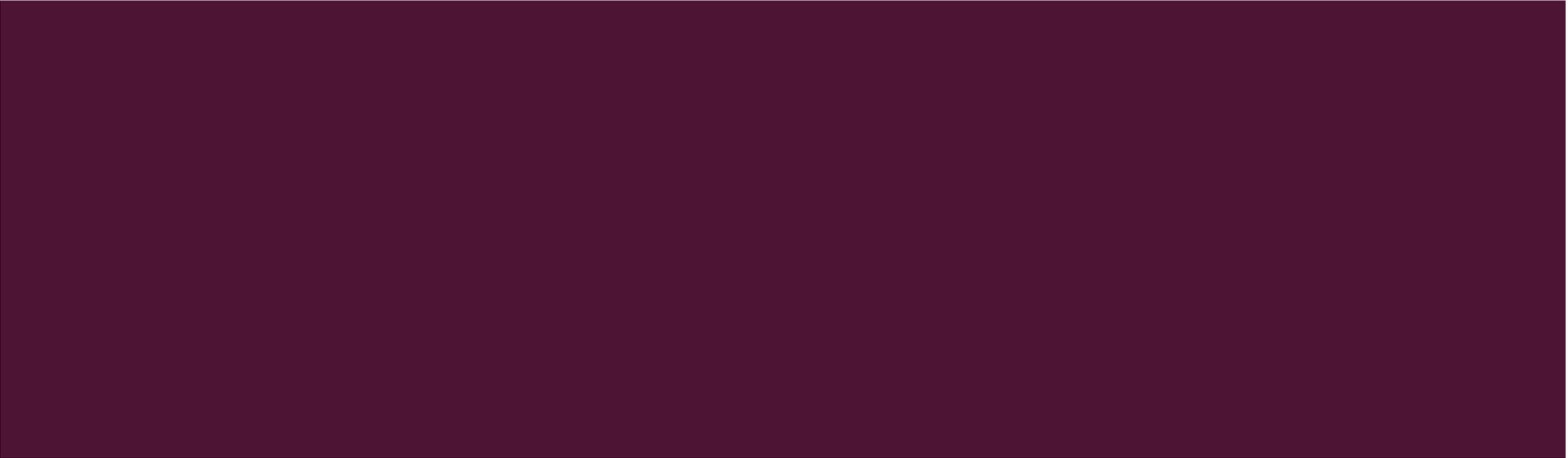

(SOME) ETHICAL DUTIES OF AN APPELLATE ATTORNEY

BY: ANNIE TALIAFERRO and DOUG THOMPSON



IN NO PARTICULAR ORDER

“As an appellate attorney, it is one of my ethical responsibilities to ——”

Go!

1. DECLINE TO RAISE ISSUES ON APPEAL UPON WHICH CLIENT INSISTS BUT WHICH YOU BELIEVE ARE “FRIVOLOUS” ???

- “[E]xplain compassionately and without judgment how my client can put before the court what, in my considered professional opinion, are meritless or legally unsupportable grounds for appeal — while I competently and simultaneously pursue all viable avenues for reversal.”

A federal out-of-state appellate attorney/supervisor

- “Seems terribly basic, but I think many clients just want to be *heard* by their lawyer **AND** the court on those irrelevant and nonviable facts and claims. This is especially true when the appellate lawyer was not the trial lawyer.”

The same federal out-of-state appellate attorney/supervisor

- 
- “File an Anders Brief when necessary.”

Attorney from Office of Federal Public Defender, Denver, Colorado

- “Search for an issue. I always try to never file an Anders Brief.”

Different attorney from Office of Federal Public Defender, Denver,
Colorado

- “. . . decline to raise an issue on appeal on which the client insists but which is patently frivolous.”

Attorney from Office of Federal Public Defender, New Mexico

- “Advise my client. Not every issue our clients have needs to be raised. Tell them why.”

A Utah appellate attorney

2. LISTEN AND COMMUNICATE WITH YOUR CLIENT

- “Speak to my client. I know this seems ridiculous, but it’s important to remember that we do have clients, even though they’re in prison. They matter. Their opinions matter.”

A Utah appellate attorney

- “Update my client at regular intervals (not less than every 3 months) *in writing* about the status of their appeal and relevant developments in controlling case law (e.g. SCOTUS and circuit decisions), etc. Even if it is just ‘nothing has changed,’ but no form letters!!! And, have regularly scheduled weeks for phone calls from/to each client (i.e., set limits) – maybe ‘the week of the 15th’ or something so you know that week may be full of interruptions.”

The same federal out-of-state appellate

attorney/supervisor

- 
- “Let your client have some input into what they feel went wrong. They may not know the law, but they have a gut feeling, and you have the ability to put their gut feeling into a legal argument. After you listen to their gut feeling, you can then explain why that problem can or cannot be raised on appeal, or can or cannot get them relief. Just knowing that you listened to them makes all the difference in the world.”

A Utah trial and appellate attorney

- “... give your client the benefit unless you prove them otherwise. They often don't know what went wrong, just that *something* went wrong. Listening to them at least tells you where to start looking.”

A Utah appellate attorney

3. RAISE IAC AND INVESTIGATE 23B CLAIMS

- Don't feel like you don't have the "right" to raise IAC claims (or prosecutorial misconduct claims) because you are "just" an appellate attorney. Get outraged!

Annie

- "Investigate 23B claims. We do this regularly. More than regularly. It's a burden, but it's important. Our clients lack representation (and freedom) in post conviction. So we take it upon ourselves to do this work for them at the appellate stage."

A Utah appellate attorney

- "Argue ineffective assistance of counsel or prosecutorial misconduct even if they are my BFFs"

A Utah trial defense attorney and former prosecutor

- "... obtain a copy of trial counsel's file and speak to them about the case if at all possible."

A Utah Appellate Attorney

- 
- Try subpoenas/GRAMA requests for IAC claims??

- Obtain experts/investigators/mental health evaluations. This is your client's last chance to have appointed counsel and defense resources.

Note: This may cut against funding contracts. If you are denied, you have made the request and denial may be used later. The "powers that be" need to understand what appeals cost.

4. ENSURE A COMPLETE RECORD

- Order transcripts of *entire* proceedings (include voir dire; transcripts of audio and visual recordings as played in court *and* of exhibit if sent to jury or judge; reading of jury instructions; bench conferences and in-chamber conferences; any gap that says “not transcribed”) -- How do you know what’s there unless you have looked at it? More often than not, there will be errors, preserved and unpreserved.

Note: This may cut against funding contracts. If you are denied, you have made the request and denial may be used later. The “powers that be” need to understand what appeals cost. And it is your burden to ensure the record is complete.

- “... actually read the entire record because if you don’t, you will never know what may be missing.”

A Utah appellate attorney

- 
- Move to supplement the record as necessary; File motions to reconstruct the record.
 - Start early. You don't want to be up against a briefing deadline when you discover the record problem.
before brief is due

A Utah appellate attorney who frequently finds record problems right

5. GIVE YOUR CLIENT A CHANCE TO FIGHT ANOTHER DAY (THINK CERT. OR PCRA)

- Frame state and federal constitutional issues (with federal PCRA in mind).

A federal appellate and PCRA attorney.

- “Don't be afraid to challenge issues on constitutionality grounds.”

A Utah trial attorney

- Forego IAC issues that are not ready/ can't be developed???

- Cooperate in PCRA with claims of IAC against you

A federal PCRA attorney.

6. ONLY ARGUE FACTS IN THE RECORD, BUT REALLY MARSHAL THEM

- Be impeccably honest. *Highlight* but don't *mischaracterize* (unlikeahem).
- “Do not take words or phrases out of context and present the facts honestly, although it is anticipated that one would highlight the facts most favorable to one's client.”

A Utah appellate attorney

- “... only argue facts in the court record.”

A Utah trial attorney (state and federal)

- Ask court for judicial notice when necessary??
- “truly marshal the evidence when it is required to do so ...”

A Utah trial attorney

7. ADVANCE THE LAW/ STOP STATE'S OVERREACHING OR CONTINUATION OF FAULTY PRECEDENT

- “Make arguments when you can that will advance the law to the benefit of all defendants and expose the plight of defendants. For example, when arguing ‘preservation’ or against invited error— why not argue how the preservation rule is not practical in the particular circumstance or why the situation does not justify the application of invited error? Or why the State’s overreaching of the standard is improper (for example, the no competent attorney argument they always make). Be vigilant and if you see a problem, raise it. That is how precedent changes.”

A Utah appellate attorney

- “Be ready to bring unconstitutional inconsistencies across the state among judges and prosecutors and defenders to the attention of a tone deaf ivory tower panel of judges.”

A Utah appellate attorney/supervisor

- “Teach trial attorneys/help trial attorneys T-up issues.”

A Utah appellate attorney

8. KEEP CURRENT ON ISSUES AND THE LAW/ BRAINSTORM WITH COLLEAGUES

- “not an appellate attorney but if I were I would think it only ethical to make sure I had proper mentorship from someone [experienced] to ensure I did all things correctly.”

A Utah trial attorney

- If we work together (i.e. several of us raise an issue, consistently reply, etc.) – Appellate Courts are more likely to see the problem. This is what the State has been doing for years. It is time we get our “vernacular” into the caselaw.

Annie



9. DON'T TAKE THE APPEAL IF NOT HAVE THE TIME AND RESOURCES

10. DO NO HARM . . .

- Is there harm to client if you win?

- Is there harm to “the law”?

Is this even an ethical consideration?

ONE FINAL REQUEST...

...win, so counsel can smugly go back to the trial judge and say, “well, well, well ...”

A Utah trial attorney