ETHICAL DUTIES OF TRIAL COUNSEL TO FORMER CLIENTS AND APPELLATE COUNSEL

by Vicki Firstman

Introduction

Inevitably, as appellate advocates, we will be faced with situations where trial counsel's competency comes into question. Often, the answers to our questions cannot be found in the appellate record. Thus, in addition to conferring with our client, we will need to raise our concerns directly with trial counsel in order to determine whether a claim of ineffective assistance of counsel ("IAC") should be raised in a concurrent habeas petition. When this situation arises, it is helpful to know the parameters of trial counsel's ethical obligations to both the client and successor appellate counsel. This article provides some general guidelines concerning the trial attorney's continuing ethical duties. Awareness of those duties can be a powerful tool in obtaining critical answers to an IAC inquiry.

The Duty of Competency

The bedrock principle which should guide our review, of course, is whether trial counsel performed competently. We all are aware of the fact that

a failure to provide effective representation deprives our clients of their Sixth Amendment Right to effective counsel. However, a breach of the duty to perform competently can also constitute an ethical violation. In fact, competency is the subject of several specific ethics rules. Rule 1.1 of the ABA Model Rules of Professional Conduct (hereafter "the Model Rules" or "RPC") provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Similarly, Disciplinary Rule 6-101(A)(1) of the ABA Model Code of Professional Responsibility[1] (hereafter the "CPR") states that a lawyer shall not "handle a legal matter which he knows or should know that he is not competent to handle" and further prohibits a lawyer from handling "a legal matter without preparation adequate in the circumstances" and from "neglect[ing] a legal matter entrusted to him." Rule 3-110 of the California Rules of Professional Conduct [2]also prohibits an attorney from "intentionally, recklessly, or repeatedly fail[ing] to perform legal services with competence." The same rule defines competence as applying the "diligence, learning and

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[1] The CPR, first adopted in 1969 and amended on various occasions up until 1980, is the predecessor to the Model Rules of Professional Conduct.

[2] All further rule references are to the California Rules of Professional Conduct unless otherwise indicated.

skill," and the "mental, emotional and physical ability reasonably necessary for the performance" of the legal service at issue.

In sum, a trial attorney who has not performed competently, either because of lack of necessary preparation, lack of necessary skill, lack of physical or mental fitness, or just plain neglect, has violated his ethical obligation to his client, though practically speaking, this seldom results in disciplinary action. (See Brady, Tooby & Mehr, California Criminal Law and Immigration (2004), § 8.30, p. 8-57, fn. 209.)

The Continuing Duty of Loyalty to the Client and the Corresponding Duty to Cooperate with Appellate Counsel [3]

Obviously, the primary method of investigating a claim of ineffective assistance of counsel will be to contact the trial attorney to obtain additional information. Often, documentary evidence outside of the record can resolve the inquiry. These would include such documents as police reports, investigation reports generated by the trial attorney, notes regarding witness interviews, discovery provided by the prosecution, forensic reports, and attorney notes reflecting research and trial strategy. Police reports, in and of

[3] The materials in this portion of the discussion are based in significant part on materials originally prepared by SDAP Assistant Director Dallas Sacher.

themselves, can often provide essential answers which either put to rest the IAC concerns or prompt further questions. If review of this documentary evidence does not settle the issue, then it will be necessary to ask trial counsel for an explanation.

Unfortunately, many trial attorneys are extremely reluctant to participate in an investigation of their own professional conduct. In this respect, trial counsel will generally fall into two categories: those who place the interest of the client first and those who place their own self-interest and reputation ahead of any duty to their client. (Brady, Tooby & Mehr, California Criminal Law and Immigration (2004), § 8.30, p. 8-57.)

When confronted with this second group, knowledge of the ethical mandates of trial counsel can be a powerful ally. First, as appellate counsel, we should be aware that we, as successor counsel, owe no duty to the trial attorney. (*Pollack v. Lytle* (1981) 120 Cal.App.3d 931, 942.) On the other hand, trial counsel is under a continuing duty of loyalty to his former client. (*Galbraith v. State Bar of California* (1933) 218 Cal. 329, 333; *Wutchumna v. Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574) and is bound to place his client's interests over his own. (ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Standard 4-1.6.)[4] Even though the employment relationship

[4] The ABA Standards for Criminal Justice adopt or closely follow the RPC and CPR, but are intended to provide guidance and are not

between trial counsel and the client has ended, "an attorney's obligation to [the] client does not cease with the termination of the employment relationship," but extends beyond and encompasses a continuing obligation "to avoid prejudice to the rights of the client." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, pp. 1-2; rule 3-700.)[5]

In fact, in the criminal context in particular, trial counsel is ethically obligated "to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, *even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel.* This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client. [Citations.] And, inasmuch as the attorney's duty to the client survives the termination of the attorney-client relationship, the fiduciary duty to the former client requires the attorney to protect the interests of the client and make appropriate disclosure." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, p. 4; italics added; .) In accordance with the duty of complete

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considered enforceable.

[5] A copy of this opinion is included as Appendix A.

fidelity to the client, it is also prohibited for a trial attorney to "assume a position adverse or antagonistic to [the client]. . ." (*People v. Davis* (1957) 48 Cal.2d 241, 256.)

The disclosure requirement referred to above includes a duty to release any papers and property in the client's file to either the client or successor counsel. This rule encompasses "not just the pleadings, depositions and exhibits in the file, [but also] work product reasonably necessary to the client's representation . . . [and] [t]he attorney's impressions, conclusions, opinions, legal research, and legal theories prepared in the client's underlying case.. . ." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127, p. 2, relying on rule 3-700(a) and (d); *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950.)

In sum, trial counsel has the obligation to be open and honest when contacted by appellate counsel and must (1) provide all or any portion of the client file if asked to do so; and (2) respond to all reasonable inquiries made by appellate counsel.

Sometimes a trial attorney, reluctant to produce the file, may claim that it has been lost. (Brady, Tooby & Mehr, California Criminal Law and Immigration, *supra*, § 8.30, p. 8-58.) However, counsel is ethically required to retain the file. (*Ibid*.) "Client files in criminal matters should not be

destroyed without the former client's express consent while the former client is alive." (State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 2001-157, pp. 3-4.) Thus, absent express consent, trial counsel has an ethical obligation to retain the client's file throughout the client's lifetime and any claim that a file has been lost constitutes an ethical breach.

Indeed, if trial counsel refuses to produce the file after reasonable requests have failed, appellate counsel may file a motion in the Court of Appeal requesting a court order for its production. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.) In a recent case, SDAP Assistant Director Dallas Sacher filed just such a motion and the Court of Appeal issued an order directing the trial attorney to turn over the file within 15 days.[6] If such an order was made and trial counsel still refused to produce the file, a motion requesting the appellate court to hold the attorney in contempt would be appropriate.[7] In fact, when the trial attorney in Mr. Sacher's case failed to produce the requested items within the 15-day period, Mr. Sacher filed a motion requesting a contempt citation. No doubt for obvious reasons, the requested portions of the file were produced

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[6] A sample motion is attached as Appendix B.

[7] A sample motion is attached as Appendix C.

shortly after the contempt motion was filed and the motion was withdrawn as a result. This is a great example, however, of how knowledge of trial counsel's ethical obligations can be used to the client's benefit by appellate counsel.

While a motion to compel production of the file should only be used as a last resort, it is useful to know that such an option is available if repeated attempts to obtain the file have been unsuccessful.

A complaint with the State Bar can also be made where a trial attorney has refused to cooperate with successor counsel.[8] Our experience has been that the Bar investigates these complaints and, in the process, contacts the trial attorney for an explanation. While rule 5-100(a) prohibits a member from threatening to present "criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute," a warning that the attorney's refusal to cooperate will be reported to the State Bar does not fall within this prohibition. Such a warning is not made in order to gain an advantage in a civil dispute, but is merely a means of reminding trial counsel of his or her ethical obligations and of the fact that a breach of these obligations is cause for discipline. As with the motion to compel production of the client's file, such a warning should only be used if other reasonable efforts to achieve

[8] A sample letter is attached as Appendix D.

cooperation have failed.

Aside from their reluctance to willingly participate in a factual investigation, some trial attorneys will assume the role of blackmailer. For example, a trial attorney will sometimes mention his firm belief that his client was guilty and will advise appellate counsel that he intends to so testify if called at an evidentiary hearing. While this threat constitutes a blatant ethical violation of the duty to refrain from acting antagonistically toward the client (*People v. Davis* (1957) 48 Cal.2d 241, 256), it is also an empty one.

Like all legal proceedings, habeas corpus hearings are governed by the rules of evidence. (*In re Fields* (1990) 51 Cal.3d 1063, 1070.) Thus, when he is called to testify, trial counsel is bound to assert the attorney-client privilege except as to those matters put in issue by the habeas petition. (*In re Gray* (1981) 123 Cal.App.3d 614, 617.) Thus, under the rules of evidence, trial counsel must maintain his client's secrets unless they are relevant to the issues before the court. (*Ibid*.)

Finally, when an order to show cause has issued, there will be situations where it may be necessary for appellate counsel to become a witness in the habeas proceeding. This can occur where a trial attorney has initially admitted that he erred in his representation and then has later recanted that admission. Under these circumstances, appellate counsel should testify to establish the

facts originally admitted by trial counsel. Importantly, since habeas proceedings are conducted before a judge and not a jury, there is no ethical proscription precluding a lawyer from acting as both advocate and witness. (Discussion to Rule 5-210 [attorney may be both advocate and witness in a non-jury adversarial proceeding.)

In short, though trial attorneys may be less than professional when appellate counsel is investigating their handling of a case, trial counsel is under an ethical duty to be both forthcoming with the truth and loyal to the client. We can only hope that even the most reluctant trial attorney will obey his ethical responsibilities once appellate counsel makes those duties crystal clear. (See, e.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 196 [after stonewalling appellate counsel, destroying his file and attempting to justify his conduct in sworn testimony, trial counsel "manifested a change of heart" and "admitted in effect that he had violated not only his duty to act with reasonable competence but also his duty of loyalty].)