. Code, § 682](#), provides that upon a showing of good cause a continuance may be granted for that period of time shown to be necessary by the moving party at the hearing on the motion. [§ 682, subd. \(b\). Section 682, subd. \(e\)](#)—which provides that the hearing shall commence on the date to which it was continued or within seven days thereafter whenever the court is satisfied that good cause exists for a further continuance and the moving party will be prepared to proceed within that time—does not limit the period for which the initial continuance may be granted on a showing of good cause.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pretrial Proceedings

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

[HN7](#) **Effective Assistance of Counsel, Pretrial Proceedings**

A court, before trial, may address a defendant's claim that he or she is receiving ineffective assistance of counsel and a motion allowing counsel to withdraw from the case and substitute other counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Legal Ethics > Client Relations > Duties to Client > Effective Representation

[HN8](#) **Counsel, Effective Assistance of Counsel**

The conduct required of attorneys in California is

determined not just by the Rules of Professional Conduct, the State Bar Act, [Bus. & Prof. Code, § 6000 et seq.](#), and judicial opinions, but also by consideration of ethics opinions and rules and standards promulgated by other jurisdictions and bar associations. Rules Prof. Conduct, rule 1-100(A). A public defender's office is considered to be the equivalent of a law firm, and responsibility for handling a case falls upon the office as a whole. The ethical obligations of public defenders and other publically funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained defense counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Legal Ethics > Client Relations > Duties to Client > Effective Representation

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

[HN9](#) **Counsel, Effective Assistance of Counsel**

Under a formal opinion of the American Bar Association (ABA) entitled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation," a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisory approval, attempt to reduce the caseload, as by transferring non-representational responsibilities to others, refusing new cases, and/or transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA opinion provides that he or she must file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients. In support of the motion, counsel should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. The conduct prescribed by the ABA opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated.

Legal Ethics > Client Relations > Duties to
Client > Effective Representation

[HN10](#) [↓] **Duties to Client, Effective Representation**

The California Rules of Professional Conduct provide that a member of the California Bar shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence, which includes the exercise of such diligence as is reasonably necessary for the performance of a particular legal service. Rules Prof. Conduct, rule 3-110(A)-(B). Where the member knows or should know that continued representation will result in the incompetent provision of legal services in a case before a tribunal, he or she shall, with the permission of the tribunal, seek to withdraw from such representation, after giving due notice to the client and allowing time for employment of other counsel. Rules Prof. Conduct, rule 3-700(A)(2),(B)(2).

Criminal Law & Procedure > Counsel > Assignment
of Counsel

Legal Ethics > Client Relations > Conflicts of
Interest

[HN11](#) [↓] **Counsel, Assignment of Counsel**

Under the California Penal Code, a public defender may not be assigned to represent an indigent defendant in a case in which he or she has a conflict of interest, *Pen. Code, § 987.2, subds. (a)(3), (d), & (e)*, and a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing. When a public defender reels under a staggering workload, he or she should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him or her, and order the employment of private counsel at public expense. Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or making provision of funds, facilities and personnel for a public defender's office adequate for the demands placed upon it.

Legal Ethics > Client Relations > Duties to

Client > Effective Representation

[HN12](#) [↓] **Duties to Client, Effective Representation**

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. If the question whether a lawyer's workload is too great is reasonably arguable, the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide diligent and competent representation, and the supervisor fails to take reasonable remedial action, the supervisor himself or herself is responsible for the subordinate's violation of the Model Rules of Professional Conduct.

Criminal Law & Procedure > Counsel > Effective
Assistance of Counsel > Tests for Ineffective
Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective
Assistance of Counsel > Trials

[HN13](#) [↓] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Deferential scrutiny of counsel's performance is limited in extent and, in certain cases, may be altogether unjustified. Deference is not abdication; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance. Counsel's first duty is to investigate the facts of his or her client's case and to research the law applicable to those facts. Generally, *U.S. Const., 6th Amend.*, and *Cal. Const., art. I, § 15*, require counsel's diligence and active participation in the full and effective preparation of his or her client's case. Criminal defense attorneys have a duty to investigate carefully all defenses of fact and law that may be available to the defendant. That counsel may be compelled to yield to his or her client's right to insist on the presentation of a defense of his or her own choosing does not excuse counsel from his or her duty to investigate and research other defenses so as to make an informed recommendation to his or her client.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN14](#) **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To prevail on a claim of ineffective assistance of counsel, a defendant must show not just that counsel's deficiencies had some conceivable effect on the outcome of the proceeding, but that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Specifically, when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The burden of proof that the defendant must meet in order to establish his or her entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sustained a petition alleging that appellant minor came within the provisions of [Welf. & Inst. Code, § 602](#), and denied the minor's motion for a new jurisdictional hearing, which his newly appointed counsel sought on the ground that the minor had been denied the effective assistance of counsel during the jurisdictional proceedings in another county. The minor had been found guilty on one of two alleged attempts to commit a lewd or lascivious act with a child under the age of 14 ([Pen. Code, §§ 664, 288, subd. \(a\)](#)) and on a charge that he annoyed or molested a minor ([Pen. Code, § 647.6, subd. \(a\)](#)). (Superior Court of Humboldt County, No. JV060084, Christopher G. Wilson, Judge, and Superior Court of Mendocino County, Leonard J. LaCasse, Judge.)

The Court of Appeal reversed the judgment and remanded the matter to the juvenile court with directions to conduct a new jurisdictional hearing. The court held

that the performance of the minor's former counsel was deficient in that counsel failed to investigate potentially exculpatory evidence, sought an inadequate continuance based on a mistake of law, and failed to move for a substitution of counsel knowing that he was unable to devote the time and resources necessary to properly defend the minor. The court found inexplicable the trial court's failure to assign any significance to, or even to mention, former counsel's lengthy and detailed admission of his own deficiencies and explanation of the reasons that he failed to provide the minor the diligent advocacy to which the minor was constitutionally entitled. If the undisputed representations set forth in former counsel's declaration under penalty of perjury were true, former counsel was aware or should have been aware that the public defender's office could not provide the minor effective representation, and failed to take reasonable steps to avoid reasonably foreseeable prejudice to the minor's rights. The court concluded that former counsel's deficient performance prejudiced the minor within the meaning of *Strickland*. The case had to be considered a close one because there was no eyewitness or physical evidence and the matter turned almost entirely on credibility. Moreover, former counsel failed to produce available evidence indicating that **[*388]** the minor did not fit the typical personality or historical profile for juvenile sex offenders and lacked the psychological sophistication necessary to steadfastly maintain his innocence over a long period of time and in the face of a polygraph test. (Opinion by Kline, P. J., with Haerle and Lambden, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Criminal Law § 88—Rights of Accused—Aid of Counsel—Scope—Competent Assistance.

Under both [U.S. Const., 6th Amend.](#), and [Cal. Const., art. I, § 15](#), a criminal defendant has the right to the assistance of counsel. The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its results. Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance. Specifically, it entitles him or her to the reasonably competent assistance of an attorney acting as a diligent conscientious advocate. Under this right, the defendant can reasonably expect that in the course of representation counsel will undertake only

those actions that a reasonably competent attorney would undertake. But he or she can also reasonably expect that before counsel undertakes to act at all, counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a decision, counsel's action—no matter how unobjectionable in the abstract—is professionally deficient.

[CA\(2\)](#) [↓] (2)

Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Test—Deficient Performance—Prejudice.

The test to determine whether a criminal defendant's claim that counsel's assistance was so defective as to require reversal of a conviction consists of two prongs. First, the defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance has been shown to be deficient, the defendant is entitled to relief only if it can additionally be established that he or she was prejudiced by counsel's deficient performance. As to these issues, the defendant bears the burden of proof.

[CA\(3\)](#) [↓] (3)

Delinquent, Dependent and Neglected Children § 22—Effective Assistance of Counsel—In Delinquency and Status-offense Cases—Failure to Investigate—Inadequate Continuance—Excessive Workload—Prejudice.

The performance of defendant minor's former counsel was deficient where counsel failed to investigate potentially exculpatory [*389] evidence, sought an inadequate continuance based on a mistake of law, and failed to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend the juvenile. Because those deficiencies were prejudicial, the minor was entitled to a new jurisdictional hearing.

[*Erwin et al., Cal. Criminal Defense Practice (2008) ch. 1, § 1.04*; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 788; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 209 et seq.]

[CA\(4\)](#) [↓] (4)

Criminal Law § 108—Rights of Accused—Competence of Defense Counsel—Tactical Matters—Duty to Investigate—Deferential Review.

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary, and a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation. California case law makes clear that counsel has an obligation to investigate all possible defenses and should not select a defense strategy without first carrying out an adequate investigation. Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[CA\(5\)](#) [↓] (5)

Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Test—Skills and Legal Knowledge Supplied.

One of the tests of whether counsel has provided effective representation is whether he or she effectively supplied to a defendant those skills and legal knowledge that courts can reasonably expect from any member of the bar.

[CA\(6\)](#) [↓] (6)

Delinquent, Dependent and Neglected Children § 82—Continuance—Showing of Good Cause.

Welf. & Inst. Code, § 682, subd. (b), provides that upon a showing of good cause a continuance may be granted for that period of time shown to be necessary by the moving party at the hearing on the motion. *Section 682, subd. (e)*—which provides that the hearing shall commence on the date to which it was continued or within seven days thereafter whenever the court is satisfied that good cause exists for a further continuance and the moving party [*390] will be

prepared to proceed within that time—does not limit the period for which the initial continuance may be granted on a showing of good cause.

[CA\(7\)](#) [↓] (7)

Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Timing of Claim—Withdrawal.

A court, before trial, may address a defendant's claim that he or she is receiving ineffective assistance of counsel and entertain a motion allowing counsel to withdraw from the case and substitute other counsel.

[CA\(8\)](#) [↓] (8)

Attorneys at Law § 3—Ethical Standards—Sources.

The conduct required of attorneys in California is determined not just by the Rules of Professional Conduct, the State Bar Act ([Bus. & Prof. Code, § 6000 et seq.](#)), and judicial opinions, but also by consideration of ethics opinions and rules and standards promulgated by other jurisdictions and bar associations (Rules Prof. Conduct, rule 1-100(A)).

[CA\(9\)](#) [↓] (9)

Public Defender § 2—Ability to Provide Effective Assistance—Excessive Caseloads.

A public defender's office is considered to be the equivalent of a law firm, and responsibility for handling a case falls upon the office as a whole. The ethical obligations of public defenders and other publically funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained defense counsel. A deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisory approval, attempt to reduce the caseload, as by transferring nonrepresentational responsibilities to others, refusing new cases, and/or transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, he or she must file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients. In support of the motion, counsel

should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client.

[CA\(10\)](#) [↓] (10)

Public Defender § 5—Duty to Client—Conflict of Interest—Excessive Caseloads—Substitution of Counsel.

Under the Penal Code, a public defender may not be assigned to represent an indigent defendant in a case in which he or she has a conflict of interest (*Pen. Code, § 987.2, subs. (a)(3), (d), (e)*), and a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent [*391] defendants he or she is representing. When a public defender reels under a staggering workload, he or she should place the situation before the judge, who upon a satisfactory showing can relieve the public defender, and order the employment of private counsel at public expense. Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and, often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials, or of making provision for funds, facilities and personnel for a public defender's office adequate for the demands placed upon it.

[CA\(11\)](#) [↓] (11)

Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Deferential Review—Limitations—Duty to Investigate.

Deferential scrutiny of counsel's performance is limited in extent and, in certain cases, may be altogether unjustified. Deference is not abdication; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance. Counsel's first duty is to investigate the facts of his or her client's case and to research the law applicable to those facts. Generally, [U.S. Const., 6th Amend.](#), and [Cal. Const., art. I, § 15](#), require counsel's diligence and active participation in the

full and effective preparation of his or her client's case. Criminal defense attorneys have a duty to investigate carefully all defenses of fact and of law that may be available to the defendant. That counsel may be compelled to yield to his or her client's right to insist on the presentation of a defense of his or her own choosing does not excuse counsel from his or her duty to investigate and research other defenses so as to make an informed recommendation to his or her client.

[CA\(12\)](#) [↓] (12)

Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Test—Prejudice to Defendant—Reasonable Probability Standard.

To prevail on a claim of ineffective assistance of counsel, a defendant must show not just that counsel's deficiencies had some conceivable effect on the outcome of the proceeding, but also that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Specifically, when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The burden of proof that the defendant must meet in order to establish his or her entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.

[*392]

Counsel: Kathryn Ann Seligman and Melanie Martin DelCampo for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Martin S. Kaye and Christina vom Saal, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Kline, P. J., with Haerle and Lambden, JJ., concurring.

Opinion by: Kline

Opinion

[**729] **KLINE, P. J.**—Edward S. ¹ appeals from the judgment of the juvenile court sustaining a petition alleging that he comes within the provisions of [section 602 of the Welfare and Institutions Code](#). His court-appointed counsel initially filed a brief raising no legal issues and asking this court to conduct an independent investigation of the record pursuant to [People v. Wende](#)

¹ We are aware that, in order to protect the privacy of minors involved in [***2] delinquency, dependency, and family law cases, many courts of appeal have recently adopted the practice of identifying such minors only by their initials, in accordance with an “informal recommendation of the Reporter of Decisions.” ([Adoption of O.M. \(2008\) 169 Cal.App.4th 672, 675, fn. 1 \[87 Cal. Rptr. 3d 135\]](#).) This practice differs from the policy prescription set forth in both the California Rules of Court and the California Style Manual. The Rules of Court provide that to protect anonymity in such cases “a party must be referred to by first name and last initial in all filed documents and court orders and opinions; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the party's initials may be used.” ([Cal. Rules of Court, rule 8.400\(b\)\(2\)](#)); see also California Style Manual (4th ed. 2000) § 5:9 [“Individuals entitled to protective nondisclosure are described by first name and last initial ...”]; see also *id.*, § 5:10.) We adhere to the rule not just because it is more authoritative than the informal recommendation but also because we have no reason to believe it has failed to adequately protect the anonymity of those to whom it applies. Additionally, we believe the use of initials [***3] only would make it increasingly difficult for legal researchers to keep track of and differentiate between and among the growing number of appellate opinions in delinquency, dependency and family law cases, create confusion, and impair the readability of many such opinions.

We use initials to identify the minor victim in this case because, according to statistical information gathered by the Social Security Administration and made available on its Web site (&t;<http://www.ssa.gov/cgi-bin/babynome.cgi>&t; [as of Apr. 27, 2009]), her name is not among the 1,000 most popular names for any year of birth in the last nine years, which is the objective standard used by the Reporter of Decisions to determine whether a particular name is “unusual” within the meaning of [California Rules of Court, rule 8.400](#).

[\(1979\) 25 Cal.3d 436 \[158 Cal.Rptr. 839, 600 P.2d 1071\]](#). After conducting that review, we issued an order requesting supplemental briefing on the issue whether the Humboldt County Superior Court erred in denying appellant's motion for a new jurisdictional hearing.

[*393]

Concluding it was error to deny the motion for a new jurisdictional hearing, we shall reverse and remand for such a hearing.

FACTS AND PROCEEDINGS BELOW

On October 4, 2006, the District Attorney of Mendocino County filed a three-count petition pursuant to [Welfare and Institutions Code section 602](#), alleging that two days earlier appellant attempted to commit a lewd and lascivious act with a child under the age of 14 ([Pen. Code, §§ 664, 288, subd. \(a\)](#)), [*394] and on the same day annoyed or molested and made a criminal threat against the same child ([Pen. Code, §§ 647.6, subd. \(a\), 422](#)). Eight days later, the district attorney amended the petition to additionally charge a second attempt to commit a lewd or lascivious act with the same underage child.

Appellant, who was 17 years of age at the time the petition was filed, is a Native [*730] American eligible for enrollment in the Yurok Tribe. He had been previously declared a ward of the court in 2004 as a result of his commission of misdemeanor vandalism and, thereafter, battery on school property and theft, both also misdemeanors. The two latter offenses violated terms of the probation appellant was placed on for the vandalism. Appellant was again placed on probation and ordered to participate in the New Horizons program. It was difficult to find a residential placement for appellant because he had been abandoned by his mother in 2002, and his father was confined in the Humboldt County Correctional Facility. Child Protective Services (CPS) was unwilling to place appellant with his grandmother, because her adult son and his four children lived with her, and CPS believed appellant's claim that he had [*395] been physically abused by the son, who had a criminal record. In 2004, appellant was permitted to live with his aunt Sherry S. in Mendocino County. In June 2005, he absconded from that placement and was subsequently apprehended and detained in the Mendocino County Juvenile Hall on February 8, 2006. With court approval, appellant was released from the New Horizons program on August 18, 2006, in order to facilitate another trial relative foster

placement with Sherry S. It was shortly after this second placement with Sherry S. that the district attorney filed the petition before us.

On October 25, 2006, the day before the jurisdictional hearing was scheduled to begin, appellant moved for a one-week continuance. In support of the motion, Mendocino County Deputy Public Defender Shane Hauschild filed a declaration stating that he had been informed by a relative of appellant that the alleged victim and her mother “may have made similar accusations of molestation in the past” and that this information may lead to “exculpatory” evidence. Defense counsel also filed a petition pursuant to [Welfare and Institutions Code section 827](#) seeking permission to inspect juvenile court [*394] records maintained [*396] by CPS apparently relating to the minor victim and/or her mother. The court granted a one-week continuance, resetting the jurisdictional hearing for November 3, 2006.

On October 31, the court conducted a hearing regarding appellant's motion to inspect juvenile records held by CPS. A representative of the Mendocino County Department of Social Services (Department of Social Services) testified that she had reviewed the CPS records “but I d[on't] find anything that really addressed the [minor victim's] honesty, truthfulness, veracity, or credibility.” Defense counsel then pressed the court to allow inspection of reports of suspected child abuse or allegations by others that the minor had been untruthful; that is, anything “that's clearly relevant to her credibility whether it has to do with child abuse [or] not.” The juvenile court agreed to inspect in camera the juvenile records produced by the Department of Social Services.

The court conducted a hearing the next day at which it stated that the records produced by Department of Social Services in response to appellant's motion to inspect revealed nothing warranting disclosure. According to the court, the records contain “some matters” regarding the victim but “nothing about any claims [*397] or allegations by the victim that she was molested which were either substantiated or not substantiated.” The court ordered a copy of the records produced to “be put in a file and sealed, not to be opened [by county counsel] until further order of the Court so that they're part of the record in this case.”²

² The sealed reports do not shed light on the truthfulness of T.S., the alleged victim, but they paint a picture of Sherry S. very different from that presented at the jurisdictional hearing. As material to the present proceeding, the numerous reports show that complaints were frequently made to CPS that

[731]** *The Jurisdictional Hearing*

The contested jurisdictional hearing held in the Mendocino County Superior Court on November 3, **[***8]** 2006, was exceedingly brief. Four witnesses testified: the victim, T.S., who had just turned 10 years of age; her mother, Sherry S.; Mike Dygert, a detective with the Mendocino County Sheriff's Department; and appellant.

T.S. testified that on the evening in question she was alone in her house with appellant, who was her nephew, and her two brothers, all of whom lived **[*395]** in the house together with her mother, who was at the time at her boyfriend's house. According to T.S., appellant came into her mother's room, where T.S. was then sleeping, awoke her by pulling down her sweatpants and, when they were down, asked her to suck his penis. After she began yelling for her mom and said she would tell what appellant had done, appellant assertedly told her "You better not tell anybody" or "else I'll hurt you." Appellant then stopped what he was doing and left. T.S. stated that appellant never took his clothes off and she never saw his "private parts," though he had put his hand under his belt. T.S. said she telephoned her mother, who returned home shortly and later called the police.

Sherry testified that appellant was related to her deceased husband and the nephew of her children, and she had known **[***9]** him since he was two years of age. She was aware he was on probation at the time she left him alone with her children, but knew him to be "[v]ery kind and gentle towards my kids" who "seemed to like his company" and she "had never seen him exhibit any behavior that would give [her] cause for concern." After she returned home and heard from T.S. what had happened, Sherry called Jason S., "an uncle—or brother of [T.S.], an older brother, and ... an uncle of [appellant]," because she was worried and scared. Jason was not home but Sherry spoke with his wife, Arla S., "another sister of [T.S.]'s and an aunt to [appellant]." Arla said they would call back when Jason returned. A few minutes later, Arla called back and said

Sherry's children suffered general neglect and physical abuse, that the children were at risk for "sibling abuse," that her residence was a "drug house," and that Sherry "has a known history of selling drugs and sex to men" and was "known to have sex with under age boys." Some of the investigations of these reports proved "inconclusive," in others the complaints were unsubstantiated, but many, though it is hard to know exactly which ones, were "substantiated."

"they were unwilling to get involved." Sherry then called the police.

On cross-examination, Sherry said she did not call the police immediately after arriving home and hearing from her daughter what appellant had done because appellant was doing well in school and sports, and thereby turning his life around, and reporting him to the police might set him back. She was also "worried about the repercussions from the relatives because I didn't want to overreact." However, **[***10]** because child molestation was prevalent in her family, Sherry believed her daughter's accusation was truthful and called the police. Sherry testified that molestations had happened "not necessarily to me but to all my cousins, all my siblings, everybody I know. And I'm the only one of two people in my extended family of about three generations that I know wasn't molested as a child." When Sherry made this statement, defense counsel said, "Okay. I don't have any more questions."

[732]** Officer Dygert testified simply that appellant had been asleep when he and another officer arrived at the residence in response to the call from Sherry. After talking to the victim and Sherry, he awakened appellant and arrested him. Because appellant was "groggy" Dygert did not interview him at the scene but took him to the police station. He did not recall whether appellant was wearing a belt at the time he was arrested or later at the police station. **[*396]** Although the officer's conduct was "accusatory," appellant was at no time belligerent or uncooperative. Officer Dygert was never asked and did not say what statements, if any, were made to him by appellant.

Appellant testified that at the time of the alleged offenses **[***11]** he had been living at Sherry's house for about six weeks. He was placed there by county officials after being found guilty of "fighting in school and getting caught at school with drugs," and was still on probation for those offenses, which occurred almost a year earlier. Appellant had good relations with all Sherry's children. He played football with her sons and helped them with their homework and chores. Appellant stated that Sherry often left him alone with her older son, but except on one occasion she always took the other two children with her. On one occasion, however, Sherry asked him to watch all three children while she was away. Appellant told her he would only watch her older son because the other "was too young and him and his brother fight a lot," and he wouldn't watch the daughter "because I didn't feel, like, right around her." Appellant said that although he was sometimes

“uncomfortable” around T.S., he “did not have any problems with her” on the day in question, during which she played happily with her brothers. Appellant attributed his feeling about T.S. to the fact that Sherry had told him that T.S. had been raped by one of his uncles.

When reminded of Sherry's testimony, [***12] that at the time of the alleged offense he had been trying to “turn [his] life around” and asked why he was doing so, appellant replied: “I was tired of being locked up, and I just wanted to really change my life because I couldn't—I was just tired of being around walls. I felt like I was taking my father's footsteps. But after I completed my program, I was, like, really wanting to turn my life around. It was going [in] that direction. But then this crime came up.” Appellant insisted that the charged molestation and threat never occurred. He testified that he went to bed about three minutes after Sherry left the house at 10:00 p.m., fell asleep almost immediately, and stayed asleep until he was “woken up by the cops.” Appellant was sure he went to bed about 10:03 p.m. because when Sherry got off the phone with her boyfriend and went to her room and left, he saw on his computer that it was 10:00 o'clock “[a]nd then three minutes later I just jumped off and went to bed.” When asked whether, as T.S. testified, he had a belt on at the time he molested her, appellant stated that he did not have a belt on at any time during the night in question or during that day. He was at all times [***13] wearing the blue pants in which he was sleeping when awoken by Officer Dygert. Appellant's testimony on direct examination ended with the following short colloquy:

“Q. Did you ever at anytime that night go into Sherry's bedroom [in which the victim claimed she was sleeping when the molestation occurred]?”

[*397]

“A. No, I did not. [¶] ... [¶]

“Q. Did you ever talk to [the victim] that night?”

“A. No, I did not.

[**733] “Q. And you never woke up that entire night?”

“A. Never. The only time I woke up is for the cops.”

On redirect, appellant stated that he had a girlfriend his own age (17) with whom he was still “involved,” and had dated other girls in the past, the youngest of whom was 16.

At the close of the jurisdictional hearing, the court found appellant guilty beyond a reasonable doubt on one of the two alleged attempts to commit a lewd or lascivious act with a child under the age of 14 (Pen. Code, §§ 664, 288, subd. (a)) and on the charge that he annoyed or molested a minor (Pen. Code, § 647.6, subd. (a)). The prosecution thereupon dismissed the allegation of criminal threat. No finding was made with respect to the second alleged attempt to commit a lewd or lascivious act with the same victim.

The juvenile [***14] court's finding rested on the testimony of the victim. As the court stated: “I think fundamentally what it comes down to is whether the child is credible or not. And I've had the opportunity to observe her. I didn't see any signs that she was using language that was the obvious result of coaching. She's amazingly smart and was a little nervous, but did pretty good in coping with the whole situation. ... I didn't see any signs that she wasn't truthful. And I think that I'm satisfied beyond a reasonable doubt that she did tell the truth and her testimony ... clearly establishes that the elements are met. [¶] She was under 14, and she was touched ... and it was with the intent to gratify the minor's sexual desires.”

At the close of the jurisdictional hearing, the district attorney indicated there was reason to believe appellant was not then residing in Mendocino County, but with his father in Humboldt County, and the court should therefore consider transferring the case to that county. (Welf. & Inst. Code, § 263.) On November 14, 2006, after the probation department had also recommended that the case be transferred, the court ordered appellant's case transferred to Humboldt County.

*The [***15] Motion for a New Jurisdictional Hearing*

On February 16, 2007, appellant's newly appointed counsel, Humboldt County Deputy Public Defender Joanne Carter, moved for a new jurisdictional hearing on the ground that appellant had been denied the effective [*398] assistance of counsel during the jurisdictional proceedings in Mendocino County. In support of the motion, she argued that his former attorney, Shane Hauschild, “knew that the case needed investigation for a proper defense but chose not to request that assistance due to the mistaken belief that he was not entitled to confidential court experts,” such as “ex-parte funding for an investigator, psychological evaluation and polygraph examination.” Appellant contended that his former counsel failed to request a

psychological evaluation and other “ancillary defense services” he knew to be necessary, and that the failure to request such assistance was “[f]or his own personal reasons (fear of being fired) not for tactical reasons.”

In her brief in support of her motion for a new jurisdictional hearing,³ Carter stated [**734] that prior counsel was ineffective also because he failed to voir dire T.S. to determine whether she was capable of understanding [***16] the duty to testify truthfully, he failed to adequately inquire of T.S. during his nine-minute cross-examination whether she understood the difference between the truth and a falsehood, and whether she had discussed her testimony with others and, if so, what was said during those discussions. He was ineffective also, Carter argued, in failing to require that T.S., on the record, take the oath required by [Evidence Code section 710](#).⁴

The motion further alleged that Hauschild was ineffective because there was at the outset a need and good cause for a continuance of more than one week, and his failure to seek an adequate continuance was tactically and otherwise unjustified and based upon an erroneous understanding of the law. Carter urged it was also ineffective and unprofessional for prior counsel to fail to request a continuance after Sherry testified she was “only one of two people in my extended family of

³Though motions for a new jurisdictional hearing are not specifically authorized by the Welfare and Institutions Code, they have been deemed tantamount to motions under [Welfare and Institutions Code sections 775](#) and [778](#) (relating to petitions to change, modify or set aside orders), and courts have in that way subjected them to the same rules as are applicable to motions for new trial in adult criminal cases. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54, 62 [34 Cal.Rptr.3d 430]; *In re Steven S.* (1999) 76 Cal.App.4th 349, 352–353 [90 Cal.Rptr.2d 290].) It is true that ineffective assistance of counsel is not among the nine grounds for ordering a new trial set forth in [Penal Code section 1181](#), but our Supreme Court has made clear that “the statute should not be read to limit the constitutional [***17] duty of trial courts to ensure that defendants be accorded due process of law,” and that in appropriate circumstances “the issue of counsel’s effectiveness [may be presented] to the trial court as the basis of a motion for new trial.” (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [189 Cal.Rptr. 855, 659 P.2d 1144].)

⁴As material, [Evidence Code section 710](#) states that “[e]very witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 ... may be required only to promise to tell the truth.”

about three generations that I know that wasn't molested as a child.” “Unbelievably,” appellant's new counsel argued, “after this [***18] bombshell of a disclosure, the defense attorney's response was, [*399] ‘Okay. I don't have any more questions.’ How can this be? The witness in this case, a 10 year old girl, apparently grew up in and around a family of three generations experiencing molest. Does this not warrant at least some further examination on the stand, at a minimum, and then possibly a further continuance for further investigation.” Carter complained as well that former counsel failed to impeach T.S. with discrepancies between the description of appellant's conduct she gave at the jurisdictional hearing and the one that she gave Officer Dygert when he interviewed her on tape on the night in question. The audiotape of Officer Dygert's interview, attached to the motion papers, assertedly showed that Officer Dygert's questions of T.S. were leading, and that her answers were coached by her mother. Hauschild never offered the audiotape of this interview, or the transcript thereof, as evidence. He also failed to offer in evidence the tape of Officer Dygert's interview with appellant. This tape is assertedly significant not only because appellant vigorously denied T.S.'s accusation, as he has consistently done, but also because [***19] it shows the difficulty Officer Dygert had in waking him up and the depth of his sleep, which is arguably inconsistent with his participation in a molestation claimed to have just occurred. Finally, Carter argued that prior counsel inexcusably failed to interview Jason and Arla S., appellant's uncle and aunt, with whom Sherry testified she spoke by phone shortly before she called the police. Carter argued the foregoing failures of counsel were highly prejudicial.

The motion for a new jurisdictional hearing also pointed out that the “[t]he entire contested hearing took less than two [**735] hours upon the conclusion of which, the court found the allegations ... to be true.”

Hauschild, appellant's former attorney, filed a lengthy declaration in support of the motion for a new jurisdictional hearing. He states that (1) he needed more than a week to investigate information he received from appellant's relatives that might lead to exculpatory evidence, but erroneously believed he was only entitled to a seven-day continuance; (2) his “excessive caseload” made it impossible to “thoroughly review and litigate each and every case” he was then litigating, including appellant's case⁵; (3) the Mendocino

⁵Hauschild states in his declaration that at the time he was

[***20] County Public Defender's Office lacked an investigator and he was expected to conduct his own investigations, which was "all but impossible" in light of his heavy caseload; (4) he considered requesting an evaluation of appellant's mental condition similar to that authorized by [Penal Code section 288.1](#), but was told by the public defender that his office would [*400] not pay for one; (5) he did not ask the court to order and pay for such an evaluation because the court had told him a court-ordered evaluation would not be confidential; (6) he did not request a polygraph of appellant "because I know that the Courts will not pay for one and I knew from my conversations with the Public Defender that my Office would not pay for a polygraph"; and (7) he feared that "if I requested or attempted to demand funding for a polygraph for my client, my job would be jeopardized." (Appellant's new attorney obtained a polygraph test, which showed appellant's denial of the charged offenses was truthful, and submitted the results to the court in support of the motion for a new jurisdictional hearing. As later explained, the result of the polygraph test was also discussed in a psychological evaluation considered [***21] by the court at the dispositional phase of the proceedings.) Hauschild asserts that his "numerous attempts to discuss my cases and caseload with [Mendocino] Public Defender Wes Hamilton were unsuccessful." For example, when he told him his unmanageable caseload interfered with his ability to represent appellant and his other clients, Hamilton responded: "I'm doing a murder case, do you want to trade?"

Hauschild's declaration ends with the statement of his belief "that much more should have been done in defending [appellant's] case. Specifically, this case required more resources, support from more experienced attorneys, proper investigation, sufficient investigative resources, and assistance with an extremely serious [W & I 602](#) petition[] None of these things were possible [***22] in light of my fear that I would lose my job if I pushed these issues with the [Mendocino County] Public Defender." Hauschild stated his investigation of the case consisted only of his conversations with appellant and request that the court inspect T.S.'s confidential juvenile court file, which he was not allowed to personally review. (See [Welf. & Inst. Code, § 827.](#))⁶

representing appellant he was also representing defendants in two other sexual molestation cases, a minor charged in adult court with a serious felony, and he was then "solely responsible for all LPS Conservatorship cases within the Mendocino County Courts" and was engaged in a jury trial of such a case at the time of appellant's jurisdictional hearing.

Humboldt County Superior Court Judge Christopher G. Wilson conducted three [**736] hearings on the motion for a new jurisdictional hearing. Jason S., appellant's uncle and Sherry's cousin, who was the only witness, testified that he attempted on several occasions to speak with Hauschild before and during appellant's jurisdictional hearing to provide information he thought Hauschild would find useful to appellant's defense. Among other things, he thought Hauschild should talk to his wife about her phone conversations with Sherry before the latter called the police. [***23] Jason's father, who was no longer alive, had had an affair with Sherry, who was his niece, and he had fathered two of her children, who were therefore Jason's stepsiblings. This incestuous relationship was controversial within the family's tribe and created tension between [*401] Sherry and others in the family. Appellant often visited Jason, and sometimes brought Sherry's two sons with him. Sherry felt Jason was competing with her for her sons' attention and thought appellant assisted him in this, and took out her anger by constantly threatening appellant. Jason thought it relevant to appellant's defense that T.S. had been molested by one of Sherry's uncles, who also tried to molest one of T.S.'s brothers. Sherry told Jason her ex-husband had also tried to molest her older son, and had broken the boy's arm in the process, and then moved on to molest or try to molest T.S. Jason stated that Sherry told him she had "reported" the molestation or attempted molestation of T.S. Jason felt the molestations or attempted molestations of Sherry's children by her uncle and her ex-husband, and her concerns about those molestations and others within the family, were the reasons she threatened appellant "in [***24] front of me and my wife and kids, [and] whoever else was around," such as by telling him "I'll send you back to Juvenile Hall."

Jason also thought it relevant that Sherry's youngest son was found at a daycare center "kissing on another boy, sucking on the boy's penis" and T.S. attended the same daycare facility. Jason also wanted Hauschild to know that, though he loved T.S., whom he referred to as his sister, she often lied. Recently, for example, one of Jason's daughters was upstairs in his house on her birthday, and Jason instructed a nephew named David not to allow other children arriving for the party to go

⁶ Appellant claims Hauschild never disclosed the foregoing information while he was representing him, and, if he had, appellant would have sought other counsel through the filing of a *Marsden* motion. ([People v. Marsden \(1970\) 2 Cal.3d 118 \[84 Cal.Rptr. 156, 465 P.2d 44\].](#))

upstairs because they would tell her of the presents downstairs and spoil the surprise. When T.S. began walking upstairs, David tried to stop her and Jason heard T.S. respond that if he did not let her pass she would tell others “that you pushed me down the stairs and you hit me.”

Finally, Jason thought Hauschild should know that Sherry told him she had initiated sexual intercourse with Jason's nephew, Josh, who was under 18, and Josh confirmed this. Sherry told Jason that Josh “wants an older woman' and stuff.” She also told him that she had sex with many other boys.

Because [***25] he thought the foregoing information would help Hauschild defend appellant, Jason repeatedly attempted to discuss it with him, but he “didn't want to talk to me really.” Jason gave Hauschild his phone number and those of his wife and sister, but none of them were ever called. Jason also gave Hauschild “contact information” for others who could corroborate the information he provided.

On cross-examination, Jason testified that he spoke briefly with Hauschild three times on the phone prior to the jurisdictional hearing and twice in the courthouse on the day it took place. During one of his phone conversations, Jason asked Hauschild “what his background was, what kind of a lawyer he [*402] was, like, as far as what kind of cases he usually takes” and, because “he didn't like some of the questions [**737] I was asking him, ... he hung up.” “[W]hat happened was he started to get, you know, like with an attitude towards me for asking him how long he's been a lawyer or how long has he been practicing. And he—he hung up on me.”

At the end of cross-examination, Jason acknowledged he had known appellant all of his life and also that he had spent time in prison for assault with a deadly weapon and kidnapping, [***26] and the victims of both were other Native Americans but not members of his family. Jason, who worked as a crane operator, had been out of prison for six years.

The arguments of counsel on the motion for a new jurisdictional hearing were separately heard by Judge Wilson on May 10, 2007. Deputy Public Defender Carter argued that Hauschild's declaration and Jason's testimony indicated that, despite the information and contacts he was provided by Jason, on which he did not follow up, Hauschild's defense of appellant consisted of little more than his conversations with appellant and the filing of the petitions asking the court to inspect juvenile

court records pursuant to [Welfare and Institutions Code section 827](#). Carter also emphasized Hauschild's complete failure to respond appropriately to Sherry's emotional testimony that she was one of only two people in her extended family of about three generations that had not been molested as a child, presumably because this provided an opportunity for Hauschild to explore the level of child molestation within the family and T.S.'s familiarity with forms of child molestation. Carter also called attention to Hauschild's failure to voir dire T.S. with [***27] respect to competency, at which time he could have asked whether she ever lied or threatened to lie in order to get her way, and to subject her to meaningful cross-examination regarding, for example, asserted discrepancies between her direct testimony and her statements to the arresting officer. Citing [In re Marquez \(1992\) 1 Cal.4th 584, 608–609 \[3 Cal.Rptr.2d 727, 822 P.2d 435\]](#), Carter claimed Hauschild's ineffectiveness was also shown by his failure to put before the court many positive aspects of appellant's life, and the support of him by other members of his family, such as Jason, and the fact that he had never before been charged with any sexual impropriety.

Finally, Carter called attention to the statement in Hauschild's declaration that, despite the fact that “I clearly required more time than a seven day continuance to fully investigate and competently defend the case,” he sought a continuance for only seven days because he understood that under [Welfare and Institutions Code section 682](#) “I was only entitled to a seven day continuance for a juvenile delinquency case.” Carter suggested that Hauschild's understanding of the law was erroneous.

[*403]

The district attorney maintained that [***28] appellant had not shown Hauschild's conduct fell below an objective standard of reasonableness. Conceding that there were things Hauschild could have done differently, the prosecutor pointed out that Hauschild met with and spoke with family members, including Jason, and “made the reasonable conclusion that the information was irrelevant, that it would not be fruitful in supplying him with a viable defense to the allegations.” According to the prosecutor, “it was probably a strategical decision to not delve into the prior family history of molest. I think that's something that, arguably, could prejudice his client just as well as serve him in formation of a defense. I think it's reasonable that a trier of fact, perhaps not properly, may—but may, nonetheless, conclude that a young man who is in a family that has

multiple incidences of molest may be more likely to himself have committed a molest. [**738] I think that was properly a door that, frankly, Mr. Hauschild properly chose not to open and at least not explore any further.”

The district attorney felt it was reasonable for Hauschild to point out the language T.S. used was sophisticated for a child her age; to emphasize how deeply asleep [***29] appellant was when he was found by Officer Dygert shortly after the offense was alleged to have occurred; and to also underscore that though appellant had in the past run away from Sherry's house when he got in trouble, he remained there this time. According to the district attorney, Hauschild “fairly successfully portrayed [appellant] as a nice young man that was on the right path for once and doing fairly well and not someone that would have risked this over engaging in the sort of conduct that was alleged. [¶] He clearly had a well-planned and orchestrated defense, and he presented it clearly and concisely to the Court.”

Finally, the prosecutor argued that even if Hauschild's conduct was not considered objectively reasonable, there would not have been a different outcome even if he had taken all of the courses of action outlined by appellant's present counsel, because “[i]t seems clear from the trial judge's ruling ... that he based his determination upon the believability of the nine-year-old victim. And I think ... we would have seen the exact same outcome.”

In rebuttal, Carter emphasized a criminal defense attorney's duty to investigate. “I think it's important that these leads [***30] be investigated. I don't think it was a wild goose chase. ... But that isn't our decision to make. I think we have a duty to investigate and that is where Mr. Hauschild failed [a]nd that is what prejudiced [appellant] as he sits here today.”

Judge Wilson took the motion for a new jurisdictional hearing under submission and, at a hearing four days later, issued his ruling denying the [*404] motion. Acknowledging that Hauschild made “errors” and that there were questions about the credibility of the complaining witness and her mother, Judge Wilson also noted that Jason was a convicted felon, and that much of his testimony was hearsay. Judge Wilson felt Judge LaCasse relied primarily on T.S.'s testimony and placed little weight on that of Sherry S. and Officer Dygert. In Judge Wilson's view, however, Sherry's testimony deserved some weight because Jason corroborated her testimony that she called other members of the family before she called the police. Finally, Judge Wilson

stated his satisfaction that Judge LaCasse's jurisdictional determination was supported by sufficient evidence. Judge Wilson then set a date for a contested dispositional hearing.

The Dispositional Hearing

On April 25, 2007, [***31] a little more than two months after the motion for new jurisdictional hearing had been filed but before the hearing on that motion, appellant's new counsel filed an ex parte application for an order authorizing funding for expert services to assist her in connection with appellant's motion for a new jurisdictional hearing. The court granted the request, directing payment from the county general fund to pay Dr. Andrew Renouf \$ 1,500 for his services. Dr. Renouf's report emphasizes that his assessment of appellant was complicated by “the undetermined validity of the charges” against appellant, and the fact that “in many ways Eddy does not fit the typical personality or historical profile for juvenile sex offenders.” The report acknowledges that appellant “comes from an extremely dysfunctional family background and has likely gravitated towards gang-involvement as a way for substituting for his missing family members and helping [**739] him survive on the streets,” but at the same time he “was going to school, performing well academically, and participating in team sports. He reportedly was liked by his coach and high-school principal, and is liked by Regional Facility staff. He was described [***32] as respectful of authority, a strong participator in treatment groups, and a positive peer leader. In addition, Eddy passed a polygraph test denying he committed the ... offense, reportedly engaged in age-appropriate sexual activity when he had the opportunity, has generally good impulse control, and no unusual sexual preoccupations revealed by psychological testing results or history.” Dr. Renouf repeatedly points out that appellant “adamantly” and “consistently denied the allegations against him of molest,” and notes “that the abilities to not confess when faced with a polygraph test and to maintain one's innocence over an extended period of time imply a level of psychological sophistication which test results suggest Eddy does not possess.”

Dr. Renouf concluded that, “[i]f the allegations of sexual molest are unfounded, Eddy would not require sex-offending treatment.” However, [*405] assuming, as did Judge LaCasse, that appellant committed the alleged molestation, Dr. Renouf felt compelled to recommend a treatment program designed to “break-

down Eddy's denial and have him assume responsibility for his behavior." Like the probation department, Dr. Renouf recommended placing appellant in [***33] a suitable residential treatment program. He felt medication was not required, but that drug and alcohol treatment programs would be appropriate.

At the commencement of the disposition hearing conducted on June 8, 2007, Judge Wilson stated that he had read the original and supplemental disposition reports and, upon counsel's submission of the issue to the court, he ordered residential treatment and counseling or sex offender treatment. Judge Wilson expressed concern that he did not have a [Penal Code section 288.1](#) evaluation of appellant, but felt "Dr. Renouf's evaluation suffices in that respect." Presumably on the basis of that evaluation, Judge Wilson concluded that "I don't consider [appellant] to be necessarily a danger to the community by way of potential for sexual offense. But I do consider him to be a danger to the community by way of his lack of impulse control and substance abuse and also the unavailability of adequate familial support." (Judge Wilson noted that Dr. Renouf disagreed with his conclusion that appellant lacked impulse control.)

At that point in the dispositional proceedings, appellant's counsel sought leave to renew the motion for a new jurisdictional hearing, basing [***34] the request on several statements in Dr. Renouf's report, including the statements that appellant "does not fit the typical personality or historical profile for juvenile sex offenders" and lacked the "psychological sophistication" to maintain his innocence in the face of a polygraph test and then pass the test. The district attorney opposed the request to renew the motion for a new jurisdictional hearing, and the court denied it, stating that a different evaluator "might see [appellant] differently, I suppose." Judge Wilson noted that, although "my experience with Dr. Renouf is that he's straightforward and objective [and] [t]here's no reason for me to doubt his evaluation in any respect, [¶] ... I found the victim's testimony and recitation to be straightforward [and] I, frankly, agreed with the Judge who presided over the jurisdictional hearing." Agreeing that appellant's offense was not "an aggravated, sexual-type assault," but "an instance of poor impulse control and poor judgment," Judge Wilson [**740] denied the request to renew appellant's motion for a new jurisdictional hearing.

The court found the maximum time of confinement was seven years three months 19 days, appellant's continuance [***35] at the home would be contrary to

his welfare, and reasonable efforts had been made to prevent his removal from that home and enable his return thereto. Accordingly, the court ordered that [**406] appellant be retained as a ward of the court, committed to the care and custody of the probation officer, and that all previous probation orders remain in force. As noted, appellant was placed in a residential treatment facility to receive counseling or sex offender treatment.

DISCUSSION

[HN1](#)[↑] [CA\(1\)](#)[↑] (1) The principles that guide our analysis were set forth by our Supreme Court more than 20 years ago in [People v. Ledesma \(1987\) 43 Cal.3d 171 \[233 Cal.Rptr. 404, 729 P.2d 839\]](#) (*Ledesma*), and are still applicable: "Under both the [Sixth Amendment to the United States Constitution](#) and [article I, section 15, of the California Constitution](#), a criminal defendant has the right to the assistance of counsel. (E.g., [Strickland v. Washington \(1984\) 466 U.S. 668, 684–685 \[80 L.Ed.2d 674, 104 S.Ct. 2052\]](#) [discussing federal constitutional rights]; [People v. Pope \[\(1979\)\] 23 Cal.3d 412, 422 \[152 Cal.Rptr. 732, 590 P.2d 859\]](#) [discussing both state and federal constitutional rights].) The ultimate purpose of this [***36] right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its results. (See, e.g., [Strickland, supra, at pp. 684–687](#) ... ; [Pope, supra, 23 Cal.3d at pp. 423–425](#).) [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance. (E.g., [Strickland, supra, 466 U.S. at p. 686](#) ... ; [Pope, supra, 23 Cal.3d at pp. 423–424](#).) Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' ([United States v. De Coster \(D.C. Cir. 1973\) 487 F.2d 1197, 1202](#), italics deleted; accord, [Pope, supra, at p. 423](#); see, e.g., [Strickland, supra, at pp. 686–689](#)) [¶] Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (See, e.g., [In re Hall \(1981\) 30 Cal.3d 408, 426 \[179 Cal.Rptr. 223, 637 P.2d 690\]](#); [***37] [People v. Frierson \(1979\) 25 Cal.3d 142, 166 \[158 Cal.Rptr. 281, 599 P.2d 587\]](#); see also [Strickland, supra, 466 U.S. at pp. 690–691](#)) If counsel fails to make such a decision, his action—no matter how unobjectionable in the abstract—

is professionally deficient.” ([Ledesma, supra, 43 Cal.3d at p. 215.](#))

HN2 **CA(2)** (2) The test to determine whether a criminal defendant's claim that counsel's assistance was so defective as to require reversal of a conviction consists of two prongs. First, the defendant must show that counsel's performance was deficient in that it “fell below an objective standard of reasonableness ... [¶] ... under prevailing professional norms.” ([Strickland v. Washington, supra, 466 U.S. at p. 688 \(Strickland\)](#); accord, [People v. Pope, \[*407\] supra, 23 Cal.3d at pp. 423–425 \(Pope\)](#).) If counsel's performance has been shown to be deficient, the defendant is entitled to relief **[**741]** only if it can additionally be established that he or she was prejudiced by counsel's deficient performance. ([Strickland, supra, at pp. 691–692](#); accord, [Ledesma, supra, 43 Cal.3d at p. 217.](#)) As to these issues, the defendant bears the burden of proof. ([Pope, supra, at p. 425.](#))

CA(3) (3) We shall conclude that Hauschild's performance was deficient in that he (1) failed to **[***38]** investigate potentially exculpatory evidence, (2) sought an inadequate continuance based on a mistake of law, and (3) failed to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend appellant. Further concluding that these deficiencies were prejudicial, we shall reverse the judgment.

I.

CA(4) (4) Emphasizing the duty of **HN3** defense counsel “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary” ([Strickland, supra, 466 U.S. at p. 691](#)), appellant correctly points out that a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation. (See, e.g., [In re Jones \(1996\) 13 Cal.4th 552, 564–565 \[54 Cal.Rptr.2d 52, 917 P.2d 1175\]](#); [Reynoso v. Giurbino \(9th Cir. 2006\) 462 F.3d 1099, 1112](#); [Rios v. Rocha \(9th Cir. 2002\) 299 F.3d 796, 805](#); [Hart v. Gomez \(9th Cir. 1999\) 174 F.3d 1067, 1070](#); [Sanders v. Ratelle \(9th Cir. 1994\) 21 F.3d 1446, 1456.](#)) California case law makes clear that counsel has an obligation to investigate all possible defenses and should not select **[***39]** a defense strategy without first carrying out an adequate investigation. ([In re Gay \(1998\) 19 Cal.4th 771, 790 \[80 Cal.Rptr.2d 765, 968](#)

[P.2d 476\]](#); [In re Visciotti \(1996\) 14 Cal.4th 325, 334 \[58 Cal.Rptr.2d 801, 926 P.2d 987\]](#); [In re Vargas \(2000\) 83 Cal.App.4th 1125, 1133 \[100 Cal.Rptr.2d 265\]](#); [Rios v. Rocha, supra, 299 F.3d at pp. 805–806.](#))

It bears emphasizing that appellant was charged with a violation of [Penal Code section 288, subdivision \(a\)](#), a serious and violent felony and a potential strike ([Pen. Code, §§ 1192.7, subd. \(c\)\(6\), 667.5, subd. \(c\)\(6\), 1170.12, subd. \(b\)\(1\)](#)), and an offense exposing him to sex offender registration requirements ([Pen. Code, § 290.008](#); [In re G.C. \(2007\) 157 Cal.App.4th 405 \[68 Cal.Rptr.3d 523\]](#)). While we do not intend to imply that any criminal charge is insignificant, reasonable counsel certainly would have appreciated the need to devote adequate time and resources to appellant's defense.

From the police report and his discussions with appellant, Hauschild must have been aware at the outset that the prosecution's case rested almost **[*408]** entirely on the credibility of T.S., who had just turned 10, because she was the only witness to the alleged offense and **[***40]** there was no physical evidence corroborating her claim. The information Jason S. provided Hauschild less than a week after he was appointed to represent appellant included not only that T.S. had been molested by an uncle and perhaps also her father, and therefore had been exposed to more sexual conduct than most 10-year-olds, but also that on a specific occasion she threatened to lie in order to work her will. Jason also provided the names of others who could corroborate this information, and told Hauschild how he could contact these individuals. Additionally, Jason informed Hauschild that Sherry was angry with appellant because of his relationship with Jason and for this reason, as well as her sensitivity about the molestation of her children by other relatives, **[**742]** had threatened appellant that she would “send him back to juvenile hall.” Despite the potential use of this information to impeach T.S. and Sherry, Hauschild made no investigatory efforts.

The sexual experiences of not just T.S. but also her siblings could have been used by the defense to advantage if the information Jason provided had been investigated and verified, even in part. For example, T.S.'s prior molestation by an **[***41]** uncle, who allegedly also molested her older brother, and evidence that her younger brother had been found “sucking the penis” of another child, suggest T.S. may have been aware of this form of child molestation. Jason testified that he gave Hauschild the address of the daycare center at which her younger brother was found sucking

the penis of another child, and the name of the daycare employee to talk to, but Hauschild never contacted that person because, as he explained in his declaration, he had neither the time nor the investigatory resources.

In [In re Vargas, supra, 83 Cal.App.4th 1125](#), in which the petitioner was charged with forcible lewd conduct upon a child, the expected defense was that the petitioner's daughter and ex-wife concocted the story of molestation out of revenge because he was leaving his ex-wife, and his daughter did not want to move with him to another state. Although many family friends had apparently agreed to testify on the petitioner's behalf, his attorney called none of them as witnesses. The attorney claimed that neither the petitioner nor many members of his family with whom she spoke were able to identify such willing witnesses. This representation was [***42] contested and the court ordered an evidentiary hearing to ascertain whether an investigation was warranted, whether the attorney conducted an investigation, and whether any investigation was sufficient or perfunctory. (*Id. at p. 1138.*) The doubt presented in *Vargas* as to whether defense counsel conducted an adequate investigation does not exist in the present case, as Hauschild fully acknowledges he received information warranting an investigation he failed to conduct.

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In [Williams v. Washington \(7th Cir. 1995\) 59 F.3d 673](#), as here, the credibility of the complaining witness was the central issue. The petitioner, who had been convicted in state court of indecent liberties with her 13-year-old adopted daughter, asserted the denial of effective assistance of counsel at trial. The only persons who testified at the bench trial were the child, a police officer, the petitioner, and her husband. Aside from airing the petitioner's denials and those of her husband, defense counsel called no witnesses and produced no evidence in favor of the petitioner despite the existence of school files suggesting the child victim "had a problem telling the truth." (*Id. at pp. 675–676.*) Though defense counsel [***43] admitted he conducted no investigation other than speaking with his clients, the state insisted this behavior was objectively reasonable "because this case was a 'simple' credibility contest." (*Id. at p. 681.*) The court disagreed. Pointing out that the excluded witnesses would have bolstered the testimony of the petitioner and her husband and undercut that of the child, the court concluded that "[b]ecause investigation into this matter might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to

investigate was not objectively reasonable." (*Ibid.*, citing [Chambers v. Armontrout \(8th Cir. 1990\) 907 F.2d 825, 830–831](#), cert. den. *sub nom. Armontrout v. Chambers (1990) 498 U.S. 950 [112 L.Ed.2d 331, 111 S.Ct. 369].*)

Here, the district attorney did not argue that Hauschild would have been unable to corroborate the information Jason provided [**743] him and use this evidence to impeach T.S.'s credibility. Her argument was that this would have been a risky strategy and Hauschild had a good tactical reason for not pursuing it. According to the district attorney, pursuing the incest and sexual acts of Sherry and the sexual experiences of [***44] her children would have been a strategic mistake, because "it's reasonable that a trier of fact, perhaps not properly, ... may, nonetheless, conclude that a young man who is in a family that has multiple incidences of molest may be more likely to himself have committed a molest. I think that was probably a door that, frankly, Mr. Hauschild properly chose not to open" This argument is self-defeating, for it ignores Hauschild's duty to anticipate the very danger the district attorney described; namely, that, for the reasons given by the district attorney, the prosecution might introduce the regularity of sexual molestation within appellant's family—as indeed it did through Sherry's direct testimony that molestations were commonplace in her extended family, which included appellant.

Hauschild concedes in his declaration, and it seems to us clearly the case, that he had no tactical justification for his failure to investigate and "much more should have been done in defending this case." As we have seen, the reasons Hauschild offers for the deficiencies in his representation of appellant pertain solely to the magnitude of his caseload, which assertedly made "it [*410] impossible for [***45] me to thoroughly review and litigate each and every case, several of which were serious and violent felonies, including [appellant's] [PC 288](#) strike case," as well as the inadequate investigative and other resources of the Mendocino County Public Defender's Office. Hauschild's attempt to obtain such resources and/or obtain relief from the competing demands of his many other cases were assertedly rebuffed by his supervisor, and Hauschild feared he "would lose my job" if he continued to push these requests, as would also happen "if I requested or attempted to demand funding for a polygraph for my client."

Acknowledging Hauschild made "errors," the court found the evidence he was ineffective inadequate because it consisted primarily of Jason S.'s testimony that he

provided Hauschild information potentially useful to appellant's defense which Hauschild failed to pursue. The trial judge disregarded Jason's testimony because he believed it consisted of "multiple layers of hearsay" and was not credible due to the fact Jason is an ex-felon. Jason S.'s testimony cannot be so easily dismissed.

To begin with, Jason's credibility was not to be measured from the perspective of a trier of fact at a [***46] trial on the merits, as the court did, but from that of an attorney charged with the duty to defend a client against criminal charges. The question before the court was not whether Jason's claims were true, but whether Hauschild's failure to inquire into their truth was reasonable; that is, would a reasonable attorney in Hauschild's shoes have felt a professional duty to his client to verify those claims? Given Jason's long relationship with and knowledge of appellant, Sherry, and T.S. and her siblings, the specificity and facial significance of the information he provided, and his identification of others who would assertedly corroborate his claims and his specifying how such persons could be contacted, no reasonable defense attorney would have declined to investigate the information he provided simply because it contained hearsay and Jason was an ex-felon (especially one who had been released from custody six years earlier and was presently gainfully employed).

As our Supreme Court has observed, [HN4](#) [↑] "“strategic choices made after [**744] less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel [***47] has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”” ([In re Thomas \(2006\) 37 Cal.4th 1249, 1258 \[39 Cal.Rptr.3d 845, 129 P.3d 49\]](#); see also [Pope, supra, 23 Cal.3d at pp. 424–425.](#)) As we have explained, the People offer no persuasive strategic reason for Hauschild's admitted failure to investigate. [***411]

The trial court's failure to assign any significance to, or even to mention, Hauschild's lengthy and detailed admission of his own deficiencies and explanation of the reasons he failed to provide appellant the diligent advocacy to which appellant is constitutionally entitled is

inexplicable.

II.

[CA\(5\)](#) [↑] (5) Hauschild states in his declaration that he knew the seven-day continuance he sought and received was inadequate to permit him to fully investigate and competently defend appellant, but he declined to seek a longer continuance because he believed [Welfare and Institutions Code section 682](#) did not permit a continuance longer than [***48] seven days. [HN5](#) [↑] One of the tests of whether counsel has provided effective representation is whether he or she “effectively suppl[ie]d to a defendant those skills and *legal knowledge* which we can reasonably expect from any member of the bar.” ([People v. Cook \(1975\) 13 Cal.3d 663, 672–673 \[119 Cal.Rptr. 500, 532 P.2d 148\]](#), italics added, cited with approval in [People v. Pope, supra, 23 Cal.3d at p. 421.](#))⁷ Hauschild's understanding of [section 682](#) is incorrect. [HN6](#) [↑] [CA\(6\)](#) [↑] (6) That statute provides that upon a showing of good cause a continuance may be granted “*for that period of time shown to be necessary* by the moving party at the hearing on the motion.” ([Welf. & Inst. Code, § 682, subd. \(b\)](#), italics added; see also [Pen. Code, § 987.05, Subdivision \(e\) of section 682](#)—which provides that “the hearing shall commence on the date to which it was continued or within *seven days thereafter* whenever the court is satisfied that good cause exists [for a *further* continuance] and the moving party will be prepared to proceed within that time” (italics added)—does not limit the period for which the *initial* continuance may be granted on a showing of good cause. So far as we can ascertain from the record, the seven-day continuance [***49] Hauschild sought (for the purposes of allowing inspection of juvenile court records pertaining to T.S. or Sherry) was the initial continuance sought at the jurisdictional hearing.

Moreover, even if [Welfare and Institutions Code section 682](#) imposed the time limitation Hauschild erroneously thought it did, he still could have requested a continuance to a jurisdictional hearing date beyond the statutorily prescribed period, which would be deemed a waiver of speedy trial rights. (See, e.g., [People v. Griffin \(1971\) 15 Cal.App.3d 442, 447, 450 \[93 Cal. Rptr. 319\]](#) [continuances totaling six months properly granted on

⁷ [People v. Cook, supra, 13 Cal.3d 663](#), was disapproved on another ground in [People v. Doolin \(2009\) 45 Cal.4th 390, 421, footnote 22 \[87 Cal.Rptr.3d 209, 198 P.3d 11\]](#).

the basis of defense counsel's representation that "further investigation is required"; see also 5 Witkin & Epstein, Cal. Criminal Law (3d [**745] ed. 2000) Criminal Trial, §§ 319–321, pp. 474–477.)

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Given the paramount responsibility of a judicial officer to assure the provision of a fair trial, we will not assume Judge LaCasse would have denied appellant an adequate continuance or other appropriate relief if the request had been based on an adequate [***50] showing that Hauschild's excessive caseload and the limited resources of the public defender's office made it impossible for him to effectively represent appellant.

III.

[CA\(7\)](#) [↑] (7) Even if a request for an adequate continuance would have been denied, or would not have solved the funding problem that apparently prevented Hauschild from competently defending appellant, Hauschild had other means by which to protect appellant's right to effective representation. [HN7](#) [↑] A court, before trial, may address a defendant's claim that he or she is receiving ineffective assistance of counsel and entertain a motion allowing counsel to withdraw from the case and substitute other counsel. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87–88 [270 Cal.Rptr. 817, 793 P.2d 23] ["the *Sixth Amendment* right to effective representation virtually compels a hearing and an order granting a motion for substitution of counsel when "there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if [the defendant's] request was denied"]; see also *State v. Peart* (La. 1993) 621 So.2d 780, 787.) The question is whether Hauschild's failure to take that course, or perhaps more saliently that of his supervisor, fell [***51] below an objective standard of reasonableness under prevailing professional norms relating to the responsibilities of public defenders and other publicly funded lawyers representing indigent accused persons.

[HN8](#) [↑] [CA\(8\)](#) [↑] (8) The conduct required of attorneys in this state is determined not just by the Rules of Professional Conduct, the State Bar Act (*Bus. & Prof. Code, § 6000 et seq.*) and judicial opinions, but also by consideration of "[e]thics opinions and rules and standards promulgated by other jurisdictions and bar associations." (Rules Prof. Conduct, rule 1-100(A).) The American Bar Association (ABA) has devoted much

attention to the obligations of a public defender in the predicament in which Hauschild found himself.⁸ On May 13, [*413] [**746] 2006, the ABA issued its Formal Opinion No. 06-441, entitled *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (ABA Com. on Ethics & Prof. Responsibility, Formal Opn. No. 06-441 (2006) (ABA Opinion).) [CA\(9\)](#) [↑] (9) Noting that, as under the California Rules of Professional Conduct (see rule 1-100(B)(1)(d)), a public defender's office "is considered to be the equivalent of a law firm" and "responsibility [***52] for handling [a] case[] ... falls upon [the] office as [a] whole," the opinion makes clear

⁸The ABA's interest in this issue is long-standing. (ABA Standing Com. on Legal Aid & Indigent Defendants, Gideon Undone: The Crisis in Indigent Defense Funding (Moran ed. 1983) [rep. of 1982 conference hearing]; ABA Standing Com. on Legal Aid & Indigent Defendants, Lefstein, Criminal Defense Services for the Poor (1982).) In 2004, after extensive hearings on the issue, the ABA [***54] found that "[f]orty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction" and that, as a result, "the integrity of the criminal justice system is eroded and the legitimacy of criminal convictions is called into question." (ABA Standing Com. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice (2004) p. 38, boldface omitted.) The ABA emphasized that "[f]unding for indigent defense services is shamefully inadequate," so that "[l]awyers frequently are burdened by overwhelming caseloads and essentially coerced into furnishing representation in defense systems that fail to provide the bare necessities for an adequate defense," specifically including investigative resources, "resulting in routine violations of the *Sixth Amendment* obligation to provide effective assistance of counsel." (*Ibid.*, boldface omitted; accord, ABA Special Com. on Crim. Justice in a Free Society, Criminal Justice in Crisis (1988).) This view, hardly confined to the ABA, is shared not just by the [***55] United States Department of Justice, which has long been concerned about the problem (see, e.g., Off. of Justice Programs, U.S. Dept. of Justice, Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations (2000) [report of 1999 Nat. Symposium on Indigent Defense]; Off. of Justice Programs, U.S. Dept. of Justice, Contracting for Indigent Defense Services: A Special Report (2000); Off. of Justice Programs, U.S. Dept. of Justice, Keeping Defender Workloads Manageable (2001)), but by virtually all of the many scholars who have looked into the matter. (See, e.g., Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help* (2004) 55 *Hastings L.J.* 835, 846–847, fns. 53, 54, and cited authorities.)

that the ethical obligations of public defenders and other publically funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained defense counsel. (ABA Opinion, at p. 5, fn. 17.) [HN9](#) Under the ABA Opinion, a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisory approval, attempt to reduce the caseload, as by transferring nonrepresentational responsibilities to others, refusing new cases, and/or transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA Opinion provides that he or she must “file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.” (*Id.* at p. 5.) In support of the motion, counsel “should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose [***53](#) confidential information or information as to strategy or other matters that may prejudice the client.” (*Id.* at p. 6, fn. 23; see also [In re Order on Motions to Withdraw \(Fla. Dist. Ct. App. 1992\) 612 So.2d 597](#) (en banc) [public defender’s office entitled to withdraw due to excessive caseload from representing defendants in 143 cases].) If the request to withdraw is denied by the trial court, the attorney should pursue appellate review. (See [Iowa Supreme Court v. Hughes \(Iowa 1996\) 557 N.W.2d 890, 894](#); see also [Ligda v. Superior Court \(1970\) 5 Cal.App.3d 811 \[85 Cal.Rptr. \[*414\]\(#\) 744\]](#).) The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct,⁹ may also be statutorily mandated.

[HN11](#) [CA\(10\)](#) (10) Under the Penal Code, a public defender may not be assigned to represent an indigent defendant in a case in which he or she has a conflict of interest (*Pen. Code*, § 987.2, *subds.* (a)(3),

⁹ [HN10](#) The Rules of Professional Conduct provide that a member of the California Bar “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence,” which includes the exercise of such “diligence” as is reasonably necessary for the performance of a particular legal service. (Rule 3-110(A)–(B).) Where the member knows or should know that continued representation will result in the incompetent provision of legal services in a case before a tribunal, he or she shall, with [***56](#) the permission of the tribunal, seek to withdraw from such representation, after giving due notice to the client and allowing time for employment of other counsel. (Rule 3-700(A)(2), (B)(2).)

(d), (e)), and a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to [**747](#) choose between the rights of the various indigent defendants he or she is representing. ([In re Order on Prosecution of Cr. App. \(Fla. 1990\) 561 So.2d 1130, 1135](#).) As we said in a different but related context in [Ligda v. Superior Court, supra, 5 Cal.App.3d 811 at pages 827–828](#): “When a public defender reels under a staggering workload, he ... should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel [citation] at public expense. Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards [***57](#) of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or making provision of funds, facilities and personnel for a public defender’s office adequate for the demands placed upon it.” (See also *Pen. Code*, § 987.2, *subd.* (a) [reasonable compensation of assigned counsel to be paid out of county general fund].)¹⁰

Hauschild’s declaration makes clear his awareness that his heavy caseload and the inadequate resources of the Mendocino County Public Defender’s [*415](#) Office made it “impossible for me to thoroughly review and litigate [appellant’s] case.” Hauschild avers that he brought this problem to the attention of his supervisor, the Mendocino County Public Defender, but to no avail.

¹⁰ We did not in [Ligda v. Superior Court, supra, 5 Cal.App.3d 811](#), discuss the nature of the showing that must be made in support of such a motion to withdraw, nor need we do so here. Suffice it for us simply to note that whether a public defender’s workload is so excessive as to warrant his or her removal and the substitution of other counsel requires evaluation not just of the size of the workload but the complexity of the cases that comprise it, available support services, and the attorney’s nonrepresentational duties, if any. Furthermore, whether the workload of counsel is sufficiently excessive as to warrant substitution of counsel must be decided on the basis of objective criteria, such as national maximum public defender workload [***58](#) standards (see, e.g., Nat. Legal Aid & Defender Assoc., Standards for the Defense (1973) std. 13.12, Workload of Public Defenders, p. 276 [report of 1973 Nat. Advisory Com. on Crim. Justice Standards & Goals]) or standards that have been promulgated by many states (see Off. of Justice Programs, U.S. Dept. of Justice, Keeping Defender Workloads Manageable, *supra*, at pp. 11–12, table 2).

Nor did the supervisor himself independently seek the withdrawal of his office in appellant's case, as he might have done.¹¹ (See [Ligda v. Superior Court, supra, 5 Cal.App.3d 811.](#)) In short, if the undisputed representations set forth in Hauschild's declaration under penalty of perjury are true, as for present purposes we must assume, Hauschild (and seemingly his supervisor) was not only aware the Mendocino County Public Defender's Office could not provide appellant **[**748]** effective **[***59]** representation, or should have been aware of this, but failed to take reasonable steps to avoid reasonably foreseeable prejudice to appellant's rights.

For **[***60]** the foregoing reasons, we conclude that the representation provided appellant by the Mendocino County Public Defender's Office was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Thus we turn to the second prong of the applicable test: whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," keeping in mind that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." ([Strickland, supra, 466 U.S. at p. 694.](#))

IV.

The frailty of the juvenile court's finding that Hauschild provided appellant effective assistance is reflected in the fact that the court felt it necessary to explain why

¹¹ With respect to the responsibilities of a supervising public defender, the ABA Opinion states as follows: [HN12](#)^[↑] "In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 [of the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003] observes, if the question whether a lawyer's workload is too great is 'reasonably arguable,' the supervisor of the lawyer has the authority to decide the question. *In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c), the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.*" (ABA Opinion, *supra*, at p. 8, fn. omitted, italics added, citing, inter alia, [Attorney Griev. Comm. v. Ficker \(Ct.App. 1998\) 349 Md. 13 \[706 A.2d 1045, 1052\].](#))

appellant suffered no prejudice even if the assistance he received from Hauschild was ineffective. With respect to that issue, the court placed special emphasis on the observations in [Ledesma, supra, 43 Cal.3d 171](#) about the "the danger of second-guessing in reviewing claims of ineffective assistance," namely the practical difficulty for judges in assessing the reasonableness of counsel's acts and omissions, and "the adverse **[***61]** consequences that **[*416]** systematic 'second-guessing' might have on the quality of legal representation provided to criminal defendants and on the functioning of the criminal justice system itself." ([Id. at p. 216.](#))

[CA\(11\)](#)^[↑] **(11)** The juvenile court failed, however, to consider the *Ledesma* court's caveat "that [HN13](#)^[↑] deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." ([Ledesma, supra, 43 Cal.3d at p. 217.](#)) Despite the fact that, unlike in the present case, the defense attorney in *Ledesma* offered no explanation for why he acted or failed to act in the manner challenged, and the appellate record shed no light on the matter ([id. at p. 218](#)), the *Ledesma* court held that counsel provided ineffective assistance by failing to investigate the viability of a diminished capacity defense. The court rejected the Attorney General's argument that the failure **[***62]** to conduct this investigation was justified by the defendant's insistence on relying instead on an alibi defense. Even if the defendant had insisted on an alibi defense, the court explained, the Attorney General's contention would still lack merit, because "[c]ounsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts. 'Generally, the [Sixth Amendment](#) and [article I, section 15](#) require counsel's "diligence and active participation in the full and effective preparation of his client's case." [Citation.] Criminal defense attorneys have a "duty to investigate carefully all defenses of fact and of law that may be available to the defendant" [Citation.] ... That counsel ... may be compelled to yield to his client's right to insist on the presentation of a defense of his own choosing [citation] does not excuse him from his duty to investigate and research other defenses so as to make an informed recommendation **[**749]** to his client [citation]." ([Id. at p. 222.](#))

Ledesma, supra, 43 Cal.3d 171, does not support, but undermines, the ruling below. Unlike the defendant in *Ledesma*, appellant did nothing to discourage Hauschild from investigating [***63] the information Jason provided; indeed, during the jurisdictional phase, appellant was not even aware Jason provided or sought to provide Hauschild any information on his behalf. Moreover, unlike the defense attorney in *Ledesma*, Hauschild did not remain silent but acknowledged his failure to investigate, and made clear it was not the result of any tactical calculation. That unusual admission and the reasons given by Hauschild for his deficient representation clearly warranted judicial attention.

The remaining reason Judge Wilson found appellant was not prejudiced by Hauschild's representation was that, while Judge LaCasse's jurisdictional [*417] determination was based on the credibility of the testimony of T.S., Judge Wilson felt that Sherry's testimony was also credible because Jason corroborated her statement that she phoned him and his wife before calling the police. Sherry's testimony was, however, relatively insignificant: The critical witness in this case was T.S., and Hauschild failed to subject her to any voir dire, made no inquiry into her ability to appreciate the difference between truth and falsity and to tell the truth; nor even asked her to promise to tell the truth, as may be [***64] required of a child her age. (Evid. Code, § 710.) Judge LaCasse made clear that, as he said at the hearing, "what it comes down to is whether the child is credible or not," and his finding that T.S. was credible does not appear to have rested at all on Sherry's credibility, which he had ample reason to question given the information provided in the sealed records he reviewed in camera. (See fn. 2, *ante.*) Moreover, had Hauschild subjected Sherry to cross-examination regarding her startling revelation that, over three generations, she was one of only two people in her extended family who had not been molested as a child—which opened the door to examination of the molestations and attempted molestations of T.S. and one of her brothers, and the sexual acts of the other brother on another minor, as well as Sherry's own sexual acts with minors—her testimony would likely have been seen in a very different light.

Nor did Hauschild do anything to buttress appellant's testimony. The theory of Hauschild's defense was that appellant had no reason to molest T.S. and was not the sort of person likely to do so. As he emphasized in closing argument, at the time of the alleged molestation [***65] appellant was "turning his life around"; he had completed a drug treatment program, ended his past

gang involvement, was regularly attending school, playing football, spending time with his 17-year-old girlfriend, and assisting Sherry with the raising of her children and the running of her household. Hauschild also emphasized appellant had never been charged with a sex offense of any sort. However, Hauschild failed to offer any testimonial or other evidence supporting this argument, such as Dr. Renouf's opinion that appellant "does not fit the typical personality or historical profile for juvenile sex offenders" and "lacked the psychological sophistication" necessary to maintain his innocence in the face of a polygraph test and then pass the test.

Acknowledging that the prosecution's case boiled down to the question "why would a ten-year-old child make this up?," Hauschild's only response was "well, its not the defense's burden to—to provide an answer to that question. And I don't think that anyone would have an answer to that [**750] question." But Jason had provided Hauschild several potential answers. First, Hauschild was given information suggesting T.S. may have obtained her knowledge [***66] of the sexual act she claimed appellant perpetrated not from his actions but from other sources. As Jason claimed (and Sherry corroborated), T.S. had previously been molested twice by adult members of her [*418] family and at least one of her siblings may have committed on another child the same type of molestation she claimed appellant committed on her. Jason also provided Hauschild information which, if verified, would cast doubt on T.S.'s credibility, including a specific example of her threatening to make a false accusation to get her way. (Evid. Code, § 780.) Jason further gave Hauschild reason to believe Sherry had threatened to send appellant back to juvenile hall, and that her anger at him may have stemmed from prior molestations and attempted molestations of T.S. and one of her brothers by her uncle and ex-husband. Despite Jason's report and provision of contact information for others who could provide similar evidence, all these possibilities were left wholly unexplored. This omission, of course, was exacerbated by Hauschild's failure to voir dire T.S. regarding her sexual experiences and the false accusation Jason said she threatened to make.

HN14 [↑] CA(12) [↑] (12) To prevail on his claim of ineffective [***67] assistance of counsel, appellant must show not just that Hauschild's deficiencies had some conceivable effect on the outcome of the proceeding, but that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra, 466 U.S. at pp. 693–694.*) Specifically, “[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” (*Id. at p. 695.*) “Finally, the burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.” (*Ledesma, supra, 43 Cal.3d at p. 218, citing In re Imbler (1963) 60 Cal.2d 554, 560 [35 Cal.Rptr. 293, 387 P.2d 6].*)

Mindful of the foregoing guidelines, we conclude that Hauschild’s deficient performance prejudiced appellant within the meaning of *Strickland*. First, the case must be considered a close one because there was no eyewitness or physical evidence and the [***68] matter turned almost entirely on credibility. Second, the evidence made available to Hauschild by Jason was germane to the central issue of the victim’s credibility. Third, Hauschild failed to produce available evidence indicating that appellant does not fit the typical personality or historical profile for juvenile sex offenders and lacks the psychological sophistication necessary to steadfastly maintain his innocence over a long period of time and in the face of a polygraph test.

We conclude appellant has shown that, as a result of Hauschild’s deficient performance, the jurisdictional proceedings conducted in the Mendocino County Superior Court were fundamentally unfair and unreliable (*Strickland, supra, 466 U.S. at p. 684*) and that there is “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” (*Id. at p. 695.*)

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DISPOSITION

For the foregoing reasons, the judgment is reversed and the matter is remanded to [**751] the Humboldt County juvenile court with directions to conduct a new jurisdictional hearing.

Haerle, J., and Lambden, J., concurred.

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9 *****

10 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**
11 **CENTRAL DIVISION**

12 THE PEOPLE OF THE STATE OF CALIFORNIA)	Case No.: CD285318
13 Plaintiff,)	DA No.: AEP884
14 v.)	MOTION FOR CONTINUANCE OF PRELIMINARY HEARING
15 ***** (3) et al,)	
16 Defendant.)	

17 Defendant ***** moves this Court for a continuance of the preliminary hearing set for January 12, 2021 until it can be held in-person with both counsel and Mr. ***** present in Court along with the presence of the witnesses. The factual basis for such a motion is as follows:

18 **FACTUAL STATEMENT**

- 19 1. To the best of counsel’s knowledge, no in-person preliminary hearings are being heard at this time.
- 20 2. Counsel is not prepared for this preliminary hearing at this time because of communications issues. The only method of conversing with Mr. ***** is through MS TEAMS to the George Bailey Detention Facility (GBDF).
- 21 3. Conversing with Mr. ***** can only be accomplished with appointments on a first-come, first service method for 30 minutes and sometimes less periods at a time.
- 22 4. Discovery consists of a multitude of multi-media items including lengthy surveillance

1 videos and audio tapes. Usually, if all the technology performs as intended, only one
2 tape can be viewed per session.

3 5. Counsel for defendant is self-isolating due to his medical condition and that of his
4 wife's.

5 6. Mr. ***** is currently in custody, requests to exercise his Constitutional right to be
6 present for the preliminary hearing and to have all witnesses present. He agrees to
7 any necessary continuances.

8 The legal basis for such a continuance is as follows:

9 **LEGAL ARGUMENT**

10 **Defendant Has Right to be Present.**

11 A defendant has the right to be present at the preliminary hearing. (Cal. Const. art I,
12 §15; Pen. Code 1054.3.) Further, a defendant has the right to the assistance of counsel at
13 a preliminary hearing. (*Coleman v. Alabama* (1970) 399 U.S. 1.) Lastly, due process
14 requires that a defendant be present at any hearing where the defendant's presence can
15 contribute to the presentation of a defense. (*Kentucky v. Stincer* (1987) 482 U.S. 730,
16 745.)

17 In pertinent part, the California Constitution states: "The defendant in a criminal
18 cause has the right...to be personally present with counsel." (Cal. Const. art I, § 15.) The
19 penal code expressly applies this right to a preliminary hearing. (Pen. Code § 1043.5(a)).
20 Given the express language of the relevant sections, the Court cannot lawfully hold a
21 preliminary hearing while Mr. ***** is not personally present.

22 **Defendant has the Right to Have Counsel Present.**

23 A defendant has the right to the assistance of counsel at the preliminary hearing.
24 (*Coleman v. Alabama, supra*, 399 U.S. at p. 10.) In *Coleman*, the United States Supreme
25 Court determined that the preliminary hearing is a critical stage of the prosecution, and that
26 a defendant is entitled to counsel at the hearing. (*Coleman, supra*, 399 U.S. at p. 10.)

27 "[A] person accused of crime requires the guiding hand of

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1 counsel at every step in the proceedings against him...and that
2 that constitutional principle is not limited to the presence of
3 counsel at trial. It is central to that principle that, in addition to
4 counsel's presence at trial, the accused is guaranteed that he
5 need not stand alone against the State at any stage of the
6 prosecution, formal or informal, in court or out, where counsel's
7 absence might derogate from the accused's right to a fair trial." .
8 . . "First, the lawyer's skilled examination and cross-examination
9 of witnesses may expose fatal weaknesses in the State's case
10 that may lead the magistrate to refuse to bind the accused over.
11 Second, in any event, the skilled interrogation of witnesses by
12 an experienced lawyer can fashion a vital impeachment tool for
13 use in cross examination of the State's witnesses at the trial, or
14 preserve testimony favorable to the accused of a witness who
15 does not appear at the trial. Third, trained counsel can more
16 effectively discover the case the State has against his client,
17 and make possible the preparation of a proper defense to meet
18 the case at the trial. Fourth, counsel can also be influential at
19 the preliminary hearing in making effective arguments for the
20 accused on such matters as the necessity for an early
21 psychiatric examination or bail."

22 (*Coleman, supra*, 399 U.S. at pp. 7-11.)

23 In *People v. Cudjo*, the California Supreme Court expressly acknowledged that a
24 defendant is entitled to counsel at a preliminary hearing. ((1993) 6 Cal.4th 585, 615.)
25 Citing, *Coleman v. Alabama, supra* and *United States v. Cronin* (1984) 466 U.S. 648.), the
26 Court wrote: "The right to counsel extends to every critical stage of the proceeding,
27 including the preliminary hearing. The right comprehends more than just the formality of
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1 representation by a lawyer; it entitles the defendant to competent and effective legal
2 assistance." (*Cudjo, supra*, 6 Cal.4th at 615.)

3 **Emergency Rules**

4 Emergency Rule 3 adopted on April 6, 2020, allows a proceeding to be conducted
5 remotely only if the defendant consents. Specifically, "[i]n criminal proceedings, courts
6 must receive the consent of the defendant to conduct the proceeding remotely and
7 otherwise comply with emergency rule 5." (Rule 3(a)(2), California Rules of Court adopted,
8 April 6, 2020.)

9 Emergency Rule 5 excepts certain cases from those that can be conducted
10 remotely. (Rule 5(a), California Rules of Court, adopted April 6, 2020). Emergency Rule 5
11 establishes: 1) the types of personal appearance waivers, 2) the elements of consent, 3)
12 the ability for counsel to appear on behalf of the Client with consent, and 4) commands that
13 a defendant must have the ability to communicate privately with counsel for those hearings
14 where the defendant has agreed to appear remotely. (Rule 5, California Rules of Court
15 adopted, April 6, 2020).

16 **Defendant has the Right to Have Witnesses Present.**

17 A defendant has the statutory right to have a witness present when the witness is
18 testifying. (Pen. Code §865.) Further, any witness who testifies against the defendant is
19 subject to cross examination on the defendant's behalf. (Pen. Code §865.)

20 Allowing the prosecutor to elicit evidence from a witness who is testifying remotely
21 additionally will violate Mr. *****'s right to counsel under the U.S. and California
22 Constitutions. Specifically, counsel for Mr. *****'s will not be permitted to confront the
23 witness with exhibits that may demonstrate inaccuracies in the witness's testimony, or that
24 may impugn the witness's credibility.

25 For instance, body-worn-camera and surveillance evidence is often probative, and
26 widely used at preliminary hearings by both the prosecution and defense. The use of
27 remote testimony will create exceedingly difficult circumstances for the defense to confront
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1 any remotely-testifying witness with this type of evidence. Allowing the witness to testify
2 remotely will, therefore, hamstring defense counsel's ability to cross-examine the witness
3 and, in turn, will deny Mr. ***** the right to the assistance of counsel prejudicing his ability
4 during a critical stage of the criminal proceedings.

5 A witness must testify in the defendant's presence and is subject to
6 cross-examination. (Pen. Code §865.) In *Jennings v. Superior Court*, the California
7 Supreme Court addressed the importance of California Penal Code section 865 and 866.
8 ((1967) 66 Cal.2d 867.) In *Jennings*, the trial court abbreviated defense counsel's
9 cross-examination at the preliminary hearing. (66 Cal.2d at pp. 873-874.) Finding error, the
10 Court first underscored vital rights that are secured and established by California Penal
11 Code sections 865 and 866. According to the Court,

12 "Doubtless these statutes are declaratory of fundamental
13 procedural rights; they are derived from our earliest criminal
14 legislation and have remained unchanged since the codification
15 of the Penal Code in 1872. They were among the statutes relied
16 on by the United States Supreme Court in the landmark
17 decision of *Hurtado v. California*...holding that the proceeding
18 by preliminary examination, commitment, and information,
19 carefully considers and guards the substantial interest of the
20 prisoner and thus constitutes due process of law. The right to
21 present and cross-examine witness is, of course, as essential
22 today as it was in 1884."

23 (*Jennings, supra*, 66 Cal.2d at pp. 873-874.)

24 Here, the prosecutor should not be permitted to elicit testimony from a witness who
25 is not personally present. By its plain terms, California Penal Code section 865 posits
26 ***** with the right to have the witness present in Court; testimony by video violates this
27 right. Further, California Penal Code section 865 vests ***** with the right to have any

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1 witness cross-examined. A witness who testifies remotely is comfortably sequestered away
2 from *****, in a manner that allows the witness to avoid the discomfort of inaccurate
3 or untruthful testimony. Such a witness is also insulated from a cross-examination that may
4 entail confronting the witness with prior statements, contradictory evidence, or evidence of
5 untruthfulness.

6 **Emergency Rule 3 is unconstitutional to the extent that it permits a witness to testify**
7 **remotely.**

8 The Judicial Council and its Chair have only those powers conferred upon them by
9 the California Constitution and the legislature. (*See Fay v. District Court of Appeal* (1927)
10 200 Cal. 522.) Under article VI, section 6, the Judicial Council's operations shall be to
11 "expedite judicial business" and "equalize work." (Cal. Const., art. VI, § 6 (e).) And while
12 the council may "adopt rules for court administration, practice and procedure... The rules
13 adopted shall not be inconsistent with statute." (Cal. Const., art. VI, § 6 (d).) The
14 Constitution could not be clearer. "[t]o the extent that a rule promulgated by the Judicial
15 Council is inconsistent with a statute, it is invalid... *A fortiori*, similar inconsistency with a
16 constitutional provision would be likewise fatal." (*Maldonado v. Superior Court* (1984) 162
17 Cal.App.3d 1259, 1265-1266.)

18 In considering a statutory framework similar to preliminary hearings, the California
19 Supreme Court made the legislature's supremacy clear and invalidated a contradictory rule
20 of court. (*In re Robin M.* (1978) 21 Cal.3d 337.) In evaluating a confined minor's right to a
21 speedy detention hearing, the Court found "the Legislature intended that a minor be
22 released from detention if a jurisdiction hearing is not held within 15 judicial days of the
23 detention hearing." (*Robin M., supra*, 21 Cal.3d at p. 344.) However, a rule of court
24 permitted continued detention should the state seek to refile a dismissed petition. In the
25 face of the statute, the rule of court could not stand. (*In re Robin M., supra*, 21 Cal.3d at p.
26 344.)

27 California Government Code section 68115 permits the chairperson of the Judicial
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1 Council to make emergency modifications to designated procedural laws within the state.
2 (Gov. Code § 68115.) The statute does not grant authority to suspend the rights conferred
3 upon a defendant by California Penal Code section 865. (Gov. Code § 68115.) Without the
4 express permission to address California Penal Code section 865, the Judicial Council
5 exceeds its authority and violates the separation of powers and non-delegation doctrines
6 by nullifying the protections found within section 865.

7 **Executive Order N-38-20 does not suspend the rights that are conferred by California**
8 **Penal Code section 865.**

9 The Emergency Services Act grants the governor broad authority in coordinating,
10 directing, and ordering about state agencies. (Gov. Code § 8627.) A state agency is "any
11 department, division, independent establishment, or agency of the executive branch of the
12 state government." (Gov. Code § 8557.) California Government Code section 8571 does
13 not permit the governor to suspend legislatively-enacted timeframes; it provides for the
14 suspension of rules, laws, and regulations promulgated by state agencies. (Gov. Code §
15 8571.)

16 In reviewing section 8571, this court must construe the statute so as to avoid serious
17 constitutional questions. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1110.) Courts
18 must also interpret statutory provisions in the context of the statutory scheme, including
19 provisions in separate codes. (*See e.g., County of Sonoma v. Superior Court* (2009) 173
20 Cal.App.4th 322, 340.)

21 The act's plain language as well as interpreting case law and statutory context limit
22 application of the Emergency Services Act to executive branch officers and agencies.
23 First, the plain language of the Emergency Services Act establishes that the act is
24 designed to grant the executive branch and such branch's officers and agencies the
25 powers necessary to respond to an emergency. (Gov. Code § 8550(a).) The legislature
26 then explicitly defined "state agency" as those entities within the executive branch. (Gov.
27 Code, § 8557.) Therefore, when the Act discusses suspending regulatory statutes, it

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Mr. *****'s constitutional and statutory rights would be violated by forcing a preliminary hearing without his physical presence and without the presence of the government's witnesses.

Respectfully submitted,

DATED: January 4, 2021

/s/ Michael L. Crowley
Michael L. Crowley
CROWLEY LAW GROUP, APC
Attorney for Defendant #3
***** *****

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**PACERS, INCORPORATED, et al., Petitioners, v. THE
SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
PHILIP NEEDHAM et al., Real Parties in Interest**

No. D001834

**Court of Appeal of California, Fourth Appellate District,
Division One**

**162 Cal. App. 3d 686; 208 Cal. Rptr. 743; 1984 Cal. App.
LEXIS 2817**

December 13, 1984

DISPOSITION: [*1]**

Let a peremptory writ of mandate issue as prayed, directing respondeat superior court to set aside its order prohibiting petitioners from testifying at trial and further directing the court to stay petitioners' depositions until after January 22, 1986.

**SUMMARY: CALIFORNIA OFFICIAL
REPORTS SUMMARY**

At depositions in a civil action for assault and battery, defendants asserted their Fifth Amendment privilege against self-incrimination, refusing to answer any questions unless they were given use and derivative use immunity from possible criminal prosecution involving the same facts as the civil action. The trial court denied defendants immunity, and granted plaintiffs' request for an order prohibiting defendants from testifying at trial as a consequence of their failure to answer deposition questions.

The Court of Appeal issued a peremptory writ of mandate directing the trial court to set aside its order prohibiting defendants from testifying at trial and further directing the court to stay defendants' depositions until after expiration of the criminal statute of limitations. The court held defendants had

no obligation to disclose to plaintiffs information which they reasonably believed might be used against them in a possible criminal prosecution. The trial court abused its discretion in prohibiting defendants from testifying at trial and thus, in effect, penalizing defendants for asserting their Fifth Amendment rights. (Opinion by Staniforth, Acting P. J., with Work and Butler, JJ., concurring.)

**HEADNOTES: CALIFORNIA OFFICIAL
REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

**(1) Discovery and Depositions § 34--
Protections Against Improper
Discovery--Privilege Against Self-
incrimination.** --In a civil action for assault and battery, defendants had no obligation to disclose to plaintiffs, in answer to deposition questions, information which defendants reasonably believed might be used against them in a possible criminal prosecution involving the same facts as the civil action. Therefore, the trial court abused its discretion in prohibiting defendants, who refused to answer the questions, from testifying at trial, which, in effect, penalized defendants for asserting their Fifth Amendment rights. It should have stayed discovery until expiration of the criminal statute of limitations, thus

allowing plaintiffs to prepare their lawsuit while alleviating defendants' difficult choice between defending either the civil or criminal case.

COUNSEL:

Larry J. Rothstein and Giometti, Scott & Greer for Petitioners.

No appearance for Respondent.

Wallace R. Nugent for Real Parties in Interest.

JUDGES:

Opinion by Staniforth, Acting P. J., with Work and Butler, JJ., concurring.

OPINION BY:

STANIFORTH

OPINION:

[*687] [**744] I

On January 22, 1981, real parties in interest Philip Needham, Frank Hobdy, George Kelly and John Angelo went to the Pacers bar as undercover agents of the federal Drug Enforcement Administration (DEA). A fight erupted between real parties and petitioners Richard Zamora, John William Adam and Greg Cole, Pacers employees. San Diego police arrived and arrested real parties.

On June 19, 1981, real parties sued petitioners Pacers, Zamora, Adam and Cole n1 for assault and battery. The United States attorney for the Southern District of California also sought indictments against the individual petitioners for criminal assault and battery. (18 U.S.C. § 111.)

[***2] Although the federal grand jury refused to issue indictments, the United States attorney is maintaining an "open file" on the case.

n1 Real parties also sued the City of San Diego and the police officers involved in the arrest; however, they

are not parties to this petition.

[*688] At petitioners' depositions in the civil action, they asserted their Fifth Amendment privilege against self-incrimination due to the threatened criminal proceeding. They refused to answer any questions unless they were given use and derivative use immunity. Real parties asked the superior court for an order granting petitioners immunity but because the United States attorney, the Attorney General and the district attorney each objected, the court denied the request. n2

n2 The court's denial was based on *Daly v. Superior Court* (1977) 19 Cal.3d 132 [137 Cal.Rptr. 14, 560 P.2d 1193]. The Supreme Court in *Daly* held if prosecutors "most likely to be interested" object to a grant of immunity because they have reasonable grounds to believe the proposed immunity might unduly hamper the prosecution of a criminal proceeding, the trial court may not grant such an order. (*Id.*, at pp. 147-149.)

[***3]

On January 25, 1984, real parties asked the superior court for an order prohibiting petitioners from testifying at trial because they failed to answer deposition questions. Petitioners opposed real parties' motion, asking the court instead to postpone their depositions until after the statute of limitations runs on the criminal prosecution (Jan. 22, 1986). The court granted real parties' request, prohibiting petitioners from testifying at trial "as to all matters forming the subject matter" of the lawsuit. Petitioners seek a writ of mandate compelling the San Diego County Superior Court to set aside its order prohibiting them from testifying at trial and compelling the court to stay their depositions until January 23, 1986. After granting the alternative writ and hearing argument, we conclude the

superior court abused its discretion in failing to fashion a remedy accommodating the interests of both petitioners and real parties, and accordingly grant the writ.

II

Code of Civil Procedure section 2016, subdivision (b), provides for discovery of information "not privileged, which is relevant to the subject matter involved in the pending action." Evidence Code section 940 specifically [***4] excludes from discovery self-incrimination information. (U.S. Const., Fifth Amend.; Cal. Const., art. I, § 15; *Maness v. Meyers* (1975) 419 U.S. 449, 464 [42 L.Ed.2d 574, 586-587, 95 S.Ct. 584]; *Black v. State Bar* (1972) 7 Cal.3d 676, 685 [103 Cal.Rptr. 288, 499 P.2d 968].) Courts have construed this principle to permit the privilege against self-incrimination to be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory" (*Kastigar v. United States* (1972) 406 U.S. 441, 444 [32 L.Ed.2d 212, 217, 92 S.Ct. 1653], reh. den. 408 U.S. 931 [33 L.Ed.2d 345, 92 S.Ct. 2478]; *Campbell v. Gerrans* (9th Cir. 1979) 592 F.2d 1054, 1057.) (1) Petitioners here are civil defendants facing possible criminal prosecution involving the same facts as the civil action. They received no immunity against the use of their deposition answers or evidence [*689] derived from those answers in any criminal proceeding against them. (See *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 428 [115 Cal.Rptr. 812, 525 P.2d 716].) Accordingly, they had no obligation to disclose to real parties information [***5] they reasonably believed might be used against them in a criminal proceeding (*Maness v. Meyers*, *supra*, 419 U.S. 449, 464 [42 L.Ed.2d 574, 586-587]; *Hoffman v. United States* (1951) 341 U.S. 479, 486 [95 L.Ed. 1118, 1124, 71 S.Ct. 814]) and real parties do not contend otherwise. Given petitioners' right to invoke their constitutional privilege against self-incrimination, the issue before

us is whether the court's order precluding petitioners from testifying at trial was proper.

III

A party asserting the Fifth Amendment privilege should suffer no penalty for his silence. "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" (*Spevack v. Klein* (1967) 385 U.S. 511, 515 [17 L.Ed.2d 574, 577, 87 S.Ct. 625].) In framing its order, the superior court forced petitioners to choose between their silence and a "meaningful chance of avoiding the loss through judicial process of a substantial amount of property." (*People v. Coleman* (1975) 13 Cal.3d 867, 885 [***6] [120 Cal.Rptr. 384, 533 P.2d 1024].) Petitioners were, in effect, penalized for exercising a fundamental constitutional right. Their inability to testify on their own behalf because they asserted their Fifth Amendment privilege made asserting that privilege "costly." (*Griffin v. California* (1965) 380 U.S. 609, 614 [14 L.Ed.2d 106, 110, 85 S.Ct. 1229]; reh. den. 381 U.S. 957 [14 L.Ed.2d 730, 85 S.Ct. 1797]; see also *Malloy v. Hogan* (1964) 378 U.S. 1, 8 [12 L.Ed.2d 653, 659, 84 S.Ct. 1489].) Because real parties had no right to information protected by the privilege against self-incrimination, petitioners did not violate the discovery rules and imposition of an order protecting only real parties was an abuse of discretion.

IV

We are not confronted here with a party who wilfully deprives his adversary of information or whose use of obstructive tactics in discovery subjects the adversary to unfair surprise at trial. (See, e.g., *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274 [105 Cal.Rptr. 276]; *Williams v. Travelers Ins. Co.* (1975) 49

Cal.App.3d 805, 810 [123 Cal.Rptr. 83].) Although the court may make any order "which justice [***7] requires to protect the party or witness from annoyance, embarrassment, or oppression" (Code Civ. Proc., § 2019, subd. (b)(1)), the court may not impose sanctions designed [***690] to punish even a party violating a discovery order. (*Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 782 [66 Cal.Rptr. 776].) Where, as here, a defendant's silence is constitutionally guaranteed, the court should weigh the parties' competing interests with a view toward accommodating the interests of both parties, if possible. An order staying discovery until expiration of the criminal statute of limitations would allow real parties to prepare their lawsuit while alleviating petitioners' difficult choice between defending either the civil or criminal case. (See *United States v. Kordel* (1970) 397 U.S. 1, 9 [25 L.Ed.2d 1, 8-9, 90 S.Ct. 763].)

This remedy is in accord with federal practice where it has been consistently held that when both civil and criminal proceedings arise out of the same or related transactions, an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter. (See, e.g., *Campbell v. Eastland* [***8] (5th Cir. 1962) 307 F.2d 478, cert. den. 371 U.S. 955 [9 L.Ed.2d 502, 83 S.Ct. 502]; *Perry v. McGuire* (S.D.N.Y. 1964) 36 F.R.D. 272; *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc.* (E.D.Pa. 1953) 14 F.R.D. 333; *National Discount Corp. v. Holzbaugh* (E.D.Mich. 1952) 13 F.R.D. 236.) The rationale of the federal cases is based on Fifth Amendment principles as well as the inherent unfairness of compelling disclosure of a criminal defendant's evidence and defenses before trial. Under

these circumstances, the prosecution should not be able to obtain, through the medium of the civil proceedings, information to which it was not entitled under the criminal discovery rules. (See *People v. Collie* (1981) 30 Cal.3d 43 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R. 4th 776].) Here, although petitioners are not criminal defendants, they are nevertheless threatened with criminal prosecution. To allow the prosecutors to monitor the civil proceedings hoping to obtain incriminating testimony from petitioners through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness.

We recognize [***9] postponing petitioners' depositions until January 1986 will cause inconvenience and delay to real parties; however, protecting a party's constitutional rights is paramount. Counsel have agreed to waive the five-year time limit of Code of Civil Procedure section 583, subdivision (b), to allow real parties any necessary time to conduct further discovery. n3

n3 Under Code of Civil Procedure section 583, subdivision (b), the parties must file a stipulation in writing that the time may be extended.

V

Let a peremptory writ of mandate issue as prayed, directing respondeat superior court to set aside its order prohibiting petitioners from testifying [***691] at trial and further directing the court to stay petitioners' depositions until after January 22, 1986.