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Ethical considerations on appeal

How to avoid the traps of the most common ethical pitfalls

"You've got to know when to hold 'em, know when to fold 'em, know when to walk away, know when to run…" – *Don Schlitz, "The Gambler" (famously recorded by Kenny Rogers).*

That advice is never truer than after a loss in the ultimate legal gamble – a trial. Your client asks, "Can we appeal?" Before you answer, make sure you consider and understand your ethical responsibilities.

Most professional responsibility or legal ethics seminars and classes focus on avoiding or properly handling conflicts of interest, understanding the duties of confidentiality and loyalty, clarifying fiscal issues (including proper handling of client funds) and general civility. These issues, of course, all apply with equal force to an appellate practice. But there are specific ethical issues that are unique to appeals, which if unheeded, become traps for the unwary litigant (or lawyer). This article tackles some of the most common.

Should I appeal?

If your client wants to appeal an adverse judgment or appealable order, first consider the question, "why?" Typically, the answer is, "I lost because the judge [or jury] got it wrong." Maybe the jury believed the defendant over your client. Perhaps the jury believed defendant's expert witness over yours. Credibility issues can be fantastic issues to litigate, but almost always present frivolous appellate issues. Bringing a frivolous appeal is not only a waste of time, money, and credibility, it is also a sanctionable ethical violation.

Counsel has a duty to refrain from advancing frivolous appeals. (Bus. & Prof. Code, § 6068, subd. (c) ["It is the duty of an attorney...to counsel or maintain those actions, proceedings, or defenses only as appear to him or her

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2016 Issue

legal or just…"]; Code of Civil Procedure section 907 ["When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just"]; Cal. Rules of Court, rule 8.276 ["On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs…on a party *or an attorney* for: (1) Taking a frivolous appeal or appealing solely to cause delay…], emphasis added.)

Rest assured, a "frivolous" appeal is not synonymous with a meritless appeal. If it were, few attorneys would risk personal liability by pursuing a legal remedy that is usually uncertain. In the seminal case, *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, the California Supreme Court defined "frivolous" appeals as, "only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit."

The consequences of filing a frivolous appeal can be severe, including not only the dismissal of the appeal, but also sanctions against the attorney and client in the form of attorney's fees, costs, or some other punitive amount set by the court. Further, the court's opinion awarding such sanctions makes a public record of the malfeasance, and any sanction exceeding $1,000 in California must be reported to the State Bar. (Bus. & Prof. Code § 6068.)

One common situation faced by attorneys is the practical need to file a notice of appeal simply to preserve their client's rights pending finding alternative appellate counsel, or even while determining whether an appeal will be advisable. A potential dilemma arises, however, if the attorney ultimately concludes the appeal would be frivolous, but the appeal is pending and the client wishes to proceed.

When must I withdraw and how do I do so ethically?

Following the ethics rules can sometimes place you at odds with your client, especially if your client's goal after losing is to cause his opponent as much pain as your client has endured, or, if your client simply does not (or cannot) understand that not every case has a non-frivolous appealable issue. Under these circumstances, if you cannot convince your client to abandon his or her appeal, but representing your client will force you to violate your ethical duties, you have an ethical duty to withdraw from the representation. (Cal. Rules of Prof. Cond., rule 3-700.)

If you must ask the court for permission to withdraw because, for some reason, your client will not consent, you still must carefully navigate the ethical duties you owe your challenging client, particularly those of loyalty and confidentiality. (Cal. Rules of Prof. Resp., rule 3-100; Bus. & Prof. Code § 6068; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1839.) You owe a duty of confidentiality to your client "at every peril to" yourself (with a limited exception for preventing future crimes). (Bus. & Prof. Code, § 6068.)

Avoiding a breach of the duties of confidentiality and loyalty in a motion to be relieved as counsel can be difficult because you must explain your reasons for the motion. Some misguided, but well-meaning courts, may offer the attorney an in camera hearing, to explain why the attorney wishes to be relieved.

The Standing Committee on Professional Responsibility and Conduct of the State Bar of California addressed this issue in its Formal Opinion No. 2015-192. That opinion offered the following limited guidance.

In attempting to justify the need to withdraw, the attorney may not disclose client confidences. Ordinarily, for purposes of the motion to withdraw, it will be sufficient to state words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship.

To the extent such general language is deemed insufficient by the court, however, the attorney may only provide additional background information, but may not disclose confidential communications or other confidential information – either in open court or even *in camera*.

If that is ineffective, the attorney must take steps to prevent the court from entering an order compelling disclosure – including by requesting a stay of the order to allow time to file a writ petition. If the court nonetheless orders disclosure, the attorney must choose between her competing duties to maintain the client's confidences and to obey the court's order. Whatever the attorney's decision, (and the opinion takes no position), she must take reasonable steps to minimize the impact of that decision on the client.

Should I handle the appeal myself?

Another ethical issue in deciding whether to handle an appeal is the duty of competence. (Cal. Rules of Prof. Resp., rule 3-110.) No, competency is not unique to appeals. However, what *is* unique to appellate advocacy is *what* constitutes or qualifies as "competent." For instance, did you know that you could waive an entire legal argument simply by failing to present it under its own separate heading? (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294.) Did you know that you could waive an appellate challenge to the amount of damages if you failed to preserve the issue in a new-trial motion? (Code of Civ. Proc., § 657, subd. (5); *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.)

Rule 3-110 broadly defines competency, prohibiting lawyers from "intentionally, recklessly, or repeatedly" failing to perform legal services with the "diligence," "learning and skill," and "mental, emotional, and physical ability reasonably necessary for the performance of such service." One, if not the most, important precepts of an appeal is a matter of diligence, i.e., timely filing the notice of appeal. Almost every other deadline in an appeal has some flexibility based on need or, even sometimes, convenience, but a late-filed notice of appeal dooms the entire appeal because the due date is jurisdictional. Despite the importance of diligence in filing a notice of appeal, however, there are a variety of triggering events that may affect the actual

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2016 Issue

due date, including whether or not a new trial motion was timely filed, whether that motion was granted or denied, whether the notice of entry of judgment was served, etc.

Some competency issues may surprise litigants. For example, an appellant must take certain steps to procure the "appellate record" (typically containing a reporter's transcript and either a clerk's transcript or appendix); failure to do so can result in a dismissal of the appeal. (Cal. Rules of Court, rule 8.140.) Procuring the record does not simply mean timely designating the necessary documents to be included in the appellate record. It also means taking an active role to ensure that, even after the transcripts are prepared, they have been done so correctly.

In the Second Appellate District, for example, which handles appeals from Los Angeles, Ventura, Santa Barbara, and San Luis Obispo counties, a local court rule requires counsel to "immediately" notify the clerk of the superior court of any material inadvertently omitted from the record. (Second Appellate District, Local Rule 2.) "Procuring the record" also requires appellants to ensure that the record contains all of the materials the reviewing court will need to evaluate an appellate issue. Failure to augment the record with a crucial motion and ruling, for example, may waive the issue on appeal.

Like all areas of the law, appellate law is full of its own procedural idiosyncrasies that may stump someone new to the practice. Of course, like any other area of law, there are numerous practice guides and resources to help novices competently navigate. Even seasoned appellate practitioners regularly consult these resources.

That being said, trial attorneys who are unfamiliar with appellate law will comply with their ethical duty of competency by "associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent." (Cal. Rules of Prof. Resp., rule 3-310(C).) Short of hiring appellate counsel to associate or substitute into the case, attorneys often hire "ghostwriters" to assist them behind the scenes with anything from understanding procedural rules to researching and writing the appellate briefs.

Do I need client consent to hire a "ghostwriter"?

One ethical issue arising from such a "ghostwriter" arrangement involves compensation, and whether the trial attorney must seek client consent before entering into such an arrangement. Rule 2-200 of the California Rules of Professional Responsibility prohibits a member of the State Bar from dividing legal fees with another lawyer who is not a partner of, associate of, or shareholder with the member, without obtaining the client's informed written consent to the agreement. Moreover, the total fee charged by all lawyers may not be increased solely by reason of the division, and of course, the total fee must not be unconscionable. (Cal. Rules of Prof. Cond., rule 2-200(A).)

At first glance, this rule appears to cover contract attorneys, including "ghostwriters." However, State Bar Formal Opinion No. 1994-138, adopted by the California Supreme Court in *Chambers v. Kay* (2002) 29 Cal.4th 142, 154, fn.6, carved a limited exception, provided certain requirements are satisfied. These include the following:

The amount paid to the outside lawyer must be compensation for the work performed and must be paid whether or not the law office is paid by the client;

The amount paid by the attorney to the outside lawyer must be neither negotiated nor based on fees which have been paid to the attorney by the client; and The outside lawyer may not receive a percentage fee.

The Court referenced with approval some examples of compensation arrangements that would not implicate rule 2-200's notice and consent requirements:

Example one: the outside lawyer is paid an hourly rate that is less than the hourly rate for the outside lawyer's services billed to the client (e.g., the outside lawyer is paid $50 an hour but is billed at $70 per hour to the client);

Example two: the outside lawyer is paid a flat rate per day or week (e.g., the outside lawyer is paid $150 per day); and

Example three: the outside lawyer is paid the amount billed to the client for her time as the fees are paid by the client (e.g., the outside lawyer's rate is $100 per hour for a project, and every dollar paid to the law office for work performed on that project is immediately paid to the outside lawyer).

According to the Court, the first two examples do not involve a division of fees because the amount paid to the outside lawyer is not tied to specific legal fees the law office receives, and the office must pay the outside lawyer whether or not the client pays the office. The third example is not a fee division because the outside lawyer receives the entirety of the fee and the law office receives no portion thereof. (*Chambers*, *supra*, 29 Cal.4th at 154, fn.6.)

Do I have to cite to adverse facts and law?

Attorneys owe a duty of candor to the appellate justices and must not mislead the court by misrepresenting any *fact* or *law*. (Cal. Rules of Prof. Conduct, rule 5-200; Bus. & Prof. Code § 6068, section (c).) One common application of this duty of candor arises in the context of presenting a factual statement in an appellate brief.

Under certain circumstances, depending, for instance, upon the legal issues being raised in the appeal, the standard of appellate review will dictate what facts must be discussed. For instance, where court reviews the record for substantial evidence, all reasonable inferences from the evidence will be drawn, and conflicts of evidence will be resolved, in the appellant's favor. Therefore, if the responding attorney wishes to present his best facts, but those facts directly conflict with the appellant's evidence, it would mislead the court for the responding attorney to simply tell his version of the story with his own best evidence, while ignoring the unfavorable conflicting evidence.

Similarly, if the attorney finds adverse precedent that conflicts with a

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2016 Issue

position he has taken, failing to acknowledge and reference that precedent would constitute a misrepresentation of law. The favored practice would be to acknowledge the adverse authority, and distinguish it to the extent possible.

It is important to note, however, that not all adverse cases are adverse precedent. For instance, in an appeal in state court on a matter of state law, an adverse case from the 9th Circuit may be on point and persuasive to the state court, but it would not be precedential. In such a circumstance, the attorney may nevertheless have tactical reasons for addressing and distinguishing the negative case, but the attorney's ethical duties to the court would not require disclosure.

The duty of candor with the court extends beyond simply identifying and citing adverse precedent. For instance, counsel has a continued obligation to update the court throughout the pendency of the appeal if circumstances, factually or legally, have changed that could affect the outcome of the appeal. This obligation includes, for example, informing the court if the client dies and the appeal becomes moot, informing the court about a settlement, and informing the court of new law that was issued post-briefing.

Should I take advantage of the "default" periods?

Other than the notice of appeal, most appellate deadlines have built-in buffers in which the court will notify the parties of non-compliance, and offer a set amount of time in which to comply (or typically face dire consequences). For simplicity, this article refers to these compliance timeframes as "default" periods. A point of controversy among appellate practitioners concerns the 15-day default period automatically attaching to the due date for the appellant's opening brief and respondent's brief. (There is no default period for an appellant's reply brief.)

Typically, appellate courts are generous with reasonable requests for extensions of time in which to file the opening or respondent's brief. Occasionally, courts will determine that too many extensions have been requested, and will deny further requests. At this point, the attorney has a choice: does he calendar the due date for his brief before the default period is triggered, or, does he calendar the due date as the final day for compliance (i.e., the last day of the default period)?

Some attorneys believe that the duty of competence requires avoiding using the default period as a de-facto extension of time. There is, of course, risk involved in using the default period to complete the brief. If there is an emergency preventing you from completing the brief, the court may grant one last extension and relieve you from default, but that is a huge gamble. It may not. You may, despite the best of intentions, fail to submit a timely brief and suffer the consequences.

Conversely, some attorneys believe that the duty of competence requires taking advantage of the default period, if needed, to ensure sufficient time between drafting and editing the brief, and to ensure the attorney has sufficient time to complete and file his best work product.

These attorneys reason that there is no tactical advantage or award given to an attorney who files his brief at the "soft" deadline. Why not take full advantage of the time provided?

Although no ethics rule directly addresses this issue, the duty of loyalty and duty of competency are implicated in this debate. The debate may be best resolved case by case, depending on the motivation for the extra time, and on what course of action will best further the *client*'s interests. For illustration, consider an appeal from a multi-week trial, with thousands of pages of transcripts and documents, before a court that tends to arbitrarily deny multiple extension requests. Under such circumstances, you may legitimately need the default period to competently complete and polish your brief. Or, consider a small appeal that you relegate until the last minute because you are busy with other clients' appeals that are due prior to this appeal. Do you need the default period to competently handle your full caseload? Or can something else move in your schedule to prevent you from entering the default period?

Do I have to notify my client that I waived oral argument?

Another issue about which appellate practitioners often disagree is whether or not to waive optional oral argument. That debate is beyond the scope of this article. However, if you decide not to argue the case, do you need to notify your client of that fact?

You have a duty to keep your client apprised of significant developments in matters with regard to which you have agreed to provide legal services. (See Cal. Rules of Court, rule 3-500; Bus. & Prof. Code, § 6068, sec. (m).) Although oral argument is not mandatory, the State Bar considers the waiver of argument to constitute a significant development in an appeal requiring notification.

What if I think the trial lawyer who hired me committed malpractice?

One of the most uncomfortable ethical issues with which appellate practitioners struggle is the discovery that the trial counsel who referred the case, or who is co-counsel on appeal, committed malpractice. Should the appellate lawyer advise the client that a civil cause of action for malpractice against the trial lawyer would be appropriate?

As a threshold consideration, no lawyer, or lawsuit, is error-free. Even significant, material mistakes may not necessarily satisfy this State's high threshold for what constitutes legal malpractice. Therefore, the simple answer is there may be no actual ethical dilemma. The appellate lawyer may not actually have identified any malpractice.

However, assuming the lawyer is well versed with what constitutes legal malpractice and is confident that she identified malpractice, several ethics principles offer guidance. For instance, Business and Professions Code section 6068, subdivision (m) requires attorneys to promptly respond to reasonable status inquiries of clients and "to keep clients

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2016 Issue

reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

California Rules of Professional Conduct, rule 3-500, similarly requires attorneys to keep their clients "reasonably informed about significant developments relating to the employment or representation…" Discovery of error so significant that it rises to the level of malpractice, is at a minimum, a "significant development" in a client's pending case, warranting disclosure to the client.

Additionally, the relationship between attorney and client is a fiduciary relation of the "very highest character, and binds the attorney to most conscientious fidelity – *uberrima fides*.'" (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 11.) Among other things, that fiduciary relationship means the attorney has a duty of loyalty to his or her clients. (*Ibid*.) That loyalty would be undermined if the attorney allowed his discomfort, reputation, or business interests, to override his client's interests.

Concluding advice – avoid inadvertent insults

One of the standards of appellate review is whether the trial court abused its discretion in making a ruling. Arguing that a trial judge abused his or her discretion can be somewhat awkward, especially because your appellate justices are also colleagues of the trial judge whose discretion you have challenged. Keep in mind, you have an ethical obligation to treat the court and judicial officers respectfully, and that obligation governs not only how you speak to the court (and opposing counsel), but also how you *write* about judicial officers (and opposing counsel). (Bus. & Prof. Code, § 6068, subd. (b).)

When appealing an adverse ruling by a trial judge, no matter how absurd the ruling may have been, be sure to challenge the *ruling* and not the *judge*. When describing misconduct, judicial or attorney, be sure to challenge the *conduct*, not the *individual*. Keeping your focus on the action rather than the actor will not only boost your credibility with the court, but will also help improve civility in the field.

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