

Presented:
24th Annual Conference on State and Federal Appeals

June 5-6, 2014
Austin, Texas

Sneaky Ethics

Kirsten M. Castañeda

Author contact information:
Kirsten M. Castañeda
Locke Lord LLP
2200 Ross Avenue, Suite 2200
Dallas, TX

kcastaneda@lockelord.com
214-740-8533

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. COMMENCING APPELLATE REPRESENTATION (a/k/a “What are you prepared to do?”)	1
A. Issues Regarding the Client.....	1
B. Issues Regarding the Lawyers	2
C. Issues Regarding the Scope of Representation.....	3
1. “Traditional” representation	3
2. “Consulting” representation	5
3. Amicus representation.....	6
III. DECIDING WHETHER TO APPEAL.....	7
A. Determining Whether the Appeal Has Merit	7
B. Determining the Client’s Goals	8
IV. REQUESTING OR PREPARING THE RECORD	9
A. Optional Non-Evidentiary Filings	9
B. Optional Reporter’s Records or Transcripts.....	9
C. Record Portions Subject to Protective or Sealing Orders	10
V. ISSUE SELECTION	10
A. Waiver	10
1. Issues your client waived (or maybe not).....	11
2. Issues that can’t be waived.....	11
3. Issues the other side waived	11
B. Legal Authority	11
C. Scope of the Appellate Record.....	12
VI. BRIEFING AND REHEARING MOTIONS	12
VII. CONCLUSION	12

I. INTRODUCTION

This paper does not purport or pretend to address all the aspects of an appeal that intersect with responsibilities under the applicable rules of professional conduct. Many excellent papers have been devoted to the most common ethical issues faced by lawyers prosecuting or defending an appeal. Although these issues are important, their “in your face” nature makes them fairly easy to spot, if not always simple to resolve. More troublesome are the ethical issues that sneak up on an appellate practitioner, often concealed in the guise of a seemingly innocuous task.

These “sneaky ethics” issues are much easier to handle properly when you know how to spot them as early as possible. Let’s take a look at some favorite hiding places of the “sneaky ethics” problems.

II. COMMENCING APPELLATE REPRESENTATION (a/k/a “What are you prepared to do?”)

My first draft of this paper began with “Deciding Whether to Appeal” (*i.e.*, the next section), which means this issue is probably the sneakiest of them all. When you are taking on a new client, particularly at the beginning of an appeal, it is important to think about the scope of representation and how that scope should be communicated in the retention or representation letter. Even if the client has been represented by your firm during the trial stage, the transition from trial to appellate work is a good time to review the representation letter the client already signed and determine whether and how it ought to be amended or supplemented with new information.

During this process, question everything and trust no one. By that, I mean, do your own work in assembling information. Do not take anyone’s word that any particular information has been communicated, that a document exists, that it contains any particular language, or that it has been signed. Intentions generally are good. Memories usually fade. Talk to people directly and read the documents themselves. Do not be afraid to ask lots of questions, some of them rather basic. By being thorough and drilling down, you are most likely to obtain the full understanding you need to draft an initial or amended/supplemental letter setting forth the necessary information about the appellate representation you will be providing.

This process will help you identify issues that might sneak up on you later without this initial exploration. For example:

A. Issues Regarding the Client

Do you know who your client is? Is it a natural person or a business entity? If a natural person, exactly who is/are the individual(s)? At this stage, you’ll want to pursue the full legal names and nicknames (a/k/a aliases). If your client is a business entity, exactly what is the entity’s legal name? Many affiliated businesses use similar names – be sure that you know the correct one. This is a good time to gather the information that will be required in any corporate disclosure statement, as well as learning about corporate relationships (such as subsidiaries and parents) that may not technically be encompassed by disclosure rules. Not only will such information help you learn about your client’s business, but also it will assist you in identifying any conflicts of interest (or business relations issues) lurking around the corporate swamp.

This inquiry is not limited to the p’s and q’s of your client’s name. It also includes a frank discussion about your client’s true identity. For example:

- A trial lawyer may approach you about coming on board to serve as lead counsel in a mandamus proceeding. Your main contact may be the trial lawyer, but your real client is the trial lawyer’s client.
- You might be contacted by two individuals who successfully sued a defendant with whom they were negotiating to begin a joint venture. In defending the judgment on appeal, will you be representing both of the individuals or just one? Or was the prevailing party actually a business entity owned by those individuals?
- A firm client may be a corporation who wants you to prosecute an appeal from a final judgment against the company and its employee. Does the employee have separate counsel, or is the company asking you to represent both?

If you have more than one client, now is the time to evaluate possible conflicts of interest. As we’ll discuss later in the paper, some conflicts may not rear up until you are digging into the record or up to your elbows in research.

However, now may be the time to educate your clients about the possibility that a conflict could arise and to discuss everyone's expectations in that regard. These discussions will provide the basis for you to evaluate any steps you may need to take in writing, or whether the risks of future problems with the joint representation outweigh the benefits.

Finally, identifying your client allows you to delineate your contact(s) or point person(s) if one or more of your clients is not a natural person. Texas Disciplinary Rule of Professional Conduct ("DR") 1.03(a) requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *See also* TEX. STDS. APP. CONDUCT *Lawyers' Duties to Clients* ¶8 (requiring counsel to "keep clients informed and involved in decisions and will promptly respond to inquiries"). Who wants to be in the loop, and are they within the scope of the attorney-client privilege? Beyond day-to-day case management, are there any questions or issues that would require input or approval from additional decisionmakers? Although such issues may arise more often at the trial level, questions about supersedeas or post-judgment discovery, whether to pursue all meritorious grounds or limit the requested relief to remand, and whether to seek high court review after an intermediate appeal may require the involvement of additional client representatives, adding to the time needed to obtain answers or approval.

Another question to ask is whether this client is involved in a multitude of litigation, or whether the issues in the appeal may impact others in a tight-knit industry. If the client is involved in other lawsuits involving similar issues, you may need to consult with additional client representatives or in-house counsel handling the other litigation in order to coordinate arguments and avoid conflicting positions. Or, if the appeal involves issues with potential industry-wide impact, your clients may want you to alert them to issues or arguments that could provide relief in the particular case but inflict negative consequences on the industry as a whole. This type of situation is a good reminder that "the client's values may not be the lawyer's, or more precisely, that the real, live client's interests may not match those of the 'standard client' for whom lawyers are wont to model their services."

Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1089 (1979). Your clients may decide that it is worth pursuing the relief that will provide the greatest relief in the case at hand, but they benefit from information allowing them to meaningfully evaluate whether pursuing a particular argument or result in the appeal is worth the risk of adverse business consequences or thorny industry relations for years to come. *See, e.g., id.* at 1088 ("[i]t would hardly be said of the standard client that his best interest may be a result that stings him or one that, at first blush, he would prefer to avoid . . . Yet the real client may in some sense want or need that seemingly less attractive result"). Providing this information dovetails with the responsibility imposed by DR 1.03(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

B. Issues Regarding the Lawyers

In addition to ascertaining the identity of your clients and client representatives, you will want to determine whether any other lawyers will be involved with the representation going forward. Will trial counsel make an appearance in the appeal? If so, what is their expected role in the appellate representation? Will activities in the trial court continue while the appeal is pending? This question is not limited to interlocutory appeal situations. Post-judgment enforcement issues and lingering sanctions motions are two examples of trial-level activities that may occur even after a final judgment is on appeal. If trial-level activities are ongoing or expected, you will need to keep in touch with trial counsel to stay apprised of the proceedings and coordinate any strategies or arguments that may impact both trial and appellate levels of the case.

If trial counsel will not continue representing the client, the outset of your appellate representation is a good time to ascertain the status of the relationship. For example, are the client and trial counsel parting on good terms? Are the client and trial counsel parting ways permanently, or is this just the end of the trial level representation in this particular case? Understanding the dynamic will be helpful in effectively communicating with both the client and trial counsel. Another question to ask is whether the client has any budgetary constraints or expectations regarding continued work by trial

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Sneaky Ethics

Also available as part of the eCourse

[Appellate Ethics](#)

First appeared as part of the conference materials for the
24th Annual Conference on State and Federal Appeals session
"Sneaky Ethics"