Appealing Ethics

Professional Responsibility and Risk Management for Appellate Lawyers

By Del O'Roark

Do the Kentucky Rules of Professional Conduct (RPC)[i] apply in the same way when practicing an appellate case as they do in other matters? Are the malpractice risks diminished because the case has reached the appellate stage where things are less messy and the air more rarified?

While it is true that the RPCs are the same for appellate practice as they are for every other type of practice, it is equally true that the context is different and the rules feel different. It is also true that appellate practice is much quieter than a trial court, but the risk of malpractice is significant in the appellate process. Complex substantive issues must be thoroughly briefed and appellate procedural requirements must be meticulously observed to avoid dismissal or default. Quiet as it is, there is little margin for error.

The purpose of this article is twofold. First, it is intended to provide appellate lawyers with an analysis of the ethical considerations uniquely applicable to appellate practice: What duty is owed clients to assist in appeals? When is an appeal frivolous? What is the significance of an appellate positional conflict of interest? What are the requirements for candor to the appellate court? This analysis is followed by a description of appellate malpractice risks and risk management guidelines on how to prevent a claim.

Appellate Ethical Issues

You took the case – now must you represent the client if there is an appeal?

When a lawyer enters an attorney-client relationship the duty arises to "… carry through to conclusion all matters undertaken for a client."[ii] There is a split of authority on whether this duty means a trial lawyer has an obligation to pursue a meritorious appeal if the client wishes to do so. One view is that a lawyer's duty to the client ends with the entry of judgment absent an agreement to continue with an appeal. A contrary view is once a lawyer accepts a case there is a duty to stay with the case through appeal. [iii] The safe way to avoid this issue is to cover appeals in a letter of engagement defining the scope of representation.

Whether to appeal is the client's decision – not the lawyer's. The rules provide this guidance when the client gives no instructions on appeal:

> " … if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter."[iv]

You lost the case – do you now have a meritorious appeal?

The appellate lawyer's ethical considerations are more complex because there are two sets of rules to observe – the RPCs and either state or federal court procedural rules. This duality is most apparent when evaluating whether an appeal has merit or is frivolous. For example, lawyers must consider the implications of the following rules when deciding to file an appeal in Kentucky appellate courts:

> (1) RPC 3.1 Meritorious Claims And Contentions: A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. ….
>
> Comment (2): …. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.
>
> (2) RPC 3.2 Expediting Litigation: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
>
> Comment: Delay should not be indulged … for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. …. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.
>
> (3) Rule 3.4(c) Fairness To Opposing Party And Counsel: A lawyer shall not: … Knowingly or intentionally disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; ….
>
> (4) CR 73.02 (4): If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith."

There is a healthy margin of safety in deciding to appeal a case. Our system contemplates appeals that expand the law and challenge the *status quo*. Losing an appeal does not mean it was frivolous or unethical. Conversely, appeals motivated by revenge, harassment, delay, or financial considerations unrelated to the merits such as putting pressure on an indigent opponent to settle during a lengthy appeal are unethical.[v]

It is important to resist other factors that may improperly influence a decision to appeal. Sometimes lawyers and clients emotionally decide without regard to the merits to fight to the end after losing a bitter trial. Lawyers may be reluctant not to appeal for fear the client will go to another lawyer who will appeal, get the fees, and thereafter keep the client. Another concern is the fear of a malpractice claim if an appeal is not made. Finally, fees for pursuing an appeal should not be a factor in deciding if it has merit.[vi]

Educating the client is the best method of avoiding a falling-out over advice not to appeal. The law guarantees a fair trial – not a perfect one. The record is what it is and cannot be changed. While there may be error, it may not be reversible error. In the final analysis, if the client wants to ignore the law and file an appeal the lawyer believes lacks merit, the lawyer must withdraw. In so doing the lawyer should carefully advise the client of all time limits that apply to the appeal and urge the immediate engagement of another lawyer.[vii]

Your meritorious appeal for Client A conflicts with your meritorious appeal for Client B. Is this a problem?

Conflict of interest analysis for appellate lawyers includes all the usual considerations plus evaluating whether there is a positional or issue conflict with another client. Positional conflicts occur when an appellate lawyer in different cases with different clients argues inconsistent legal positions. Current guidance for Kentucky lawyers is in Comment (8) to RPC 1.7 Conflict Of Interest: General Rule:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Comment (8) is based on a version of the ABA Model Rules of Professional Conduct that was criticized as too simplistic. In response to this criticism the ABA issued an ethics opinion offering a more sophisticated analytical approach. The awkward synopsis of the opinion provides:

> When a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction, the lawyer, in the absence of consent by both clients after full disclosure, should refuse to accept the second representation if there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client. If the two matters are not being litigated in the same jurisdiction and

there is no substantial risk that either representation will be adversely affected by the other, the lawyer may proceed with both representations.[viii]

The most recent and best treatment of positional conflicts is in The Restatement Of The Law Third, The Law Governing Lawyers, §128 Comment *f*:

> *Concurrently taking adverse legal positions on behalf of different clients.* A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.
>
> However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients … the lawyer must withdraw from one or both of the matters. …. On circumstances in which informed client consent would not allow the lawyer to proceed with representation of both clients, see §122(2)(c) and Comment *g(iv)* thereto.

The key to avoidance of unresolved positional conflicts is to be sensitive to the issue and use a conflict identification system that searches for positional conflicts. My experience is that many Kentucky lawyers balk at this added layer of conflict review as being too burdensome. With the sophisticated conflict identification software now available it is a manageable task. A positional conflict of interest search should be part of every new matter conflict review. Periodic reviews for positional conflicts should be made as a case progresses to appeal.

Your appeal has some weaknesses. How candid must you be about them?

RPC 3.3 Candor Toward The Tribunal forbids Kentucky lawyers from making false statements of material fact, failing to disclose material facts when disclosure is necessary to avoid fraud on the tribunal, and offering false evidence. A good succinct description of how the candor rules apply to an appellate court was provided in the Selected Appellate Ethics Issues program materials at the ABA 27th National Conference on Professional Responsibility:

> Appellate review is ordinarily limited to matters contained in the record, and the basic rule is that an advocate should not volunteer information outside the record without the court's permission. Lawyers are sometimes chastised for going outside the record in briefing or in oral argument. Yet, despite the vari-

> ous courts' rules that review is limited to the record, many appellate judges expect lawyers to advise them of extra-record facts, either as part of their presentation of the case or in response to questions during oral argument. *(footnote omitted)*
>
> A corollary principle is that the designation and preparation of the record should be complete and fair. *See Rhinevault v. Rhinevault,* 91 Wn. App. 688, 693, 959 P.2d 687 (1998) (record designated for appeal "replete with glaring omissions given the nature of the order appealed"). References to the record in briefing should not distort the record. *See Amstar Corp. v. Envirotech Corp. and Energy Fuels Nuclear, Inc.* 730 F.2d 1476, 1486 (D.C. Cir. 1984) (distortion of the record by deletion of critical language in quotations from the record, reflects a lack of the candor required by the Model Rule of Professional Conduct Rule 3.3). *See also Washburn v. Beatt Equip. Co.,* 120 Wn.2d 246, 280, 840 P.2d 860 (1992) ("Defendant's reliance on only a part of the record on this point is less than candid").[ix]

The leading issues concerning candor to appellate courts are:

<u>*Citation of adverse authority:*</u> The Kentucky Supreme Court did not adopt the portion of the ABA Model Rules of Professional Conduct on candor to the tribunal requiring lawyers to disclose to the court legal authority in the controlling jurisdiction directly adverse to the client's position and not disclosed by opposing counsel. This avoids for Kentucky lawyers the problem of struggling with nice distinctions of what does directly adverse really mean, but puts Kentucky out of step with many other jurisdictions.[x] When practicing in other state or federal jurisdictions be sure to know their rules on disclosure of adverse legal authority.

<u>*Citation of unpublished opinions:*</u> State and federal court rules are split on whether it is permissible to cite unpublished opinions in briefs. There is considerable criticism of a rule forbidding their citation complaining of shadow law and secret decision-making.[xi] Lawyers must know the rule of the jurisdiction in which they are appealing. In Kentucky it is CR 76.28(4)(c): "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."

<u>*Misrepresentations:*</u> A classic example of misrepresentation of the record is the appellate lawyer who stated in oral argument that the client testified, "I applied the brakes, but the brakes failed." In fact the record showed the testimony to be, " I applied the brakes, but the brakes failed to stop the car before impact." Other examples of lack of candor to the court by misrepresentation are:

- Misstatement of facts of case
- Misstatement of law
- Misstatement of what a case holds
- Distortion of case law or statute
- Nondisclosure or misstatement of critical facts
- Statements of purported facts unsupported by the record

- Selective cropping of the record
- Inferences represented as facts
- Lifting materials without attribution in briefs[xii]

<u>*Too much candor*</u>: Lack of civility can be an issue at the appellate level as well as at trial. At the appellate level, however, it is even more problematic because the victim of the uncivil conduct is usually a judge. An Indiana lawyer was recently disciplined for alleging in an appeal that the court of appeals authorized attorneys to lie.[xiii] You can think it, but don't say or write it, is the prudent rule.

Appellate Malpractice

Appellate Lawyer Standard of Care

There is no special standard of care for appellate lawyers. Appellate malpractice cases are litigated using the same standard of care as any other lawyer malpractice case – whether the lawyer exercised the skill and capacity normally exercised in similar circumstances. It must be established that the lawyer's negligence caused damage; *e.g.*, the client would have prevailed on appeal but for the lawyer's negligence and the client would have recovered or not paid a certain amount in the underlying case. An excellent analysis of appellate malpractice issues is Mallen & Smith's *Legal Malpractice* 5th ed., §30.44 The Appellate Attorney. It is the place to start in researching appellate malpractice.

Appellate Lawyer Negligence

Legal Malpractice gives the following examples of appellate lawyer negligence:

> The nature of alleged errors are as varied as the post-trial procedures available to a client. These include failing to make post-trial motions; improperly made post-trial motions; advising against taking an appeal; failing to advise of an appeal; failing to take the preliminary steps necessary to appeal, such as moving for a new trial; failing to file timely the notice of appeal; failing to file required records, transcripts and factual statements necessary to perfect the appeal; and negligence in presenting the client's contentions. A related issue concerns a client who settles a case pending an appeal, contending that the lawyer should be responsible for the difference between the settlement and benefit that should have been achieved.[xiv] (*footnotes omitted)*

Appellate Lawyer's Discovery of Trial Lawyer Malpractice

A special ethics and malpractice issue for an appellate lawyer who was not the trial lawyer is whether there is a responsibility to the client to review the record for trial lawyer malpractice. Is failure to do so malpractice by the appellate lawyer? While there is no definitive answer to this question, in ABA Informal Opinion 1465 (1981) the committee observed that neither the Code of Professional Responsibility nor Rules of Profes-

sional Conduct prohibit or require appellate counsel to advise about trial lawyer malpractice. One commentator, appropriately uneasy with this opinion, suggests that appellate lawyers avoid the question by limiting the scope of engagement to exclude reviewing the trial record for malpractice.[xv]

Neither of these approaches satisfactorily addresses the question of the appellate lawyer's duty to advise of trial lawyer malpractice. They are typical of lawyer friendly ethics opinions that relieve lawyers of unpleasant duties. A lawyer's fiduciary obligation of loyalty along with the RPCs on competence, diligence, and client communication impose a duty to inform a client on appeal of all aspects of the case. An appellate lawyer may limit the scope of representation to preclude representing the client in a collateral malpractice case against the trial lawyer, but should advise of malpractice even if outside the scope of representation.[xvi] Failure to do so in today's legal environment could provoke a bar complaint or malpractice claim against the appellate lawyer.

Appellate Practice Risk Management Guidelines

1. Client Screening: Declining to represent difficult clients is one of the best ways to avoid a malpractice claim. As part of the client screening process consider whether the potential client will be difficult to work with on appeal. Remember that filing an appeal means the case was lost in whole or part at the trial level. Client relations are often strained from this point forward with accusations of malpractice not infrequent.

2. Matter Screening: Screen a new matter to assure firm competence in both applicable substantive law and appellate practice prior to accepting the representation. Accepting close or novel cases requires trial advocacy skills and appellate skills of record review, brief writing, and oral argument. In some cases it may be appropriate to represent the client at trial, but refer any appeal to an experienced appellate lawyer.

3. Conflicts of Interest: Include in the firm's conflict check system positional conflicts of interest. Periodically check for positional conflicts as a case progresses to appeal.

4. Letters of Engagement: Cover appeals in letters of engagement so there is no doubt whether there is a duty to represent a client on appeal. Fees for appellate representation should be specifically addressed. Remember that RPC 1.5(c) Fees requires that fees for appeals be covered in writing in contingency fee representations.

5. Time Limits: Most appellate malpractice claims arise because of late post-judgment motions, late notices of appeal, and other missed appellate deadlines. Unlike trial practice where missing the statute of limitations is the major time limit cause of malpractice claims, appellate practice involves numerous deadlines any one of which can be fatal to the appeal. The appellate lawyer must be expert in state and federal time limit rules on post-judgment motions, notice of appeal fillings, brief filings, exceptions to filing requirements, and whether an extension of time or motion for enlargement tolls other appellate deadlines. There is no substitute for knowing what you are doing.[xvii]

6. Client Communication: It is the client's decision whether to appeal – be sure the client understands this. Be clear on what the client wants appealed so there is no later accusation that the lawyer omitted appellate issues. The short time limits on post-trial motions and notices of appeal require a prompt decision by the client. Document the file.

7. Preparation: Procrastination is the appellate lawyer's greatest enemy. Last minute preparation leads to inadequate review of the record and a hasty and poorly researched brief. A five or six page appellate brief with sparse legal authority in a complex appeal screams procrastination or incompetence and raises the question of malpractice. There is no substitute for doing your homework in appellate practice.

8. Withdrawal: The most likely reason for an appellate lawyer to withdraw is because the lawyer believes an appeal lacks merit. Other reasons include strained client relations, lack of appellate practice experience, and when the client discharges the lawyer.
The withdrawing or discharged lawyer must take action to protect the client's interest. These steps include giving reasonable notice of withdrawal, allowing time for retention of another lawyer, and promptly returning papers and property to which the client is entitled.[xviii] The short time limits on post-trial motions and notices of appeal mandate that the withdrawing lawyer move expeditiously. The client should be urged to retain another lawyer immediately. Avoid the accusation that delay in making a decision to withdraw and complying with withdrawal duties caused the client to miss appeal deadlines.

---

[i] SCR 3.130.
[ii] RPC 1.3 Diligence, Comment 3.
[iii] *See* Fortune, Underwood, and Imwinkelried, Modern Litigation and Professional Responsibility Handbook § 18.7 Duty to Appeal, p. 607 (1996); Hunt & Magnuson, Ethical Issues on Appeal, 19 Wm. Mitchell L. Rev. 659 (1993); and Mallen & Smith, Legal Malpractice 5th ed. (2000), Vol. 4, § 30.44, The Appellate Attorney, p. 616.
[iv] RPC 1.3 Diligence, Comment 3.
[v] Appointed defense lawyers in criminal cases have a particularly difficult time with frivolous appeals. The U.S. Supreme Court provides guidance on how to proceed in *Anders v. California*, 386 U.S. 738 (1967) and *Smith v. Robbins*, 528 U.S. 259 (2000).
[vi] *See generally*, Miner, Professional Responsibility In Appellate Practice: A View From The Bench, 19 Pace L. Rev. 323 (1999).
[vii] For further analysis of frivolous appeals see, Fortune, Underwood, and Imwinkelried, Modern Litigation and Professional Responsibility Handbook § 19 Appeals, p. 612 (1996).
[viii] ABA Formal Opinion 93-377 Positional Conflicts, October 16, 1993.
[ix] Selected Appellate Ethics Issues, Part II The Record And Candor To The Court, ABA 27th National Conference on Professional Responsibility Coursebook, May 31- June 2, 2001, page 485. Panel members: Narda Pierce, Solicitor General, Washington State Attorney General's Office, Olympia, WA; Kay N. Hunt, Lommen, Nelson, Cole & Stageberg, Minneapolis, MN; Paul R. Q. Wolfson, Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C.
[x] *See* Gaetke, Kentucky's New Rules of Professional Conduct for Lawyers, 78 Ky. L. J. 767, 792 (1989-90).
[xi] *See* Carpenter, The No-Citation Rule For Unpublished Opinions: Do The Ends of Expediency For Overloaded Appellate Courts Justify The Means of Secrecy, 50 So. Car. L. Rev. 235 (1998).
[xii] *See*, Medina, Ethical Concerns In Civil Appellate Advocacy, 43 Sw. L.J. 677, 694 ((1989).
[xiii] In re McClellan, Ind., No. 18S00-0008-DI-498, 9/7/01, Current Reports, p. 578, Vol. 17, No. 20, 9/26/01, ABA/BNA Lawyers' Manual On Professional Conduct.
[xiv] Mallen & Smith, Legal Malpractice 5th ed. (2000), Vol. 4, § 30.44, The Appellate Attorney, p. 611.

[xv] Medina, Ethical Concerns In Civil Appellate Advocacy, 43 Sw. L.J. 677, 685 (1989).
[xvi] A typical example of a violation of this requirement is when a lawyer fails to advise on a potential third-party claim while representing a client on a workers' compensation claim.
[xvii] A good short article on federal deadlines is "Appellate Law Deadlines," by Mark R. Kravitz, The National Law Journal, p. A14, 1/22/01.
[xviii] RPC 1.16(d) Declining or Terminating Representation.