



Ethics in Appeals

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Incompetent Representation

- Associate someone who is competent
- “Study and analysis” may make you competent
- Emergency circumstances, such as an emergency mandamus

Conflicts of Interest - Generally

- Can't represent opposing sides in litigation
- New client's interests are adverse to existing client's interests
 - Unless both clients consent after full disclosure
- If multiple representation becomes improper, must withdraw

Positional Conflicts

- Substantial risk that actions in one case will adversely affect another
- May take inconsistent positions at different times
- Client may consent to positional conflict, or to refraining from a particular argument

Third-Party Payors

- Some rules suggest, and other rules require, client consent
- Cannot accept direction from the third-party without client consent
- Must maintain professional independence
- Duty to client may require work the third-party won't pay for
- Minority view: the insurer is a client, too

Successive Govt. & Private Employment

- After government / private switch, can't participate in cases where previously involved
- If a former government lawyer did not work on the case, the lawyer's new private firm may keep the case if the lawyer is screened off
- Judges cannot negotiate employment with firms with pending cases; authorities split on whether this applies to law clerks

Fee Agreements

- Agreements signed after representation has begun must be fair and reasonable to the client
- Client can't be pressured to sign after representation has begun
- Fee is unconscionable if “a competent lawyer could not form a reasonable belief that the fee is reasonable”

Contingent Fees

- Prohibited in criminal cases, discouraged in family law cases
- Tex. Gov't Code requires written, signed agreement
- Reverse contingent fees generally permissible

Fee Splitting

- If no confidential info disclosed and no additional cost to the client, client consent not required for associated counsel
- Attorney associating other counsel may have fiduciary duty to prevent total fees from being unconscionable
- Division of fees should be spelled out; if not, *quantum meruit* may be applied

Disclosing Adverse Authority to the Court

- Duty to disclose authority that is “directly adverse”
- In a mandamus, “all material facts” must be disclosed
- Referencing facts outside the record may be sanctionable
- May be strategically advantageous to address adverse facts or law

Frivolous Appeals

- Must have a “reasonable basis” for the appeal
- Include a “good faith basis for extending, modifying, or reversing existing law”
- Poor practices (bad brief, skipping oral argument, etc.) seem more likely to result in a frivolous appeal finding
- Appointed counsel in criminal and family appeals should file a brief explaining why there are no good faith grounds for appeal

Civility

- Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process
- Personal or unsubstantiated attacks may result in sanctions
- Evading briefing rules and size limitations may be sanctionable

Reporting Misconduct by Trial Counsel

- Duty to report when “knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer”
- May have independent duty to inform client
- May have been strategic reasons for a decision that looks bad in hindsight

Ethical Behavior Helps Your Client

- Saves time
- Encourages reciprocal decency
- Ingratiates you to the courts