ETHICAL ISSUES FOR APPELLATE LAWYERS DEALING WITH TRIAL LAWYERS

by Roger D. Townsend

This paper discusses the neglected topic of ethics when an appellate lawyer in one firm is retained by a trial lawyer in another firm.

The first issue is who is the client. If the appellate lawyer is expected to enter an appearance in court or to communicate with the party, then the client will be the party represented by the retaining trial lawyer. This will be true even if the trial lawyer pays the appellate lawyer's fees. The analogy is to third-party insurance cases, in which defense counsel retained by an insurer to represent an insured owes the duty of loyalty to the insured, even though the insurer pays the fees.

But is the situation the same if the appellate lawyer merely consults with the trial lawyer, never entering an appearance in court? Perhaps the appellate lawyer merely gives advice to the trial lawyer or looks over a brief drafted by the trial lawyer. Perhaps the appellate lawyer ghostwrites the brief, but it is signed and filed by the trial lawyer. Perhaps the party never even learns of the appellate lawyer's involvement. Does the appellate lawyer have an attorney-client relationship with the party, or merely with the hiring trial lawyer? The answers are important for several reasons.

First, assume that the appellate lawyer uncovers evidence of malpractice by the trial lawyer. If no duty is owed to the party, then the appellate lawyer can keep quiet and maintain a good relationship with the trial lawyer, perhaps securing future business. On the other hand, if the duty is owed to the party, then the appellate lawyer must ensure that the malpractice is disclosed to the client — unless the engagement agreement expressly disclaims that duty.

Second, assume that the appellate lawyer's fees go unpaid. If the client is the party, then the appellate lawyer may not be able to withdraw if to do so would prejudice the client. The same considerations might not apply, or at least not to the same extent, if the client is the trial lawyer.

Third, what about conflicts of interest? If the appellate lawyer does not appear on papers filed in court or ever meet with the party, has the appellate lawyer actually represented the party? Presumably the appellate lawyer has received confidential information about that case, which would preclude the appellate lawyer from working both sides of the same case. But could the appellate lawyer simultaneously advise a trial lawyer representing the party in case *A* while the appellate lawyer also appears in court adverse to the same party in case *B*? And can there be an issue conflict if an appellate lawyer has taken a conflicting position in a brief only ghostwritten by that lawyer?

Fourth, what duties of ordinary disclosure and advice are there to the party? I have been retained in cases by trial lawyers who did inform the client of my involvement (since I had my name on the brief and argued the case in the appellate court), and in which the client paid my fees. Yet the trial lawyers did not want me to communicate directly with the client, but only through them. I ultimately had concerns about the soundness of some opinions that they were expressing to the client. When I asserted my fiduciary duty to disclose matters to the client first-hand, relations with the trial lawyers soured and they have not hired me again. Which of us was correct?

Fifth, what duty does the appellate lawyer owe the tribunal if the appellate lawyer is merely in a consulting role? Of course, an appellate lawyer whose name appears on papers filed in court owes the usual duties of candor. This can create tensions if the trial lawyer is inclined to fudge either the record or the law. In that situation, however, the duty to act is clear, even if the actions will lead to disagreeable consequences or perhaps withdrawal from the case. But does an appellate lawyer who is merely ghostwriting a draft for a trial lawyer owe the same duty to the tribunal?

Fee issues can also arise. If the party is paying the appellate lawyer's fees, but the appellate lawyer must communicate only through the trial lawyer, there is a potential for great delay. And

many jurisdictions require a client to be informed of any fee-splitting between lawyers. Thus, in those situations, which include contingent-fee arrangements, the appellate lawyer must ensure that the party actually signs some sort of fee agreement reflecting the appellate lawyer's involvement — unless the trial lawyer's fee agreement has already arranged for a blanket consent. And, just as with party-clients, the appellate lawyer should ensure that a trial lawyer-client sign a fee agreement. Otherwise, there is a potential for misunderstanding, particularly if the case turns out extra well or extra bad.

Finally, tying back into the systems approach to managing an appellate practice, an appellate lawyer who is merely assisting trial counsel must be extremely clear, preferably in writing, about who is responsible for what. The breakdown of responsibilities will not always be so clear as when a case is handed off for appeal. Again, the duties may be affected by who is considered the client. If the party is the client, then the appellate lawyer's duties to express disagreements about strategy and who should do what will be one thing. If the trial counsel is considered the client, then the trial lawyer's decision ultimately may prevail. I suggest spelling out duties clearly at the outset in the engagement agreement.

Depending on the relationship with trial counsel, moreover, some may be oversensitive or unfamiliar with so-called "CYA" letters or e-mails. A great deal of tact can be required to clarify responsibilities in writing while keeping the degree of informality necessary for collegiality with the particular trial counsel involved. A past relationship with the trial counsel generally, but not always, helps.