ADVERSE CONSEQUENCES AT A GLANCE[1]

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Introduction

Once an appellate attorney begins to read the record for his or her client's appeal, the hunt for issues begins. Given the importance of this key task, many CLEs have been presented and articles written on the subject of issue spotting. Equally important, but receiving much less attention, is the appellate attorney's hunt for adverse consequences. With this in mind, this article addresses adverse consequences by covering the practical aspects of working with your client, the projects, and the Courts of Appeal in the face of a potential adverse consequence, and by providing a list of adverse consequences often encountered, any one of which may be lurking in the record.

Because adverse consequences play a greater role in criminal appeals than in delinquency or dependency appeals, this article focuses primarily on adverse consequences that can occur in a criminal appeal. However, adverse consequences can—and do—occur in delinquency and dependency appeals, and thus are covered, as well.

Finally, a disclaimer: While this article attempts to provide common examples of adverse consequences, the article should not be viewed as an exhaustive survey. Thus, whether included in this article or not, always review the record and the law for anything that may negatively impact your client should he or she proceed with the appeal.

Adverse Consequences: What They Are and What to Do with Them

I. What Is an Adverse Consequence?

"Adverse consequence" means a bad result should your client proceed with his or her appeal. More specifically, it can refer to either (A) an error made by the trial court that provided your client with a benefit to which he or she was not entitled, or (B) an unwanted outcome should your client prevail on appeal.

A. Error Made by the Trial Court.

The term "adverse consequence" can refer to an error made by the trial court that gave your client some benefit to which he or she was not entitled. This benefit typically falls into one or more of the following broadly-defined categories: a lighter prison term than should have been imposed; an unauthorized grant of probation; a greater presentence custody credit than earned; a lesser financial burden (fines, penalty assessments, restitution) than mandated by law; or a statutorily prohibited plea bargain.

B. Unwanted Outcome Following a Successful Appeal.

The term "adverse consequence" also refers to a scenario where your client ends up in a worse position following a successful appeal. Examples include where your client succeeds in undoing his or her plea and ends up with a sentence greater than what he or she received as a result of the plea bargain; where your client has dismissed charges reinstated or more serious charges added on remand; where your client succeeds in getting his or her not guilty by reason of insanity determination reversed but ends up with a lengthy prison sentence, etc.

II. Is it Likely the Adverse Consequence Will be Discovered?

If you discovered one or more potential adverse consequences as part of your review of the record, you must advise your client so he or she can decide whether to proceed with the appeal or to abandon. What your client really wants to know is, "Is it likely the adverse consequence will be discovered?" Unfortunately, determining the odds of discovery with any certainty is difficult at best. However, you can aid your client's decision-making by providing him or her with a "more likely/less likely" discussion, where the determination is supported by controlling or analogous authority.

The odds of discovery of an adverse consequence are driven, in part, by the number of parties involved in the appeal. Should your client proceed with the appeal, then the Attorney General/County Counsel and the Court of Appeal will all be reviewing the record. Thus, it is more likely that the adverse consequence will be discovered. Although it is not always the case that an adverse consequence you easily discovered gets raised by the Attorney General/County Counsel or discovered by the Court of Appeal, it is more prudent for your client to assume that when the potential adverse consequence unambiguously appears on the record, the error is likely to be discovered in the course of the appeal.

What about the California Department of Corrections and Rehabilitation (CDCR) in criminal and delinquency appeals? CDCR's relationship to your client's appeal is different than that of the Attorney General/County Counsel or the Court of Appeal. First, CDCR does not receive the entire record. Second, CDCR receives your client's sentencing records regardless of whether a notice of appeal was filed. Thus, regardless of whether your client proceeds with or abandons the appeal, CDCR may discover an adverse consequence. But this, too, has a caveat. Such discovery depends on what the adverse consequence is. It is reasonable to conclude that an error detectible simply by looking at the abstract of judgment or probation report is more likely to be caught than an error that would require review of other parts of the record not provided to CDCR. Additionally, counsel should be aware that CDCR will review an inmate's sentencing records each time he or she is transferred to a new prison, so an adverse consequence that is apparent in the sentencing materials and is not discovered initially may be discovered at a later date. Also, in a delinquency appeal, there is always the possibility that any adverse consequence might be uncovered by a probation officer or other person, regardless of whether the appeal proceeds.

III. What are Your Client's Options if You Find an Adverse Consequence?

If your client faces potential adverse consequences, he or she has two options: (1) proceed with the appeal, or (2) abandon the appeal. The decision of which option to pursue is your client's alone to make. (*Jones v. Barnes* (1983) 463 U.S. 745, 751 ["[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case [including whether to] take an appeal . . . ."].)

Should your client choose not to communicate with you regarding whether or not to proceed in the face of an adverse consequence, you are without authority to dismiss the appeal. Your client's direction to abandon is required. Absent that, the last direction you had from your client, by virtue of the filing of the notice of appeal, was to proceed. Thus, you must do so.

A. Advising Your Client.

Although the decision of how to proceed in the face of an adverse consequence is your client's to make, it is your duty to provide your client with enough information, i.e., the pros and cons of proceeding, so that he or she can make that decision intelligently. (U.S. v. Beltran-Moreno (9th Cir. 2009) 556 F.3d 913, 918 [reminding counsel "that the professional norms that establish the constitutional baseline for their effective performance indisputably include the duty . . . to advise a client properly on the consequences of an appeal"].) Even though you cannot predict whether the potential adverse consequence will be discovered, you must offer your client your best possible professional judgment to aid in his or her decision. Be as specific as you can as to the additional custody time or financial burden your client is risking should the appeal proceed. Lay out factors for your client to weigh. For example, the negative impact of the adverse consequence may be small or of little import to your client, whereas the upside, should the appeal succeed, may be great. Alternatively, the adverse consequence may have significant consequences, whereas any issues that can be raised will be of little

consequence. Or there may be no issues to raise. Even if there are no issues to raise, another factor for your client to consider is whether there is an issue he or she feels so strongly about that the opportunity to file a supplemental brief is worth the risk to him or her of the adverse consequence being discovered.

B. Determining Your Client's Election.

In communicating with your client as to the pros and cons of continuing with the appeal, always put it in writing. If your initial communication is via telephone, follow the call up with a letter as to what was discussed. To make it as easy as possible for your client to communicate his or her election to either proceed with or abandon the appeal, provide your client with an election form. (See the appendix for samples.) However, if your first communication is by letter and you do not hear back from your client, you may need to follow up by telephone. Sometimes this is a counselor-initiated phone call when the client is a prisoner.

C. Abandoning the Appeal.

"An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record." (Cal. Rules of Court, rule 8.316(a).) Note that while the Rules of Court allow the attorney of record sign the abandonment form, the decision to abandon an appeal is your client's alone to make. (*Jones v. Barnes*, *supra*, 463 U.S. 745, 751.) The process of abandonment has three components: (1) communicating with the project, (2) communicating with your client, and (3) communicating with the Court of Appeal.

1. Communicating with the Project.

The guidelines and policies related to abandoning an appeal vary among the projects. For appointed counsel in Third District and Fifth District cases, consultation with the CCAP

staff attorney assigned to the case is required by all counsel (assist and independent appointments) prior to filing the notice of abandonment and request for dismissal. For cases in other California District Courts of Appeal, counsel should consult the project administering the case regarding their abandonment policy.

2. Communicating with Your Client.

If your client elects to abandon his or her appeal in the face of one or more adverse consequences, your next step is to prepare the abandonment form that you will ultimately file with the Court of Appeal. Each project has posted on its website a sample abandonment form (note that the names and format vary; searching under "abandonment" will get you to your project's form).

Once you prepare the abandonment form, send it back to your client for his or her signature and the date signed. Include a self-addressed stamped envelope to make it easy for your client to return the form to you. Although you may be practicing in a Court of Appeal that does not require the appellant's signature on the abandonment form that is filed with the court, it is a good practice to have your client sign the form. Absent that, it is strongly recommended that you have something in writing and signed by your client expressing his or her desire to abandon the appeal. Again, the fact that the appellant's signature may not be required on the abandonment form does not eliminate the need to obtain your client's authorization to abandon the appeal.

3. Communicating with the Court of Appeal.

Generally speaking, the completed abandonment form is TrueFiled with the Court of Appeal and served on the same parties who would have been served had an appellant's opening brief been filed. Specifically, follow any Court of Appeal local rules or project requirements.

Typically, the abandonment form is filed in lieu of an appellant's opening brief. On occasion, however, your client may initially decide to proceed with the appeal, then later change his or her mind after you have filed the opening brief. The Courts of Appeal will generally grant a subsequently-filed notice of abandonment and request for dismissal. But the chances of the court doing so may decrease the further into the appellate process the appeal proceeds. The chances of the dismissal being granted may also decrease based on the particulars of the appeal. (See, e.g., *People v. Nelms* (2008) 165 Cal.App.4th 1465, 1469 [noting that while an appellant may abandon an appeal, it is for the Court of Appeal to decide if it shall be dismissed; under the facts in *Nelms* the Court of Appeal declined to do so].)

Adverse Consequences: By-Category Guide

As noted previously, the term "adverse consequence" can refer to either (1) an error made by the trial court that provided your client with a benefit to which he or she was not entitled or (2) an unwanted outcome should your client prevail on appeal. Adverse consequences in the first category can occur in one of two ways. First, they can occur where a matter is correctly determined but is incorrectly recorded—or not recorded—on the sentencing documents. Second, they can occur where, although pronouncement and recording are consistent, the pronouncement was incorrect. Adverse consequences that occur should your client be successful on appeal result from subsequent proceedings on remand, such as when the district attorney may be able to add new charges or reinstate dismissed charges, or a subsequent finding of guilt on a vacated plea agreement may result in a longer sentence.

When reviewing a record for adverse consequences, counsel should be guided by Justice Frankfurter's three rules for mastering the meaning of a statute: "(1) Read the statute; (2) read the statute; (3) read the statute!" (*Enterprise Ins. Co. v. Mulleague* (1987) 196 Cal.App.3d 528, 535, citing Friendly, Benchmarks (1967) Mr. Justice Frankfurter and Reading of Statutes, p. 202.) Carefully reviewing the pertinent statutes in the case at hand (e.g., the statutes outlining the offense(s) and the sentencing scheme) will assist counsel in the search for potential adverse consequences.

I. Criminal Adverse Consequences.

An adverse consequence stemming from a trial court error may be discovered even when the Attorney General does not raise it. "An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) "Indeed, it has the authority to do so." (*Ibid.*) The following is a discussion, by category, of typical adverse consequences that may occur in criminal trial court proceedings.

A. Presentence Custody Credit.

As part of your record review, always check the number of presentence actual and conduct custody credits your client was awarded. Should your client have been awarded too many, the resulting adverse consequence could be a longer sentence, even if your client is released from incarceration before the appeal is final. (*People v. Clancey* (2013) 56 Cal.4th 562, 586-587 [concluding that returning the defendant to prison to serve additional time resulting from an excessive award of presentence custody credits would not be so unjust as to preclude reincarceration].) The following are various ways in which an adverse consequence can occur related to presentence custody credit.

1. Actual Presentence Custody Math Error.

To calculate the correct number of actual presentence custody credits your client earned, add up the time your client spent in presentence custody based on the in/out dates noted in the probation report or other parts of the record. If this information is not included in the record, check with trial counsel for any information he or she may have.

Under Penal Code section 2900.5, a defendant sentenced either to county jail or to state prison is entitled to credit against that term for any days spent in custody prior to sentencing, as well as any days served as a condition of probation. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053.) Because Penal Code section 2900.5 refers to "days" rather than hours, "it is presumed the Legislature intended to treat any partial day as a whole day." (*People v. King* (1992) 3 Cal.App.4th 882, 886.) Thus, count the in- and out-day each as a full day.

CCAP has a "Day & Date Calculator" on its website for calculating total days based on in/out dates: https://www.capcentral.org/resources/charts_calc/datecalc.aspx.

Once you have calculated your client's total presentence actual custody days, compare it with what was recorded on the abstract of judgment. If he or she actually earned fewer than awarded, your client faces a possible adverse consequence.

2. Earned Conduct Credit Statutory Error.

In addition to credit for actual time spent in presentence custody, your client may also be entitled to conduct credit for that time. Unfortunately, calculating presentence conduct credit can be a challenging task due to the many and frequent changes to the governing code sections. At its simplest, calculating conduct credit involves determining which code section applies (Pen. Code § 4019; Pen. Code, § 2933.1, or Pen. Code, § 2933.2), applying the associated conduct credit formula, and adding the calculated conduct credits to your client's actual presentence custody credits.

For a detailed discussion of the amendments to the statutes governing the calculation of presentence custody credit, see "Awarding Custody Credits after Realignment" by J. Richard Couzens (Judge of the Superior Court, County of Placer (Ret.)) and Tricia A. Bigelow (Presiding Justice, District Court of Appeal, 2nd Appellate, Div. 8), located at: www.courts.ca.gov/partners/documents/Credits_Memo.pdf.

Also see CCAP's website for two helpful charts summarizing the various enactments and the associated formulas: https://www.capcentral.org/criminal/custody_credits/credits_calc.asp.

Below is a discussion of the several ways that error related to presentence conduct credit can occur.

a. Incorrect Penal Code § 4019 Enactment Applied.

Penal Code section 4019 is one of several code sections governing presentence conduct credit. It was amended three times over an 18-month period. This resulted in four different versions of Penal Code section 4019 to contend with: the version in effect prior to January 25, 2010; the revision effective January 25, 2010; the revision effective September 28, 2010; and the revision effective October 1, 2011. As the years pass, the need to work with more than one enactment for any given case will affect fewer and fewer cases. However, for now, it still comes up. Thus, be sure to check the date the offense of conviction was committed and the dates of confinement to determine the correct enactment to use. Each involves different formulas, exclusions, etc.

b. Failure to Apply the Penal Code § 2933.1 Limitation.

Another presentence custody credit error to look for is where your client was convicted of a violent felony (offenses listed in Pen. Code, § 667.5, subd. (c)). Such a conviction limits presentence conduct credit to 15% of the actual presentence credit your client earned. (Pen. Code, § 2933.1, subds. (a) & (c).) If the trial court did not impose the Penal Code section 2933.1 limitation and instead credited your client with Penal Code section 4019 conduct credit, your client received more conduct credit than he or she was entitled to and faces a potential adverse consequence.

c. Failure to Apply the Penal Code § 2933.2 Limitation.

Similar to Penal Code section 2933.1, Penal Code section 2933.2 affects the grant of presentence conduct credit that may be earned. In the case of Penal Code section 2933.2, if your client has been convicted of murder (Pen. Code, § 187), he or she is not entitled to any presentence conduct credit. (Pen. Code, § 2933.2, subds. (a) & (c).) Should the trial court have awarded any conduct credit, your client faces a potential adverse consequence.

3. Presentence Custody Credit Awarded But Not Available.

Penal Code section 2900.5, subdivision (a), provides that a defendant will earn custody credit for any actual time he or she spends in presentence confinement. Such confinement includes "any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . . ." (Pen. Code, § 2900.5, subd. (a).) If your client spent part or all of his or her presentence custody in a facility other than one of those listed in Penal Code section 2900.5, subdivision (a), i.e., in a facility for which presentence custody credit is not earned, but the trial court nonetheless awarded such credit, your client faces a potential adverse consequence.

a. Presentence Custody Credit Erroneously Awarded for Time Spent in Unlocked Outpatient Facility.

A mentally disordered offender, a mentally disordered sex offender, and a defendant found not guilty by reason of insanity do not receive actual presentence custody credit for time in an unlocked outpatient facility. (Pen. Code, § 1600.5.) Should your client have been found to be one of the enumerated types of defendants and he or she spent time in an unlocked outpatient facility for which presentence custody credit was awarded, your client faces a potential adverse consequence.

b. Presentence Custody Credit Erroneously Awarded for Time Spent in Outpatient Rehabilitation Program.

A defendant does not receive actual presentence custody credit for time spent as an outpatient in a drug rehabilitation program. (*People v. Schnaible* (1985) 165 Cal.App.3d 275, 277.) When Penal Code section 2900.5 was originally amended to provide for presentence actual custody credit for time spent in institutions other than jail, there was no requirement that the "similar institution[s]" be residential. (*Ibid.*) Upon a subsequent

amendment, "the word 'residential' [was added] to this description [in Penal Code section 2900.5, subdivision (a).] (Stats.1978, ch. 304, p. 632.)" (*Ibid*.) "The amendment makes clear the Legislature's intent to exclude outpatient treatment as a form of restraint comprising custody within the meaning of [Penal Code] section 2900.5." (*Ibid.*) Thus, if your client received presentence custody credit for time spent as an outpatient in a drug rehabilitation program, he or she faces a potential adverse consequence.

For more on custody credits in general, and qualifying and non-qualifying facilities specifically, see CCAP's article on custody credits found here: https://www.capcentral.org/criminal/custody_credits/docs/presentence_custody_credits.pdf.

4. Duplicate Presentence Custody Credit Erroneously Awarded.

An adverse consequence related to presentence custody credit can occur when your client's appeal involves multiple cases. Under Penal Code section 2900.5, "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (Pen. Code, § 2900.5, subd. (b).) When evaluating a multiple-case fact pattern, it is helpful to keep in mind the general purpose of Penal Code section 2900.5. That purpose is to eliminate the inequities that exist between defendants charged with a crime who cannot afford to post bail and thus must spend time in presentence custody, and those who can afford bail and therefore do not spend time in presentence custody. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Equity is accomplished by awarding presentence custody credit to the former group of defendants. (*Ibid.*) Because the purpose of Penal Code section 2900.5 is not to bestow a windfall of duplicative credits on a defendant in a multiple case (consecutively sentenced, or previously sentenced) scenario, the question to ask is whether your client would have been free from custody if the case upon which he or she was sentenced went away. (*Id.* at

pp. 1180, 1191-1192.) If the answer is no, then your client is likely not entitled to the credit in question and faces a potential adverse consequence. (*In re Joyner* (1989) 48 Cal.3d 487.)

For more on custody credits in general, and duplicative credits specifically, see CCAPs article on custody credits found here: https://www.capcentral.org/criminal/custody_credits/docs/presentence_custody_credits.pdf.

B. Fines, Mandatory Penalty Assessments, Restitution.

In California, there are a number of fines that can be imposed on a defendant by the trial court as part of the punishment. In addition, "'[t]he Legislature has superimposed onto the base fine scheme a number of penalties, assessments, fees, and surcharges,' which attach to 'almost all ... fines' imposed in criminal cases. [Citation.]" (*People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109.) The state has enacted various fines and fees for a variety of purposes. Some, such as the base fine and the restitution fine, are generally tied to the seriousness of the crime. Others were enacted to generate revenue to fund specific activities and thus support various state and local government programs and services. At this point in time, the Legislature has created an "increasingly complex system of fines, fees, and penalties," leaving it "doubtful that criminal trial lawyers and trial court judges have the ability to keep track of the myriad of charges that now attach to criminal convictions." (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1533 [conc. opn. of Kriegler, J.].) The result of all of this is that the area of fines, mandatory penalty assessments, and restitution is fertile ground for adverse consequences.

In order to fully evaluate a potential adverse consequence related to fines and fees, counsel should be familiar with *People v. Dueñas* (2019) 30 Cal.App.5th 1157, and the issues developing as a result of this case. The court in *Dueñas* held (1) due process requires a trial court to conduct an ability to pay hearing and ascertain a defendant's

present ability to pay before it imposes court facilities and court operations assessments; and (2) although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.

1. *Failure to Correctly Impose Required Fines, Mandatory Penalty Assessments, and Restitution Assessments.*

The list of adverse consequences related to the imposition of any of the required fines, mandatory penalty assessments, and restitution assessments is long due to the numerous financial burdens that may be imposed on a defendant. An adverse consequence occurs if the trial court imposes a lower financial burden on your client than statutorily required. This can occur if the trial court (1) fails to pronounce the required financial burden, (2) pronounces the required financial burden but fails to record it on the abstract of judgment, or (3) erroneously pronounces and records a lesser financial burden than required.

A resource to aid you in your analysis of whether your client faces an adverse consequence related to fines, mandatory penalty assessments, and restitution is CCAP's Fines Chart Page found at: https://www.capcentral.org/criminal/crim_fines.asp. The chart summarizes selected code sections in the Government, Penal, Health and Safety, and Vehicle Codes. While not a substitute for checking the actual code section(s), it is a helpful tool to get you started.

2. *Failure to Impose Victim Restitution Where Victim Suffered Economic Loss.*

There is one financial burden that can be imposed on a defendant that is sufficiently distinguished from the rest to warrant specific discussion—victim restitution as required by Penal Code section 1202.4, subdivision (f). This code section requires that "in every

case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (Pen. Code, § 1202.4, subd. (f).) If your client's case involved a victim incurring economic loss, but no provision for victim restitution was made at your client's sentencing due to the trial court reserving the issue, and should your client prevail on appeal and the matter be remanded for resentencing, there is a possible adverse consequence of the victim restitution being revisited on remand.

The issue of victim restitution being revisited on remand is what happened in *People v. Harvest* (2000) 84 Cal.App.4th 641. There, the defendant was convicted of first degree and second degree murder, with the jury finding true a multiple murder special circumstance allegation. On appeal, the reviewing court reversed the second degree murder conviction and special circumstance finding with directions that the prosecution either retry the second degree murder charge or consent to reducing the charge to voluntary manslaughter. After the prosecution elected not to retry the charge, the trial court imposed victim restitution for first time at resentencing. On the subsequent appeal challenging the imposition of victim restitution, the reviewing court affirmed, holding that victim restitution is not punishment for double jeopardy purposes.

C. Striking/Dismissing Action, Charge, or Punishment.

Penal Code section 1385, subdivision (a) provides:

> The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall

> not be made for any cause that would be ground of demurrer to the accusatory pleading.

(Pen. Code, § 1385, subd. (a).) On review, a court may hold that the trial court abused its discretion in granting a dismissal if the order fell outside the bounds of reason under the applicable law and the relevant facts. Or your client may face a potential adverse consequence if the trial court failed to state the reasons for the dismissal on the record. (See *People v. Williams* (1998) 17 Cal.4th 148.) An erroneous dismissal may be subject to retrial and thus could present a potential adverse consequence. (*People v. Hatch* (2000) 22 Cal.4th 260, 271 ["Although the trial court had the power to dismiss for insufficient evidence as a matter of law after submission to the jury, we will not construe its dismissal as an acquittal for double jeopardy purposes absent clear evidence the court intended to exercise this power."].)

Counsel should be aware that a former version of section 1385 required the reasons for the dismissal to be set forth in an order entered upon the minutes in every case (now the court is only required to set forth the reasons in a minute order if requested by a party or if the proceedings are not being recorded). The amendment changing this requirement was effective January 1, 2015. (Stats. 2014 ch. 137 § 1 (SB 1222).) As a result, you may find older cases where the appellate court remanded the case to the trial court because the reasons for striking the sentencing component were not stated in the minutes. This is unlikely to happen after the 2015 amendment unless the trial court failed to state the reasons in a minute order where a party requested the reasons be stated in the minute order or the proceedings were not recorded.

While it may not appear to be of much consequence, the failure of the trial court to state on the record why dismissal of an action is in the furtherance of justice (Pen. Code, § 1385, subd. (a)) presents a situation with potentially significant consequences for your client. *People v. Orin* (1975) 13 Cal.3d 937, illustrates an adverse outcome following a trial court's failure to state on the record its reasons for striking an action. Although *People v. Orin* (1975) 13 Cal.3d 937 is a People's appeal, and thus any adverse

consequence could not have been mitigated by abandoning the appeal, it is nonetheless instructive. The People argued that the trial court's order dismissing two of the defendant's three charged counts under Penal Code section 1385 following the defendant's plea to the third was not in the furtherance of justice as required by that code section. The California Supreme Court agreed, holding that the order dismissing the two counts was invalid both because the trial court failed to state on the record its reasons for dismissal and because, based on the record, the dismissals were not in the furtherance of justice. The dismissal of the two counts was reversed and the matter remanded.

Counsel should check the record to make sure that the correct version of section 1385 is complied with. The current version of section 1385 maintains the requirement that the court orally state the reasons for dismissal in open court.

Additionally, Penal Code section 1192.6 provides for the dismissal of charges or actions related to the prosecution of a defendant. Subdivision (a), requires that, if the prosecuting attorney seeks to dismiss a charge in the complaint or information, he or she must state the reasons for doing so on the record.

D. Prison Terms.

Like fines, mandatory penalty assessments, and restitution, the area of prison term sentencing is rather complex due to the various sentencing schemes. In addition, components of a prison term sentence can be enhanced, stayed, or dismissed. Thus, when assessing your client's sentence for potential adverse consequences, be sure to do so through the lens of what sentencing scheme, etc., should have been pronounced, not what was pronounced. Below are the more frequently-occurring adverse consequences related to the imposition of a prison sentence.

1. Consecutive Terms - Mandatory Imposition.

When sentencing a defendant convicted of two or more crimes, the trial court generally has discretion to run the terms for those crimes concurrently or consecutively. (Pen. Code, § 669, subd. (a).) If the trial court does not specify that the terms are to be served consecutively, the presumption is that the terms run concurrently. (Pen. Code, § 669, subd. (b).) There are, however, certain situations where the trial court is required to impose consecutive terms. The court's failure to do so presents a potential adverse consequence of the appeal.

If your client has strike priors, see section D.6, Three Strikes Sentencing, below for additional information regarding when consecutive terms are required.

a. Failure to Impose Consecutive Terms for Escape.

The trial court is required to impose consecutive prison terms if your client was convicted for escaping from custody. This includes escape from (1) a mental health facility (Pen. Code, § 1370.5 [consecutive to any other term or commitment]), (2) a state prison (Pen. Code, § 4530 [consecutive sentencing required]), (3) a county or city jail or alternative custody program when convicted of a misdemeanor and the escape was with force or violence (Pen. Code, § 4532, subd. (a)(2) [consecutive sentencing required]); (4) a county or city jail or alternative custody program when convicted of a felony (Pen. Code, § 4532, subd. (b) [consecutive sentencing required even where no force or violence was used] (b), (d). Failure of the court to sentence consecutively presents a potential adverse consequence on appeal.

b. Failure to Impose Consecutive Terms for In-Prison Offense.

The trial court is required to impose consecutive prison terms if your client was convicted of an offense committed while in prison. Such in-prison offenses include assault (Pen.

Code, § 4501), aggravated battery by gassing (Pen. Code, § 4501.1), battery (Pen. Code, § 4501.5), possession or manufacture of a weapon (Pen. Code, § 4502), and the holding of hostages (Pen. Code, § 4503). Failure to sentence consecutively following a conviction of any of these presents a potential adverse consequence.

c. Failure to Impose Consecutive Terms for Certain Enumerated Sex Offenses.

The trial court is required to impose consecutive prison terms if your client was convicted of any of certain enumerated sex offenses (see Pen. Code, §§ 667.6, subd. (e) [listing 10 qualifying offenses or circumstances]; 667.61, subds. (c), (n) [listing 7 and 6 qualifying offenses or circumstances respectively]) involving either separate victims or the same victim on more than one occasion. (Pen. Code, §§ 667.6, subd. (d); 667.61, subd. (i).) Failure to impose consecutive prison terms under these facts presents a potential adverse consequence.

2. Consecutive Terms - Mandatory Full-Term Subordinate Term(s).

Ignoring for the moment any exceptions, if your client has been convicted of two or more felonies and the trial court has sentenced those felonies consecutively, the total term of imprisonment is comprised of a principal term, one or more subordinate terms, and, where applicable, terms for enhancements. (Pen. Code, § 1170.1, subd. (a).) "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (*Ibid*.)

There are exceptions. Conviction of certain offenses requires that the subordinate term(s) discussed above be imposed at full middle term, not one-third the middle term. Failure to impose the full-term presents an adverse consequence. The exceptions include the following:

a. Failure to Impose a Full Middle Term Subordinate Term Where a Victim or Witness of an Earlier Felony is Subsequently Threatened with Great Bodily Injury or Death by the Perpetrator of the Earlier Felony.

If your client was convicted of a felony offense and he or she was also convicted of communicating a credible threat of death or great bodily injury to either a witness to or victim of that felony or to that person's immediate family (Pen. Code, § 139, subds. (a) & (b)), then the trial court is required to impose a full middle term subordinate term for each consecutive offense. (Pen. Code, § 1170.13.) Failure to do so presents a potential adverse consequence on appeal.

b. Failure to Impose a Full Middle Term Subordinate Term Where a Victim or Witness of an Earlier Felony is Subsequently Dissuaded, Prevented, Bribed, or Threatened, Either Directly by the Perpetrator of the Earlier Felony or by His or Her Solicitation of Another, Related to Attending or Testifying at a Legal Proceeding, Giving False Testimony, or the Withholding of Material Information.

If your client was convicted of a felony offense and he or she was also convicted of:

(1) attempting to or actually preventing/dissuading a witness or victim from attending or testifying at a legal proceeding (Pen. Code, § 136.1, subds. (a), (c));

(2) attempting to prevent/dissuade a witness or victim from making any report of that victimization to law enforcement or from causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof (Pen. Code, § 136.1, subds. (b), (c));

(3) attempting to or actually bribing, or attempting to force, threatening by force or fraud, or actually inducing a witness or victim to give false testimony or material information or to withhold true testimony or material information (Pen. Code, § 137, subds. (a), (b), (c)); or

(4) soliciting another to participate in a bribe or commission of a crime to prevent/dissuade someone who is or may become a witness from attending or testifying at a legal proceeding (Pen. Code, § 653f, subd. (a)),

and the witness, potential witness, or victim in question relates to your client's first felony, then the trial court is required to impose a full middle term subordinate term for each consecutive offense. (Pen. Code, § 1170.15.) Failure to do so presents a potential adverse consequence.

c. *Failure to Impose a Full Middle Term Subordinate Term Following Two or More Kidnapping Convictions Involving Separate Victims.*

If your client was convicted of "two or more violations of kidnapping [(Pen. Code, § 207)] involving separate victims, the subordinate term for each consecutive offense of kidnapping shall consist of the full middle term and shall include the full term imposed for specific enhancements applicable to those subordinate offenses." (Pen. Code, §

1170.1, subd. (b).) Failure to impose the required full middle term subordinate term presents a potential adverse consequence.

d. Erroneously Designating an Indeterminate Sentence as the Principal Term and an Additional Determinate Sentence as the Subordinate Term.

If your client was convicted of both determinate term crimes and indeterminate term crimes, the trial court must calculate the terms for each independent of the other, due to the determinate and indeterminate sentencing schemes being separate and unique schemes. (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) "Only after each [sentence under each scheme] is determined are they added together to form the aggregate term of imprisonment." (*Ibid.*) Thus, if the trial court designated your client's indeterminate term the principle term and any determinate term as the subordinate term at one-third the middle term for the determinate term offense, your client faces a potential adverse consequence. (*Ibid.*) The designation of principal and subordinate terms for consecutively imposed sentences (Pen. Code, § 1170.1, subd. (a)) "applies only when all terms of imprisonment are 'determinate' . . . ." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856.)

3. Staying a Sentencing Component.

Penal Code section 654, subdivision (a) provides:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

"The purpose of [Penal Code] section 654 is to insure that a defendant's punishment is commensurate with his culpability and that he is not punished more than once for what is essentially one criminal act." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252.) Thus,

when a defendant is convicted of two offenses that are part of an indivisible course of conduct or arise from a single act or omission, the sentence for one of the offenses must be stayed. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) For a recent discussion of section 654 by the California Supreme Court, see *People v. Corpening* (2016) 2 Cal.5th 307.

However, there are exceptions to section 654. For example, section 654 does not require a stay if the defendant commits a violent act (or an indivisible course of violent conduct) against multiple victims. (*People v. McFarland* (1989) 47 Cal.3d 798, 803; *People v. Martin* (2005) 133 Cal.App.4th 776, 781-783; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1215-1216.) There are also exceptions to section 654 for multiple sex acts. (See *People v. Perez* (1979) 23 Cal.3d 545; *People v. Harrison* (1989) 48 Cal.3d 321, 334-338; Pen. Code, § 667.6.) For a more detailed discussion of section 654, see California Criminal Law Procedure and Practice, Felony Sentencing §§ 37.44-37.50.

If your client's sentence includes one or more Penal Code section 654 stays, check that there was substantial evidence supporting these determinations. Otherwise, your client may face a potential adverse consequence.

a. Erroneously Staying a Sentence.

If the trial court erroneously stayed a sentence, your client faces a potential adverse consequence. The impact of the error depends on how your client should have been sentenced. If your client should have been sentenced concurrently, then the impact of the error is more conceptual than practical. This is because with a concurrent sentence "the defendant is deemed to be subjected to the term of both sentences although they are served simultaneously." (*People v. Jones* (2012) 54 Cal.4th 350, 353.) By contrast, a stay becomes permanent following the completion of the unstayed term(s). (*People v Beamon* (1973) 8 Cal.3d 625, 640.) Should one of the unstayed terms be vacated, the imposed and then stayed term is available for imposition. (*People v. Alford* (2010) 180 Cal.App.4th

1463, 1469.) An erroneously stayed term may have benefited your client with a shorter-than-required total prison term, which is a potential adverse consequence of note.

The unpublished case *People v. Henry* (June 16, 2011, B226460) illustrates this adverse consequence. There, following the appellate court's independent *Wende* review during which it also considered the defendant's issues raised via supplemental briefs, it determined that the trial court erroneously stayed the defendant's sentence for possession of a firearm by a felon. (Pen. Code, § 12021, subd. (a)(1).). The court concluded that "[a]n erroneous stay under [Penal Code] section 654 is an unauthorized sentence and therefore may be reviewed without preservation of the issue by objection or by cross-appeal. [Citation.] The abstract of judgment should be corrected to reflect a concurrent sentence on count three, rather than a stay under [Penal Code] section 654. We therefore order the superior court to correct the abstract of judgment, and transmit a copy of the same to the Department of Corrections." (*People v. Henry* (June 16, 2011, B226460.)

b. *Erroneously Staying a Longer Sentence and Instead Imposing a Shorter One.*

Penal Code section 654 requires that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment . . . ." (Pen. Code, § 654, subd. (a).) Thus, your client faces an adverse consequence if the trial court erroneously stayed the sentence for a conviction providing a longer term of imprisonment than an unstayed term of shorter duration.

c. *Erroneously Staying a Consecutive Term Required under Penal Code § 667.6, sub. (c).*

A sentence imposed under Penal Code section 667.6, subdivision (c), which permits the imposition of consecutive full-term sentences when a defendant has been convicted of

certain enumerated sex offenses, does not fall under Penal Code section 654. Instead, Penal Code section 667.6, subdivision (a), creates an exception that allows consecutive full-term sentences be imposed without staying them even for separate acts, including non-sex offenses, committed during an indivisible or single transaction. (*People v. Hicks* (1993) 6 Cal.4th 784, 787.) Thus, your client faces a potential adverse consequence if he or she was sentenced under Penal Code section 667.6, subdivision (c), and the trial court erroneously stayed a consecutive term.

*4. Unauthorized Striking of a Firearm Enhancement (**IMPACTED BY RECENT CHANGE IN LAW (SB 620)**).*

Penal Code section 12022.5, subdivision (a), provides for an enhanced punishment of three, four or 10 years' imprisonment for "any person who personally uses a firearm in the commission of a felony or attempted felony . . . ." Similarly, Penal Code section 12022.53 provides enhancements for 10, 20, or 25 years to life depending upon the underlying crime and the circumstances of possession or using a firearm. Prior to 2018, section 12022.5 and 12022.53 each stated that, "[n]otwithstanding [Penal Code s]ection 1385 or any other provisions of law, the court shall not strike an allegation under this section . . . ." (Pen. Code, § 12022.5, former subd. (c); Pen. Code, § 12022.53, former subd. (h).) If the trial court struck a section 12022.5 or section 12022.53 firearm enhancement prior to 2018, a defendant could have faced a potential adverse consequence that was significant. (See *People v. Thomas* (1992) 4 Cal.4th 206; *People v. Lopez* (1993) 21 Cal.App.4th 225.) However, under Senate Bill No. 620, effective January 1, 2018, a court may, in the interest of justice pursuant to Penal Code section 1385 and at the time of sentencing, strike or dismiss a firearm enhancement otherwise required to be imposed. (Pen. Code, § 12022.5, subd. (c); Pen. Code, § 12022.53, subd. (h).) This amendment, giving trial courts discretion to strike the enhancement, should apply retroactively to any case in which the judgment was not final before the effective date of the statute. (*People v. Chavez* (2018) 22 Cal. App. 5th 663, 712, review den. (June

27, 2018, S248461); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091 review den. (April 25, 2018, S246941.)

Note that trial court will still need to comply with section 1385 if it decides to strike or dismiss a firearm enhancement under section 12022.5 or section 12022.53. The failure to comply with section 1385 presents a possible adverse consequence.

5. Gang-Related Sentencing.

Penal Code section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act of 1988 (STEP). (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 910.) STEP increases the punishment for crimes committed in relationship to criminal street gangs. (*Ibid.*) Since the original enactment, there have been subsequent amendments to Penal Code section 186.22, both legislative (*People v. Fuentes* (2016) 1 Cal.5th 218, 224, fn. 3), and via ballot initiative (*People v. Montes* (2003) 31 Cal.4th 350, 354 [discussing Proposition 21].) At present, Penal Code section 186.22 has three categories of charging provisions:

(1) Substantive Offense (Pen. Code, § 186.22, subd. (a)): This subdivision establishes a stand-alone offense that criminalizes active participation in a criminal street gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 55.) This subdivision is violated if a person willfully promotes, furthers or assists in the commission of a felony while being an active gang member. (Pen. Code, § 186.22, subd. (a).)

(2) Enhancement (Pen. Code, § 186.22, subd. (b)(1)): Different from subdivision (a), subdivision (b)(1) defines a sentencing enhancement that is mandatory and must be imposed if the felony of which the defendant was convicted was committed to "benefit" a criminal street gang. (*People v. Le* (2015) 61 Cal.4th 416, 422-423.) For this gang enhancement to be imposed,

the defendant need not be actively or currently participating in a gang (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207), nor is it required that the defendant be a gang member (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402). All that is required is that the defendant be convicted of any felony committed for the benefit of a gang. (Pen. Code, § 186.22, subd. (b)(1).)

(3) Alternate Penalty Provisions:

(a) Pen. Code, § 186.22, subd. (d): This subdivision does not describe a substantive offense because it does not set forth elements of a new crime. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) Nor is it an enhancement because there is no additional term added to the base term. (*Id.* at pp. 898-899.) Rather, "it provides for an alternate sentence when it is proven that the underlying offense [misdemeanor or felony] has been committed for the benefit of, or in association with, a criminal street gang." (*Id.* at p. 899.) The person "shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail."

(b) Pen. Code, § 186.22, subds. (b)(4) & (b)(5): These two subdivisions serve as "alternate penalty provision[s]—section 186.22, subdivision

(b)(4) imposes a life sentence if the underlying felony is an enumerated crime, and section 186.22, subdivision (b)(5), which imposes a minimum prison confinement of 15 years before a defendant is eligible for parole, applies when the underlying felony by its own terms provides for a life sentence." (*People v. Fuentes* (2016) 1 Cal.5th 218, 224.)

Below are potential gang-related adverse consequences to look for.

a. Failure to Impose Mandatory Gang-Related Indeterminate Sentencing.

Both subdivision (b)(4) and (b)(5) of Penal Code section 186.22 require indeterminate life terms be imposed under certain scenarios, as detailed by these two subdivisions. The trial court's failure to do so, either by oversight or choice, presents a potential adverse consequence. In the unpublished gang case *People v. Gonzalez* (Nov. 20, 2012, E052704), the reviewing court caught the fact that the trial court had erroneously stricken the mandatory indeterminate sentencing provided for by Penal Code section 186.22, subdivision (b)(5). It did not matter that the prosecutor had not objected or requested a statement of reasons from the trial court. Citing to *People v. Campos* (2011) 196 Cal.App.4th 438, 454, the reviewing court noted that Penal Code section 186.22, subdivision (g), does not authorize trial courts to strike the minimum prison time that must be served per subdivision (b)(5). Because striking the Penal Code section 186.22, subdivision (b)(5), penalty was an unauthorized sentence, the matter was not forfeited.

b. Failure to Impose Mandatory Gang-Related Minimum Sentencing When Probation Granted.

Penal Code section 186.22, subdivision (c), requires that the trial court impose a minimum 180-day county jail sentence where it either grants probation following the

defendant's conviction of actively participating in felonious conduct while being an active participant in a gang (Pen. Code, § 186.22, subd. (a)) or where the execution of the sentence imposed for that violation is suspended. (Pen. Code, § 186.22, subd. (c).) Failure to impose this minimum county jail sentence presents a potential adverse consequence in an appeal.

c. Failure to Impose Mandatory Gang-Related Enhancement.

Most felonies committed for the benefit of a criminal street gang are subject to an enhancement of an additional prison term of two, three, or four years. (Pen. Code, § 186.22, subd. (b)(1)(A).) If the underlying crime is a serious felony, the additional term is five years. (Pen. Code, § 186.22, subd. (b)(1)(B).) If the underlying felony is a violent felony, the additional term is 10 years. (Pen. Code, § 186.22, subd. (b)(1)(C).) Failure of the trial court to impose this enhancement presents a potential adverse consequence. In the unpublished case *People v. Mateuz* (Mar. 29, 2010, B210698), the defendant argued on appeal that the minute order and abstract of judgment erroneously applied a four-year gun enhancement (Pen. Code, § 12022.5, subd. (a)) to his sentence. The Attorney General concurred, but pointed out that the trial court had not imposed the five-year gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(B)) the jury had found true. The Court of Appeal agreed. Without remand, the defendant's sentence was modified to include a concurrent five-year gang enhancement.

d. Failure to State on the Record Why a Case Was Unusual Such that the Interests of Justice Would Be Served by Striking Additional Gang-Related Punishment.

Penal Code section 186.22, subdivision (g), gives the trial court sentencing discretion to strike additional punishment provided for under section 186.22 in an unusual case where the case is such that the interests of justice would be served by doing so. The trial court may do so "if the court specifies on the record and enters into the minutes the

circumstances indicating that the interests of justice would best be served by that disposition." (Pen. Code, § 186.22, subd. (g).) There are no cases, published or otherwise, that address the potential adverse consequence of the trial court failing to state its reasons on the record for striking gang-related punishment. (But see *People v. Simpson* (July 11, 2017, B271460) [nonpub. opn.] [noting the trial court failed to either impose a mandatory enhancement under section 186.22, subd. (b)(1)(C), or else to strike the enhancement after making findings on the record as required by section 186.22, subd. (g), and remanding for the court to reconsider in light of multiple errors in which the trial court had some discretion].) Penal Code section 1385, might serve as a useful reference, as that code section similarly gives the trial court discretion to strike and requires that the reasons for doing so be stated on the record, and the language in section 186.22 appears even more clearly mandatory than the similar language in section 1385. (See Pen. Code, § 1385, subd. (a).) Section I.C. above discusses the adverse consequences that can result from a failure to state reasons on the record under Penal Code section 1385.

Note also that a trial court has the discretion under section 1385, subdivision (a) to dismiss a sentencing enhancement allegation for a gang-related offense, and the court is not limited to its authority under section 186.22, subdivision (g). (*People v. Fuentes* (2016) 1 Cal.5th 218.)

6. Three Strikes Sentencing.

The Three Strikes law was codified in 1994 in two nearly identical code sections: (1) Penal Code section 667, subdivisions (b) through (i), which the Legislature enacted, and (2) Penal Code section 1170.12, which the voters adopted via the initiative process. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 505.) Both are designed to increase the prison sentences of repeat offenders. (*Id.* at p. 504.) "Under these provisions, a defendant who has one qualifying prior conviction, or 'strike,' may receive a lengthier sentence than would have been possible without that strike, and a defendant with two strikes may receive an even lengthier sentence." (*People v. Benson* (1998) 18

Cal.4th 24, 26.) "[T]he term 'strike' [is used] to describe a prior serious or violent felony conviction within the meaning of the Three Strikes law." (*People v. Strong* (2001) 87 Cal.App.4th 328, 331, fn. 2.) The list of "serious" felonies is found in Penal Code section 1192.7, subdivision (c). The list of "violent" felonies is found in Penal Code section 667.5, subdivision (c). There are a number of potential adverse consequences to look for related to Three Strikes sentencing.

a. *Failure to Count as a Strike a Prior Strike that Was Stayed at the Time of Conviction.*

The staying of a strike in an earlier criminal proceeding does not preclude that strike from being counted as a strike in a later proceeding. This was the issue raised in *People v. Benson* (1998) 18 Cal.4th 24. There, the California Supreme Court held that even if the two strikes arose from the same course of conduct, thus leading to the stay of one of them under Penal Code section 654, the stayed strike could nonetheless be counted by a later trial court for sentencing purposes should the defendant reoffend. However, the trial court may still grant a discretionary *Romero* motion. In addition, if the two strikes arose from the "same act, committed at the same time, against the same victim" then the court is required to dismiss one of the two strikes. (*People v. Vargas* (2014) 59 Cal.4th 635.) Thus, if your client had a prior strike conviction that was stayed at the sentencing hearing following the conviction, and in the current proceeding from which the appeal was taken this stayed-strike was not factored into your client's sentencing, he or she could face a potential adverse consequence, depending on the nature of the underlying strikes.

b. *Failure to Impose the Enhancement for Having Both a Current and a Prior Conviction for a Serious Felony* ***(IMPACTED BY RECENT CHANGE IN LAW (SB 1393)).***

If a defendant is convicted in the present proceeding of a serious felony and it is additionally found that he or she suffered a prior serious felony conviction, the trial court

is required to impose a consecutive five-year enhancement. (Pen. Code, § 667, subd. (a)(1). But see note about SB 1393 below, effective January 1, 2019, trial courts now have discretion to strike this enhancement under section 1385.) If the trial court failed to impose the enhancement, and this error is discovered on appeal, the reviewing court can order imposition of a consecutive five-year Penal Code section 667, subdivision (a)(1) enhancement. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 426.) Notably, in an earlier unpublished review of the same issue in the same case, the court in *Vizcarra* did not require that the pleading specifically refer to the enhancement; it was enough that the People alleged a factual basis for a finding that Vizcarra had a prior serious felony conviction. (*People v. Vizcarra* (May 22, 2013, D061878) [nonpub. opn.].) However, *People v. Nguyen* (2017) 18 Cal.App.5th 260, stated that the five year prior can only be imposed if the accusatory pleading referred to the five year punishment in addition to the strike punishment. (*Id.*, citing *People v. Mancebo* (2002) 27 Cal.4th 725.) The information in *Nguyen* affirmatively indicated that the prior conviction was being pleaded solely for purposes of the Three Strikes law.

Counsel should be aware that, effective January 1, 2019, trial courts now have discretion to strike the five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)) under Penal Code section 1385. (See Stats. 2018 ch. 1013 § 1 (SB 1393), effective January 1, 2019.) Prior to the amendment by SB 1393, section 1385 stated that a judge was not authorized to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under section 667.

Thus, if your client has a prior strike and was sentenced on a current serious felony, check to see if the five-year enhancement was stricken or imposed. If it was not imposed and the trial court did not comply with section 1385, your client could face a significant potential adverse consequence.

c. Failure to Apply the Enhancement for Having Both a Current and a Prior Conviction for a Serious Felony to Each Count of a Third Strike Sentence.

If your client was sentenced as a third-striker, the five-year consecutive enhancement under Penal Code section 667, subdivision (a), must be applied to each count of a third strike sentence (unless the trial court struck the prior after the effective date of SB 1393). (*People v. Williams* (2004) 34 Cal.4th 397, 403.) Under Penal Code section 1170.1 and the determinate sentence law, a trial court must impose a sentence enhancement for a prior felony conviction—including a section 667, subdivision (a), enhancement—only once regardless of the number of new felonies. (*People v. Tassel* (1984) 36 Cal.3d 77.) However, in *Williams,* the court held that the consecutive sentencing scheme of section 1170.1 does not apply to indeterminate life terms, and the section therefore has no application to sentencing calculations for defendants with three strike offenses. (*Williams, supra*, 34 Cal.4th 397, 402.) Thus, a trial court's failure to apply the enhancement to each count of a third strike sentence presents a potential adverse consequence, as occurred in the unpublished case *People v. Macharique* (Nov. 9, 2010, B222378). There, the reviewing court on its own raised the question of whether it was error for the trial court to add 10 years for two section 667, subdivision (a), enhancements to the defendant's aggregate sentence instead of 10 years to each of the four 25-years-to-life sentences imposed under the Three Strikes law (two were imposed concurrently). After requesting supplemental briefing from the parties, it concluded the trial court was obligated to do the latter. This took the defendant from an aggregate state prison term of 60 years to life, to an aggregate term of 70 years to life. Note that this case was decided before SB 1393 was enacted and that trial courts now have discretion to strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1).

d. Failure to Impose Consecutive Terms Where the Defendant Has Strike Priors and the Current Convictions Include Two or More

Felonies Not Committed on the Same Occasion or Arising From the Same Operative Facts.

If your client's appeal is from a conviction of two or more felonies not committed on the same occasion or arising from the same operative facts and he or she has one or more prior strikes, the trial court is required to impose consecutive prison terms for each current felony your client was found guilty of committing. (Pen. Code, § 667, subd. (c)(6); Pen. Code, § 1170.12, subd. (a)(6); see also *People v. Torres* (2018) 23 Cal.App.5th 185, 197, 200-203 [discussing a change that Proposition 36 made to section 1170.12, subdivision (a)(7) and concluding that the change did not alter the rule that "trial courts have discretion to impose concurrent sentences for multiple serious or violent felonies against a single victim if they were committed on the 'same occasion' or arose from the 'same set of operative facts.'"].) Failure to impose consecutive prison terms for each current felony in these circumstances presents a potential adverse consequence. That is what happened in the unpublished case of *People v. Madera* (July 31, 2006, B185749), a defendant's appeal. The Attorney General argued that the Court of Appeal should remand the case for resentencing because the trial court erred in failing to impose a mandatory consecutive sentence on one of the counts as required by Penal Code section 667, subdivision (c)(6). The Court of Appeal agreed. Discovery of this adverse consequence resulted in a 2-year concurrent term being resentenced as a consecutive term, taking the defendant's sentence from 15 years to 17.

e. Failure to Impose Consecutive Terms Where the Defendant Has Strike Priors and the Current Convictions Include (1) Two or More Strike Felonies and (2) a Nonserious and/or Nonviolent Felony or Misdemeanor.

As mentioned above, *People v. Torres* (2018) 23 Cal.App.5th 185, 200-203 discusses a change that Proposition 36 made to section 1170.12, subdivision (a)(7). This change "now requires that where there are multiple serious and/or violent felony convictions, the

sentences for those crimes 'must run consecutive to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed.'" (*People v. Torres*, *supra*, 23 Cal.App.5th 185, 201-202, quoting *People v. Hendrix* (1997) 16 Cal.4th 508, 518 (conc. opn. of Mosk, J.).) This rule "applies not only when serious or violent felonies were not committed on the same occasion or did not arise from the same set of operative facts, but whenever a defendant is convicted of multiple serious or violent felonies." (*Id.* at p. 201.) The court also discussed how the change Proposition 36 made to section 1170.12, subdivision (a)(7), was not made to the identical language in the legislative version of the Three Strikes law (Pen. Code, § 667, subd. (c)(7)) and determined the later-enacted initiative version of the law controls.

If your client has a strike prior and current convictions for (1) two or more strike felonies and (2) a nonserious and/or nonviolent felony or misdemeanor, and the trial court did not impose a consecutive term for the nonserious and/or nonviolent felony or misdemeanor, your client faces a potential adverse consequence. (See People v. Buchanan (2019) 39 Cal.App.5th 385, 391-392.)

f. Failure to State Reasons for Striking a Strike on the Record.

See section I.C., Striking/Dismissing Action, Charge, or Punishment, above for a discussion of section 1385, which allows a trial court to strike a strike. However, there is a potential adverse consequence if the trial court fails to state the reasons for the dismissal on the record. In *People v. Turner* (1998) 67 Cal.App.4th 1258, the reviewing court invited the parties to address an issue not raised by either party: whether the case had to be remanded so that the trial court could state on the record its reasons for striking one of the defendant's two prior strikes. By striking one of the two priors strikes, the trial court was able to sentence the defendant as a second-strike offender, not as a third-strike offender. Despite the trial court unequivocally exercising its discretion to strike one of the strikes to facilitate a particular sentencing outcome, the reviewing court nonetheless concluded that remand was proper so that the reasons for doing so could be stated in the

minutes. This presented the defendant with the risk that the third strike would be reinstated and he would thus be sentenced as a third-striker. (See also *People v. Andrade* (1978) 86 Cal.App.3d 963, 973-978.) Note that this case was decided before the amendment to section 1385 regarding the reasons appearing in the minutes discussed in section I.C.

Counsel should check the record to make sure that the correct version of section 1385 is complied with.

7. Enhancements.

An enhancement is an "additional term of imprisonment added to the base term." (Cal. Rules of Court, rule 4.405(3).) Enhancements are categorized as either conduct enhancements, which relate to the way the crime was committed (e.g. use of weapons, infliction of injury), or status enhancements, which relate to the defendant's status when the crime was committed (e.g. prior criminal convictions, prior prison terms). (*People v. Martinez* (2005) 132 Cal.App.4th 531, 535–536.) Generally speaking, conduct enhancements enhance every count to which they are applicable. (*People v. Garrett* (1991) 231 Cal.App.3d 1524, 1527.) Generally speaking, status enhancements, which have nothing to do with any particular count, are added only once. (*Ibid.*) However, there is an exception to this—status enhancements are treated differently under determinate sentencing than under Three Strikes sentencing. (*People v. Williams* (2004) 34 Cal.4th 397, 402.) Under determinate sentencing, status enhancements are only added once, whereas under Three Strikes sentencing any status enhancement is added to each count in a third strike sentence. (*Id.* at pp. 404-405.) Any mandatory enhancement presents a potential adverse consequence when the trial court fails to impose it. Given the extensive number of possible mandatory enhancements, only the more frequently-occurring enhancements are discussed below. Mandatory enhancements related to gang-related sentencing and the Three Strikes sentencing scheme have already been discussed in section I.C.5 and I.C.6, above.

a. Failure to Impose the Enhancement for Committing an Additional Offense While Released on Bail or on Own Recognizance.

Penal Code section 12022.1 requires that the trial court impose a two-year consecutive term enhancement if the defendant committed an additional offense while released on bail or on own recognizance prior to judgment. Thus, the trial court does not have discretion to stay the enhancement or run it concurrently. The failure to properly impose the enhancement presents a potential adverse consequence. In *People v. Garrett* (1991) 231 Cal.App.3d 1524, the trial court followed probation's recommendation at sentencing and stayed the two-year Penal Code section 12022.1 enhancement. The People challenged this as error and the reviewing court agreed. Similarly, in *People v. Baries* (1989) 209 Cal.App.3d 313, the People contended that the sentence imposed was unauthorized because Penal Code section 12022.1 requires consecutive sentencing, not the concurrent sentencing the defendant received. The reviewing court agreed, stating that the imposition of concurrent sentences was clearly unauthorized by law. Thus, should the facts of your client's case present any of these scenarios, he or she faces a potential adverse consequence.

b. Failure to Impose the Enhancement for Furnishing a Firearm to Another.

Penal Code section 12022.4 provides for a mandatory consecutive enhancement of one, two, or three years for furnishing a firearm to another related to the commission of a felony. The enactment of this statute was in response to *People v. Miley* (1984) 158 Cal.App.3d 25. In that case, the defendant was convicted of soliciting the murder of his ex-wife and her two children. Related to the solicitation, the defendant gave the presumed assassin (who was actually working undercover for the police) a gun to use in the murders. Based on this, he was also convicted of being armed in the commission of a

felony (Pen. Code, § 12022, subd. (a)), which provided for a mandatory consecutive one-year term. The *Miley* court struck the arming enhancement because the defendant was not armed related to the crime of solicitation, but rather provided a gun for the later crime of murder. "*Miley* clearly directs itself to the absence of legislation punishing the act of knowingly 'furnishing' a firearm to be used in a felony. In response to the legislative lacuna in the law, the Ventura District Attorney proposed specific legislation." (*People v. Heston* (1991) 1 Cal.App.4th 471, 477-478.) Thus, if in your client's case the trial court failed to impose a mandatory enhancement for furnishing a firearm to another, you client faces a potential adverse consequence.

c. Failure to Impose One of the Use of a Firearm While Committing or Attempting to Commit a Felony Enhancements.

If your client was found to have personally used a firearm of some type while committing or attempting to commit a felony, he or she is subject to sentencing enhancements pursuant to Penal Code sections 12022.5 and/or 12022.53, depending on the particulars of the use. The following is a summary of those particulars and the associated punishments:

Pen. Code, § 12022.5:

- Subd. (a): Imposes an additional 3, 4, or 10-year consecutive term if the defendant personally used a firearm while committing or attempting to commit a felony.
- Subd. (b): Imposes an additional 5, 6, or 10-year consecutive term if the defendant personally used an assault weapon or machine gun while committing or attempting to commit a felony.

Pen. Code, § 12022.53:

- Subd. (a): Lists the offenses to which this section applies.

- Subd. (b): Imposes an additional 10-year consecutive term if the defendant personally used a firearm while committing one of the subdivision (a) felonies.
- Subd. (c): Imposes an additional 20-year consecutive term if the defendant personally used a firearm and intentionally discharged it while committing one of the subdivision (a) felonies.
- Subd. (d): Imposes an additional 25-to-life consecutive term if the defendant personally used a firearm and intentionally discharged it causing great bodily injury or death while committing one of the subdivision (a) felonies.

Prior to the enactment of SB 620 in 2017, which amended Penal Code sections 12022.5 and 12022.53 by permitting the trial court to strike the enhancements in the interests of justice, the trial court had no discretion to strike section 12022.5 or 12022.53 allegations or findings. (Pen. Code, §§ 12022.5, former subd. (c); 12022.53, former subd. (h).) In *People v. Palacios* (2007) 41 Cal.4th 720, the defendant fired a single shot at a single victim during the simultaneous commission of three qualifying offenses, with three Penal Code section 12022.53 enhancements imposed. The Court of Appeal held that punishment on all but one of these enhancements had to be stayed pursuant to Penal Code section 654. The California Supreme Court concluded otherwise, holding that Penal Code section 12022.53 enhancements are not limited by the Penal Code section 654 multiple punishment prohibition. It reasoned that to hold otherwise would contravene the plain language of the version of Penal Code section 12022.53 that was in effect. Currently, the enhancements may only be stricken if the court complies with the requirements of section 1385, and you should check to see if the court made the required findings.

Note that there is another possible adverse consequence stemming from Penal Code section 12022.53 related to presentence conduct credits. Penal Code section 12022.53, subdivision (i), limits presentence conduct credit to 15 percent if a Penal Code section 12022.53 enhancement is imposed. In the unpublished case *People v. Manning* (Sept. 1, 2011, B223372), the defendant raised two primary issues on appeal, neither of which the Court of Appeal agreed with. However, it did agree with the Attorney General that the

defendant was erroneously granted full presentence conduct credits instead the correct 15 percent limitation per Penal Code section 12022.53, subdivision (i). The discovery of this adverse consequence cost the appellant 147 days of presentence custody credit.

d. Failure to Impose the Enhancement for Discharging a Firearm from a Vehicle.

Penal Code section 12022.55 provides for a 5, 6, or 10-year mandatory consecutive enhancement for discharging of a firearm from a vehicle during the commission or attempted commission of a felony where the defendant intends to inflict great bodily injury or death and in fact inflicts great bodily injury or death. Counsel should check the record to see if the trial court failed to properly impose this enhancement (either through oversight, erroneously staying the enhancement, or imposing the enhancement concurrently). The failure to properly impose the enhancement presents your client with a potential adverse consequence.

e. Failure to Impose the Enhancement for Personal Infliction of Great Bodily Injury in the Commission of a Felony.

Penal Code section 12022.7 imposes a mandatory consecutive enhancement for personally inflicting great bodily injury under various scenarios during the commission or attempted commission of a felony. This code section has five subdivisions describing the various conduct:

- Subd. (a): Personally inflicting great bodily injury; additional consecutive term of three years.

- Subd. (b): Personally inflicting great bodily injury causing the victim to become comatose or permanently paralyzed; additional consecutive term of five years.

- Subd. (c): Personally inflicting great bodily injury on a person who is 70 years or older; additional consecutive term of five years.

- Subd. (d): Personally inflicting great bodily injury on a child under five years of age; additional consecutive term of four, five, or six years.

- Subd. (e): Personally inflicting great bodily injury related to domestic violence; additional consecutive term of three, four, or five years.

Penal Code section 12022.7 does not apply if your client was convicted of murder (Pen. Code, § 187), manslaughter (Pen. Code, § 192), arson (Pen. Code, § 451), or unlawfully starting a fire (Pen. Code, § 452). (Pen. Code, § 12022.7, subd. (g).) The enhancements provided for in subdivisions (a), (b), (c), and (d) may not be imposed if the infliction of great bodily injury is an element of the offense. (Pen. Code, § 12022.7, subd. (g).)

Like all enhancements, there is the potential for an adverse consequence due to the trial court's failure to impose the enhancement. That occurred in the unpublished case of *People v. Sanchez* (Dec. 29, 2010, B215306). In this case, the defendant was charged with 71 counts arising from the battery and sexual assault of eight women during a 21-month period. Following a bench trial, the defendant was convicted of a majority of the counts and sentenced to an aggregate term of 616 years, four months, plus a consecutive life term and eight consecutive 25-years-to-life terms. The defendant raised four sentencing issues on appeal. The reviewing court in turn found a number of sentencing adverse consequences, including failing to impose the required bodily injury enhancements under Penal Code section 12022.8 (addressing bodily injury inflicted during specified sex offenses).

E. Plea Bargaining.

"Plea bargaining is a method of disposing of criminal prosecutions through a guilty plea by the defendant in return for 'a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged.' [Citation.]" (*People v. Renfro* (2004) 125 Cal.App.4th 223, 230.) In California, plea agreements fall into one of two categories: (1) unconditional or open pleas, and (2) conditional pleas, where the plea is conditioned upon a certain outcome. (*People v. Holmes* (2004) 32 Cal.4th 432, 435.) Penal Code section 1192.5 addresses guilty and nolo contendere (no contest) pleas where a defendant has been charged with a felony. There are two primary areas where adverse consequences may present themselves related to pleas: (1) the consequences of your client successfully undoing his or her guilty plea on appeal, and (2) your client not being entitled to have entered into a plea bargain.

1. Downside of Undoing a Guilty Plea.

Sometimes a client who was convicted by a guilty or no contest plea decides to challenge that plea on appeal. What the client often does not consider are the potential adverse consequences of undoing a plea should he or she be successful on appeal. For example, in *People v. Collins* (1978) 21 Cal.3d 208, the California Supreme Court reversed the defendant's plea because it agreed that the trial court erred in imposing sentence on conduct that was no longer punishable by the time the defendant was sentenced. Unfortunately, the Court also concluded that some or all of the 14 counts that were dismissed as part of the plea bargain could be restored upon remand.

Even if your client is not at risk of having charges restored following the successful undoing of his or her plea on appeal, there is still the risk of receiving a greater sentence than the one received as part of the plea bargain. Although *People v. Henderson* (1963) 60 Cal.2d 482 protects a defendant from receiving a more severe punishment as a result of successfully exercising his or her appellate rights, there is an exception. *People v. Serrato* (1973) 9 Cal.3d 753, 765 allows for the imposition of a more severe punishment following a successful appeal where the original sentence was unauthorized. (See *People*

v. Vizcarra (2015) 236 Cal.App.4th 422, 436.) Thus, should your client desire to challenge his or her plea on appeal, be sure to analyze whether the facts of your client's case suggest a potential adverse consequence upon remand should your client succeed in undoing his or her plea.

2. Client Not Entitled to Plea Bargaining.

Not all defendants are entitled to plea bargaining. Penal Code section 1192.7, subdivisions (a)(2) and (a)(3), prohibit plea bargaining where a defendant is charged with: (1) a serious felony; (2) any felony with personal use of a firearm; (3) driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance; (4) enumerated violent sex crimes. The exceptions, also provided by Penal Code section 1192.7, subdivisions (a)(2) and (a)(3), are where "there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." In *People v. Floyd P.* (1988) 198 Cal.App.3d 608, the reviewing court noted on its own that due to the offenses charged, the defendant was not entitled to enter into a plea bargain and remanded the case for the People to show that a plea bargain was authorized under section 1192.7. If your client was convicted following a plea bargain and one or more of the convictions was for any of the offenses triggering the prohibition on plea bargaining, and none of the exceptions apply, then your client faces a potential adverse consequence.

Note that the Penal Code section 1192.7, subdivision (a)(2), "prohibition against plea bargaining appears to apply only to the postindictment or postinformation stage . . . ." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 259.) In other words, should your otherwise ineligible client have entered into a plea bargain based on the complaint, he or she does not appear to be barred from entering into a plea agreement.

F. <u>Probation.</u>

Probation is not punishment; rather it is an act of clemency that rests in the discretion of the trial court. (*People v. Morrison* (1980) 109 Cal.App.3d 378, 383.) The trial court may grant probation as an alternative to imposing a prison sentence. (Pen. Code, §§ 1202.7, 1202.8, 1203.) "Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) One of the primary considerations in granting probation is the nature of the offense committed by the defendant. (Pen. Code, § 1202.7.) It is this consideration that gives rise to two potential adverse consequences related to a grant of probation: (1) the trial court erroneously granted probation to a defendant whose offense(s) made him or her ineligible for probation; and (2) following remand, new facts come to light during retrial that were not available at the time of the first sentencing, thus jeopardizing the grant of probation.

1. Defendant Erroneously Granted Probation.

The trial court's discretion to grant probation as an alternative to imposing a prison sentence (Pen. Code, §§ 1202.7, 1202.8, 1203; Cal. Rules of Court, rule 4.414) is not absolute. A defendant who has been convicted of certain kinds of offenses is not eligible for probation, regardless of mitigating factors. These offenses include:

- Any current felony conviction if the person has a prior conviction for one of the violent felonies listed under Penal Code 667.5 or serious felonies listed under Penal Code 1192.7 (Pen. Code, § 667, subds. (c)(2));
- Any current conviction of one of the violent felonies listed under Penal Code 667.5 or serious felonies listed under Penal Code 1192.7 if the person was on felony probation at the time the current offense was committed (Pen. Code, § 1203, subd. (k));
- A conviction of certain enumerated offenses committed while personally using a firearm (Pen. Code, § 12022.53, subds. (a) & (g));

- A conviction for the commission or attempted commission of certain enumerated offenses in which the defendant personally inflicts great bodily injury (Pen. Code, § 1203.075, subd. (a));
- A conviction of certain enumerated sex offenses (Pen. Code, §§ 667.61, subd. (h) & 1203.065, subd. (a));
- A conviction of certain enumerated drug offenses where there is a prior conviction of certain enumerated drug offenses (Health & Saf. Code, § 11370, subd. (a));
- A conviction of certain violations related to destructive devices, explosives, and similar weapons (Pen. Code, § 18780).

In addition to convictions that preclude a grant of probation, certain other offenses come with the presumption of ineligibility "except in unusual cases where the interests of justice would best be served . . . ." (Pen. Code, § 1203, subd. (e).) Should probation be granted in such a case, the trial court must state on the record its reasons for doing so. (Pen. Code, § 1203, subd. (f).) Examples of some of the more commonly-occurring scenarios that presume ineligibility for probation include:

- Being armed with a deadly weapon either at the time of committing certain enumerated offenses or at the time of arrest (Pen. Code, § 1203, subd. (e)(1));
- Using or attempting to use a deadly weapon in connection with the convicted offense (Pen. Code, § 1203, subd. (e)(2));
- Willfully inflicting great bodily injury or torture as part of the convicted offense (Pen. Code, 1203, subd. (e)(3));
- Inflicting great bodily injury or death by discharging a firearm from or at a vehicle while committing a felony (Pen. Code, § 1203, subd. (e)(10));
- A conviction of certain other enumerated sex offenses (Pen. Code, § 1203.066).

The lists above are not exclusive. In any appeal from a grant of probation, always check the particulars of your client's case—including the offense(s) of which your client was

convicted, any prior convictions your client may have suffered, and any enhancements that were imposed—to determine whether your client in fact qualified for probation.

In addition, you should check the statute under which probation was granted in order to determine that the terms and conditions of probation were correctly ordered. (See, e.g., Penal Code, § 597, subd. (h) [if the defendant is granted probation for a conviction of animal abuse under this section, the court must also order counseling].) Failure to order required terms of probation may result in a potential adverse consequence for your client.

2. New Facts Jeopardize Grant of Probation Upon Remand.

It is well-established that "a defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his [or her] right to appeal." (*People v. Ali* (1967) 66 Cal.2d 277, 281.) However, this rule is not absolute. One exception can occur in the context of a grant of probation. If a defendant received probation following his or her first trial court proceedings, and then succeeds in gaining a reversal of conviction on appeal, the trial court is within its discretion to sentence the defendant to prison on remand versus reinstating probation if new facts come to the trial court's attention during the second proceedings. (*People v. Thornton* (1971) 14 Cal.App.3d 324, 326.) Thus, if your client is appealing from a grant of probation, he or she needs to be advised that should the appeal be successful, and should new facts come to light on remand, it is possible that he or she will not be granted probation the second time around.

II. Delinquency Adverse Consequences.

Within the juvenile delinquency system there are two types of petitions: those filed under Welfare and Institutions Code section 601 and those filed under section 602. The former covers "status" cases, which are offenses that are illegal for juveniles but not for adults. Status cases include the failure to obey the reasonable or proper orders of one's parents,

being beyond the control of one's parents, violating a curfew, or being habitually truant from school. Petitions filed under Welfare and Institutions Code section 602 cover cases where the action(s) committed by the minor are illegal regardless of whether one is a minor or an adult. This section discusses adverse consequences that may occur in a Welfare and Institutions Code 602 case. Although adverse consequences occur much less frequently in 602 cases than in adult criminal cases, they do occur. The following are potential adverse consequences to look for.

A. The Juvenile Court Erroneously Granted Probation.

Welfare and Institutions Code section 725, subdivision (a), provides that the juvenile court "may, without adjudging the minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months." However, there are exceptions to such a grant of probation. A minor is excluded from probation if he or she has done any of the following as listed in Welfare and Institutions Code section 654.3:

- committed any of the 30 offenses enumerated in Welfare and Institutions Code section 707, subdivision (b);
- sold or possessed for sale a controlled substance;
- possessed a controlled substance at any elementary, vocational, junior high, or high school, or assaulted a school employee engaged in his or her duties with a deadly weapon, firearm, stun gun or taser, or brought a firearm or other enumerated weapon onto any school grounds;
- actively participated in a criminal street gang and promoted, furthered, or assisted in its felonious criminal conduct;
- previously participated in a program of supervision under Welfare and Institutions Code section 654;
- previously was adjudged a ward of the court;
- committed an offense that results in victim restitution exceeding $1,000;

- previously was alleged to have committed a felony when he or she was 14 years or older.

If your client has been placed on probation and any of the above scenarios applies, your client faces a potential adverse consequence and should be advised accordingly.

B. The Juvenile Court Failed to Impose Probation Conditions

Welfare and Institutions Code section 725, subdivision (a) also requires the juvenile court to impose probation conditions:

> The minor's probation *shall include the conditions required in Section 729.2* [concerning education programs] except in any case in which the court makes a finding and states on the record its reasons that any of those conditions would be inappropriate. If the offense involved the unlawful possession, use, or furnishing of a controlled substance, as defined in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, a violation of subdivision (f) of Section 647 of the Penal Code, or a violation of Section 25662 of the Business and Professions Code, the minor's probation *shall include the conditions required by Section 729.10* [concerning alcohol and drug education programs].

(Emphasis added.) The juvenile court's failure to impose required probation conditions under section 729.10 and/or failure to impose required probation conditions under section 729.2 without findings as to why the conditions required in section 729.2 are inappropriate, presents a potential adverse consequence.

C. Failure to Properly Calculate Maximum Confinement Time and Conduct Credit

Whenever a minor is removed from parental custody, Welfare and Institutions Code section 726, subdivision (d), requires the juvenile court to calculate the minor's maximum confinement time to ensure that the minor "not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be

imposed on an adult convicted." The calculation refers to the amount of time an adult would serve under Penal Code sections 1170 and 1170.1 and certain enhancements, using the upper term under section 1170.1. Also, although the minor is awarded custody credit for actual days served pending disposition, conduct credit is not awarded for time at a juvenile detention facility. (*In re Ricky H.* (1981) 30 Cal.3d 176, 186-190.) (However, a minor tried as an adult and sentenced to state prison is entitled to conduct credits for presentence time spent in a juvenile facility. (*People v. Garcia* (1987) 195 Cal.App.3d 191, 197; *People v. Twine* (1982) 135 Cal.App.3d 59, 62-63.)) Failure by the court to order the full maximum confinement time is a potential adverse consequence of the minor's appeal. So the court's calculation of maximum confinement time should be checked against the provisions of section 726.

D. Failure to Declare Whether a Wobbler is a Misdemeanor or Felony.

Welfare and Institutions Code section 702 requires that "[i]f [a] minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." In *In re Ricky H.* (1981) 30 Cal.3d 176, the minor raised issues that made it all the way to the California Supreme Court. In addition to addressing the issues raised, the Court discussed several problems with the juvenile court's dispositional order that neither party raised. As relevant here, it noted that the assault count (Pen. Code, § 245, subd. (a)) was a wobbler that required, per Welfare and Institutions Code section 702, the juvenile court to declare the offense either a misdemeanor or a felony. (*Id.* at p. 191.) Because the juvenile court did not make this express finding on the record, the case was remanded, in part, so that it could do so. Should the juvenile court have failed to make such a declaration in your client's case, it may or may not present a potential adverse consequence, depending on the particular facts of the case.

E. Failure to Impose Lifetime Sex Offender Registration.

"Not all juveniles who commit sex offenses, even serious offenses, are required to register [as sex offenders]. Juvenile wards are required to register as sex offenders only 'when they are discharged or paroled from [the Division of Juvenile Justice (DJJ)] after having been committed for one of the enumerated offenses.' [Citation.]" (*In re J.C.* (2017) 13 Cal.App.5th 1201, 1206.) The statutory authority for requiring sex offender registration for minors under these circumstances is Penal Code section 290.008, subdivision (a). Subdivision (c) provides the enumerated sex offenses for which registration is mandatory.

A juvenile court has the discretion, when committing a minor to the DJJ on a current petition that does not involve one of the enumerated sex offenses, to not aggregate previously sustained petitions that do involve one of the enumerated sex offenses so that the minor can avoid having to register as a sex offender. (*In re Alex N.* (2005) 132 Cal.App.4th 18, 22, 24-25.) However, the converse is not true. The juvenile court does not have the discretion to commit a minor to DJJ based on a previously sustained petition that does not involve one of the enumerated sex offenses instead of the current petition which does, so that the minor can avoid having to register. (*In re G.C.* (2007) 157 Cal.App.4th 405, 409, 410-411.) Thus, if your client was committed to DJJ under circumstances that statutorily required him or her to register as a sex offender and this order was not made, your client faces a potential adverse consequence.

F. Failure to Impose Mandatory Driver's License Suspension.

There are two Vehicle Code sections that provide that the juvenile court shall suspend a minor's driver's license under specific circumstances:

- Vehicle Code section 13202.5: Applies to minors 13 to 20 years of age whose offense involved controlled substances or alcohol. (Veh. Code, § 13202.5, subds.

(a) & (d).) It provides that "the court shall suspend the person's driving privilege for one year. If the person convicted does not yet have the privilege to drive, the court shall order the [Department of Motor Vehicles] to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive." (Veh. Code, § 13202.5, subd. (a).)

- Vehicle Code section 13202.6: Applies to persons 13 years old or older whose offense involved vandalism. (Veh. Code, § 13202.6, subd. (a)(1).) It provides that "the court shall suspend the person's driving privilege for not more than two years, except when the court finds that a personal or family hardship exists that requires the person to have a driver's license for his or her own, or a member of his or her family's, employment, school, or medically related purposes. If the person convicted does not yet have the privilege to drive, the court shall order the department to delay issuing the privilege to drive for not less than one year nor more than three years subsequent to the time the person becomes legally eligible to drive." (Veh. Code, § 13202.6, subd. (a)(1).)

Should your client have been found in violation of an offense involving a controlled substance, alcohol, or vandalism, and the juvenile court did not order your client's current or future driving privileges suspended, your client faces a potential adverse consequence.

G. Failure to Impose Mandatory Restitution.

For minors adjudged a ward of the court (Welf. & Inst. Code, § 602), the juvenile court is required to impose both a restitution fine and victim restitution, if applicable. (Welf. & Inst. Code § 730.6, subds. (a)-(b).) The juvenile court must impose the restitution fine regardless of the minor's inability to pay. (Welf. & Inst. Code, § 730.6, subd. (c); but see *People v. Dueñas* (2019) 30 Cal.App.5th 1157). The juvenile court may, however, waive the imposition of the restitution fine should it find that there are extraordinary and compelling reasons to do so and it states those reasons on the record. (Welf. & Inst. Code,

§ 730.6, subd. (g)(1).) The court shall waive imposition of the restitution fine if the minor also comes within the description of a dependent child. (*Id.*, subd. (g)(2).)

In reviewing the record for your client's appeal, if the juvenile court did not imposed the restitution fine and failed to state reasons for waiving it, your client faces a potential adverse consequence. Currently, there is no case law directly addressing this in the delinquency context. However, there is case law in the criminal context that may be instructive. This is because when the Legislature enacted Welfare and Institutions Code section 730.6, it also enacted Penal Code, section 1202.4, which provides "parallel restitutionary requirements" for criminal defendants. (*People v. Birkett* (1999) 21 Cal.4th 226, 240, fns. 15 & 16.) In *People v. Tillman* (2000) 22 Cal.4th 300, the People argued that the trial court had erroneously failed to impose the mandatory Penal Code section 1202.4 restitution fine. The California Supreme Court determined that the trial court failed to state on the record the compelling and extraordinary reasons that presumably the trial court had found to exist—because otherwise it could not have legally avoided imposing the fine. The court noted that such an omission is correctable, however it needed to have been raised by the People at the time of sentencing. Absent that, the issue was forfeited.

Thus, based on *Tillman*, it is possible that if the juvenile court failed to impose the required Welfare and Institutions Code section 730.6 restitution fine on your client and there was no objection from the People, the matter would be deemed forfeited by the People absent an objection. However, in the abundance of caution, you should alert your client as to a possible adverse consequence.

III. Dependency Adverse Consequences.

Adverse consequences occur rather infrequently in juvenile dependency appeals. This is in large part due to the nature of the juvenile court dependency proceedings and the dynamics at play. Within this framework, there is not much opportunity for adverse

consequences to occur. But they can. Keep an eye out for client-favorable orders that provided for something that was unauthorized under the facts of the case.

Another type of dependency appeal adverse consequence to look for is an unintended consequence flowing from your client's appeal. Take, for example, a situation where your client is appealing an order granting services to the other parent, where no services were ordered for your client and your client has no chance of gaining custody. It is possible that if your client is successful on appeal, the unintended consequence could be the termination of parental rights of both parents and the placement of the child(ren) with someone outside of the family. Thus, your client should be advised of this potential adverse consequence should he or she be successful on appeal.

IV. Avoiding Disclosure of Potential Adverse Consequences in Compensation Claims

Quite often the time spent researching potential adverse consequences is billed on a claim as an unbriefed issue—which raises a problem. On one hand, it is clear when billing substantial time on research that the unbriefed issue will have to be described in detail to obtain full compensation. On the other hand, one does not want to disclose potential adverse consequences. Descriptions of unbriefed issues comments are forwarded to the JCC/ACS so care should be taken not to disclose potential adverse consequences.

When claiming substantial time for an unbriefed issue having a potential adverse consequence, the claim comment for that issue should be worded as, "Provided to CCAP in confidential memo." The staff attorney in explaining the recommendation will also maintain confidentiality in the comments supporting the project recommendation.

When claiming an insignificant amount of time for an unbriefed issue, a less specific comment such as "sentencing issue" will avoid disclosure of the potential adverse consequence.

Additional Resources

ADI Appellate Practice Manual 2d Ed., §§ 1.29, 4.91-4120, http://www.adi-sandiego.com/panel/manual.asp.

Anna L. Stuart, SDAP Staff Attorney, First Do No Harm; Adverse Consequences or Bank Favorable Errors, A Review, http://www.sdap.org/downloads/research/criminal/als17.pdf.

Appendix - Client Election Forms

Client Election Form - Adverse Consequence & Arguable Issue(s).

Ms. Anne C. Attorney
Attorney at Law
123 Main Street
Anytown, CA 99999

Re: People v. Smith (C012345)

Dear Ms. Attorney:

I have read your letter dated September 7, 2019, in which you explained the pros and cons of continuing with my appeal based on the issue and the adverse consequence you found. After carefully considering the points you raised, I choose to:

____ **Proceed with my appeal**. In choosing this option, I understand that I face a potential adverse consequence, including the imposition of overlooked fines and penalty assessments totally around $600. Nevertheless, I wish to proceed with my appeal and have you file an appellant's opening brief raising the issue you discussed in your letter.

____ **Abandon my appeal**. In choosing this option, I understand that my appeal will be dismissed without further action being taken on the appeal by you, with the exception of preparing and filing the paperwork necessary to file a notice of abandonment. I also understand that even if I abandon my appeal, the adverse consequences may be discovered.

I have indicated how I wish to proceed by placing my initials in the space provided next to the option above that I wish to pursue. **I understand that if I do not timely return this form to you, you will proceed with my appeal, consistent with my intent to bring an appeal based on the filing of the notice of appeal in this matter.**

Sincerely,

_____
(sign name)

_____
(print name)

_____
(date)

Client Election Form - Adverse Consequence & No Issues.

Ms. Anne C. Attorney
Attorney at Law
123 Main Street
Anytown, CA 99999

Re: People v. Jones (F012345)

Dear Ms. Attorney:

I have read your letter dated September 7, 2019, in which you explained the pros and cons of my appeal based on the adverse consequences you found, and that you found no arguable issues to raise on appeal. After carefully considering the points you raised, I choose to:

____ **Proceed with my appeal**. In choosing this option, I understand that I face potential adverse consequences, including an additional 8 months of prison time for the escape conviction; the adjustment downward of my presentence custody credits by 82 days, which would increase my prison time; and the imposition of the overlooked $300 parole revocation restitution fine. Nevertheless, I wish to proceed with my appeal and have you file a *Wende* brief.

____ **Abandon my appeal**. In choosing this option, I understand that my appeal will be dismissed without further action being taken on the appeal by you, with the exception of preparing and filing the paperwork necessary to file a notice of abandonment. I also understand that even if I abandon my appeal, the adverse consequences may be discovered.

I have indicated how I wish to proceed by placing my initials in the space provided next to the option above that I wish to pursue. **I understand that if I do not timely return this form to you, you will proceed with my appeal, consistent with my intent to bring an appeal based on the filing of the notice of appeal in this matter.**

Sincerely,

_____
(sign name)
_____
(print name)
_____
(date)