Appellate ethics for the trial attorney

By Herb Fox

As a trial lawyer, the risk of appellate malpractice and ethics violations may not keep you awake at night. But with the arrival of the new Rules of Professional Conduct, it might be wise to now pay attention to the peril.

To be sure, appellate malpractice is not new. Professional liability for failing to prosecute a meritorious appeal dates back nearly 145 years (see *Drais v. Hogan* (1875) 50 Cal. 121, affirming the liability of a trial attorney who neglected to appeal a reversible judgment).

But there is more than malpractice lurking in the appellate netherworld. Other risks include sanctions for prosecuting a frivolous appeal or writ (*In re Flaherty* (1982) 31 Cal.3d 637*;* Code Civ. Proc. § 907; Rules of Court 8.276 and 8.492*)* and for making false and misleading representations about the trial court record (*DCD Programs, Ltd. v. Leighton* (9th Cir. 1988) 846 F.2d 526, 528), and discipline for prosecuting an appeal despite a client's instruction not to do so (*In re Regan* (2005) 4 Cal. State Bar Ct. Rptr. 844) or for failing to prosecute an appeal (*Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934 ["conduct unbecoming" a member of the 9th Circuit Bar]).

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Thus while there has always been appellate-level danger for trial lawyers who have little appellate experience or do not have an experienced appellate practitioner leading the way, there is no doubt that the new Rules of Professional Conduct (hereafter the "Rules") increases the exposure for discipline and/or malpractice for appellate indiscretions. With new and revised Rules that clarify and enlarge our appellate duties to clients, increased caution is the word of the day.

Here are a few of the new, beefed-up Rules and their potential impact on your practice.

Limiting the Scope of Representation and the New Duty to Refer

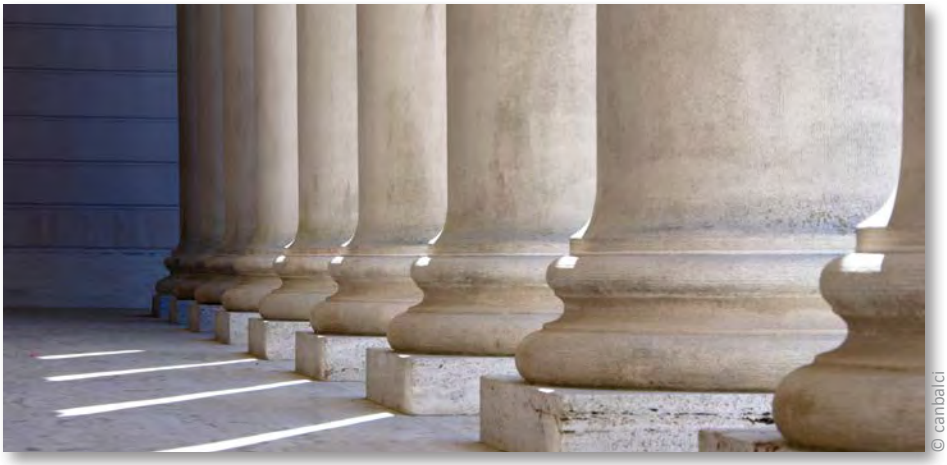
Trial attorneys – and particularly those handling contingent fee cases – often attempt to exclude appellate-level services from their scope of representation by adding an appellate escape clause to their legal services agreement. Typical language will purport to limit or exclude responsibility for post-judgment appeals. Such clauses may protect you from post-judgment abandonment claims (see *DiLoreto v. O'Neill* (1991) 1 Cal.App.4th 149) but otherwise have limited value because a client can reasonably expect you to protect his or her appeal rights for anything that arises *during* the litigation, such where an interlocutory appeal or writ review is necessary or advisable (e.g., orders re: disqualification of the judge or counsel; temporary or preliminary injunctions; change of venue; expunging a lis pendens, etc.)

Under the new Rules, the efficacy of such efforts by trial counsel to limit responsibility for appellate proceedings are even more questionable. California attorneys now have an affirmative duty to "reasonably consult with the client as to the means by which to accomplish the client's objectives in the representation", and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (Rule 1.4(a)(2,4); see also Rule 1.3(a).)

The Rules now define an attorney's "reasonable diligence" so as to require that the attorney "acts with commitment and dedication to the interests of the client and does not neglect or disregard or unduly delay a legal matter entrusted to the lawyer." (Rule 1.3(b).)

Applied to appellate matters, a trial attorney – even one who repudiates the responsibility to prosecute an appeal or writ – may now have an affirmative duty to advise the client about the existence of appellate remedies (including interlocutory writs and notice of appeal deadlines) so as to assure that such remedies are not lost, and to advise the client about the merits of such remedies, so that the client can make an informed decision. While the new Rules continue to allow attorneys to limit the scope of representation, that limitation must now be "reasonable under the circumstances" and accompanied by informed consent. (Rule 1.2(b).)

Informed consent, in turn, now must be in a writing that communicates the "material risks" and the "reasonably foreseeable adverse consequences of the proposed course of conduct." (Rule 1.0.1(e, e-1).) In short, any attempt to wholly exclude appellate proceedings from the scope of representation, must explain in writing that the client's failure to independently pursue appellate remedies may be disastrous.



Unless you have a sophisticated client who clearly understands the significance of this limitation on the scope of services – and knows how to locate and retain appellate counsel on their own – the attempt to limit the scope may not withstand scrutiny.

But the Rules provide ways to mitigate the risk. One is to assume the responsibility to advise the client about appellate remedies after acquiring the skill and knowledge necessary to do so. (Rule 1.1(c).) Another option – newly specified in the Rules – is to refer the matter to an experienced appellate attorney "whom the lawyer reasonably believes to be competent." (Rule 1.1(c).)

Avoiding Malicious Appeals Prosecuted Without Probable Cause and Warrantless Delay

Rule 3.1 continues, without modification, former Rule 3.100, that prohibits, inter alia, the prosecution of an appeal "without probable cause and for the purpose of harassing or maliciously injuring any person, or presenting a claim or defense that is not warranted under existing laws, unless it can be supported by a good faith argument for an extension, modification or reversal of existing law."

Augmenting those restrictions, however, is an entirely new Rule prohibiting attorneys from using "means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." (Rule 3.2.) Thus prosecuting an appeal or a writ petition for the sole purpose of delay – which has long been a component of appellate sanctions (Code Civ. Proc. § 907 and Rules of Court 8.276 and 8.492) – has now been elevated to an ethical violation.

Coextensive with these standards, new Rule 1.16 states that an attorney shall not represent a client or, where representation has commenced, shall withdraw from the representation if the lawyer knows, or reasonably should know that the client is, inter alia, taking an appeal "without probable cause and for the purpose of harassing or maliciously injuring any party." (Rule 1.16(a)(1).) This continues in different form the standards for accepting or continuing employment set forth in former Rule 3-200 and 3-700.

Reading these Rules together, it is now an ethical violation to prosecute – or continue to prosecute – an appeal or a writ petition that is without probable cause or cannot be supported by the law, and to do so for the purpose of delay or to inflict pain on the opposing party. And, if you know or reasonably should know that your client wants to prosecute a specious appeal or writ petition for the purpose of delay or to cause injury to the opposing party, you have an affirmative duty to withdraw.

Expanding Duties of Candor Up Through the Appellate Decision

New Rule 3.3 expands the duty of an attorney to be candid and honest with both the trial court and an appellate court. As applicable to conduct before an appellate tribunal, attorneys must not

- Knowingly make a "false statement of fact or law" or fail to correct a false statement previously made (Rule 3.3(a)(1); or,
- Fail to disclose to the tribunal the existence of legal authority in the controlling jurisdiction "known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority." (Rule 3.3(a)(2).

Equally important, these duties of candor and disclosure now expressly continue until the "conclusion of the proceeding," which is defined as "when a final judgment has been affirmed on appeal or the time for review has passed." (Rule 3.3(c) and Comment 6.) Thus it appears that we now have an affirmative duty to inform a judge or an appellate panel of the erroneous legal or factual basis for a judgment or decision even after entry of judgment or after oral argument on appeal. That the disclosure may be adverse to your client is not an exception to the new Rule!

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Drilling Down on Division of Fees

It has long been the case that any division of a contingency fee between trial counsel and appellate counsel must be approved in writing by the client. (Former Rule 2-200(A).) Those standards have been tightened and modified to require that the attorneys themselves must now enter into a written agreement between them, which agreement must be promptly approved in writing by the client. To wit:

- Both trial counsel and appellate counsel must enter into a written agreement as

between them to divide the fee (Rule 1.5.1 (a));
- The client must consent in writing to that agreement either at the time the lawyers enter into the agreement or as soon thereafter as reasonably practicable (Rule 1.5.1(a)(2);
- That client consent requires a "full disclosure" to the client of the fact of the division of the fee; the identity of the lawyers or law firms; and the terms of the division (Rule 1.5.1(a)(2); and,
- That the total fee charged by all lawyers must not increase solely by reason of the agreement to divide fees (Rule 1.5.1(a)(3).

Thus it is no longer sufficient (if ever it was) for the trial attorney (or originating referring attorney) to simply include in a contingency fee agreement the general disclosure that the fee may be shared by other, unnamed attorneys, and without setting forth the terms of that division.

Note however, that it appears to be permissible for the total fees paid by the client, including appellate fees, to exceed the contingency percentage set forth in the original agreement, as that increased fee is not based "solely" on the sharing of the fee, but reflects the additional time and effort expended in the appellate proceeding.

Providing Notice to the Client of Employing Inactive, Suspended or Disbarred Attorneys

It is not unusual for attorneys to hire disbarred or suspended colleagues to conduct legal research or draft briefs. Under new Rule 5.3.1(c), it is not per se improper to do so, as long as the disbarred or suspended attorney is not engaging in the practice of law or rendering advice to a client.

However, the new Rule requires that prior to, or at the time of, employing that ineligible person, the attorney must provide written notice to the State Bar of that employment, listing all of the activities prohibited by the Rule. Further, attorneys must also provide written notice to *each client* on whose specific matter the ineligible person will work, stating that the ineligible person is providing services but shall not be providing the specifically prohibited services (Rule 5.3.1(d)).

In short, attorneys must now disclose to a client that legal research and/or drafting of appellate briefs will be conducted by a disbarred or otherwise ineligible former attorney. Whether this new disclosure requirement effectively eliminates the practice of employing disqualified attorneys to work on a case, remains to be seen.

Conclusion

It's been said that trial attorneys who prosecute their own appeals have "tunnel vision." Having tried the case themselves, they "become convinced of the merits of their cause [and] may lose objectivity…." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449 – 1450). Such a loss of objectivity may also lead the trial attorney, blinded by zeal or inexperience, into violating the express and implied standards for appellate practice encompassed by the new Rules.

So be careful out there, and when in doubt – or even better, when just short of actual doubt – consult with an appellate colleague for a light in that tunnel. ■