

The Trial and Appellate Counsel Relationship: THE “A.C.E.” APPROACH¹

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Introduction

Let’s face it, many human relationships are born out of necessity. The origin of the trial and appellate counsel relationship is no different. But necessity can be a good thing, particularly in the context of this relationship, as it brings us into position to work together for the greater good of the criminal defendant, the criminal defense bar and the criminal justice system as a whole.

As trial and appellate attorneys, we advocate for our client’s legal rights and best interests in our respective judicial forums. Whether trial counsel negotiates a plea, a sentence or argues for an acquittal before a jury, or appellate counsel subsequently challenges some aspect of the conviction on appeal, we both strive to afford a defendant the best possible legal representation.

In this article, I have outlined an approach to maximize the benefits and minimize the pitfalls of the trial and appellate attorney relationship. I call it the “A.C.E.” approach. “A” for availability, “C” for candor and “E” for exchange. When this approach is applied, it encourages a relationship between trial and appellant counsel that is supportive, rewarding and effective.

“A” for Availability

Be available. Easier said than done, right? Most trial and appellate counsel represent a large number of indigent clientele and as a result shoulder heavy caseloads. Under the press of business, we are constantly triaging our attention to cases on the basis of immediate need, complexity, briefing schedules and court appearances. Add to this mix, unexpected emergencies, client calls, jail visits, record review, investigations, lengthy trials, and preparation for oral argument . . . it’s no wonder that making time to respond to an attempted contact by trial or appellate counsel, on a case that may be a on a back-burner, can quickly get lost in the shuffling of tasks.

¹ Source: www.capcentral.org/procedures/case_manag/docs/ACE_approach.pdf

Nonetheless, because we share a duty to represent a client zealously within the bounds of the law, trial and appellate counsel must become available for each other in order to make contact and discuss the case.

The following tips promote an available mindset:

1. *Avoid Negative Stereotypes.*

“Trial attorneys are adrenalin junkies who crave center stage and like to fly by the seat of their pants.” Really? Or, are trial attorneys individuals who commandeer the facts in an effort to create a persuasive legal defense, are able to manage immediate stress well, feel comfortable in front of an audience, excel at thinking on their feet and as a result of this skill-set are most effective at representing a defendant in the trial court?

“Appellate attorneys show up after the battle is over and shoot the wounded.” Really? Or, are appellate attorneys individuals who possess the aptitude, patience and desire to carefully review a trial court record through a kaleidoscopic lens of potential issues in search of reversible error, grounds for modification of sentence or remand for further proceedings and as such are most effective at litigating a defendant’s case in the appellate court?

If we appreciate our respective talents, rather than negative stereotypes, and keep our focus on the fact that our jobs are interconnected by our mutual concern for the overall legal welfare of the defendant, we are more likely to create the time to work together.

2. *Be Proactive and Responsive.*

“Four, three, two, one, action.” When a defendant’s case remains active in either the trial or appellate court, so should the relationship between trial and appellate counsel. The nature of a particular case and the transparency of the issues presented will determine the necessary level of communication between trial and appellate counsel.

There will be attempts to contact one another. If an attempt is unsuccessful, messages will be left. We can choose traditional face to face, snail mail or information technology to interact with one another. We can arrange an office meeting, chat over breakfast, lunch, dinner or a cup of coffee, use a land-line or go wireless, use voicemail, email, scan, text or fax . . . whatever best fits the message, the messenger, the recipient and respective time constraints. “Now” may not be the best time. If not, suggest a reasonable day/time that works for you: “I am in trial right now. I’ll give you a call on Friday at one o’clock,” or “I have a court imposed filing deadline of [date], please contact me at your earliest possible

convenience.”

What is important is that we respect each other’s time pressures but still develop a practical and effective rapport in support of the defendant’s judicial cause.

“C” for Candor

I once heard an associate justice of the Court of Appeal say: “A very important trait in effective advocacy is that of candor.” In earlier writings, the term candor meant whiteness, illumination, and kindness. Its modern usage encompasses the quality of being fair, unprejudiced, impartial; sharply honest or frank in expressing oneself.

If we combine the earlier and modern meanings of candor, and practice its combined force in the context of the trial and appellate counsel relationship, we will be better equipped to see and understand a defendant’s case and its issues from each other’s perspective.

The following tips encourage the practice of candor:

1. Be Candid.

Relax and be open with each other. Discussions between trial and appellate counsel should be impartial, informal, and honest. If either trial or appellate counsel call and open up with a barrage of questions about a case one cannot recall, rather than feel blindsided, be frank and ask for a brief synopsis of the case to gain perspective or refresh one’s memory. Consider what may be missing from one another’s vantage point and offer to fill-in that gap.

Appellate counsel is starved of the sights, sounds, gestures, exhibits and off-the-record colloquies that occurred during the trial court proceedings. Trial counsel should consider sharing off-the-record aspects of proceedings because such aspects may enhance appellate review and possibly breathe strength into what otherwise might be a weak issue.

Trial counsel may communicate what he/she strongly believes is a meritorious issue, but appellate counsel may upon independent review and legal analysis conclude that such an issue will not withstand appellate scrutiny because of forfeiture, the standard of review, the way the record reads, and/or the standard of prejudice. As a professional courtesy, appellate counsel should discuss with trial counsel why he cannot raise a suggested issue on appeal.

The practice of law is a never-ending education. Trial and appellate counsel should strive to

continually share with each other what they experience in their respective judicial forums.

2. Accept Feedback.

My husband was an assistant public defender and still practices as a criminal defense attorney. Over the years, he observed that when he told a client something that he/she did not want to hear, the client would routinely avoid eye contact and turn his/her head to one side, as if doing so would make the undesirable facts disappear. As we all know, undesirable facts usually do not disappear. Unfortunately, in many cases, the failure to acknowledge facts causes their negative impact in a case to remain predominant.

The behavior of our clients is all too reflective of human nature in general. No one wants to hear information about oneself that is unfavorable or that casts doubt as to one's competence, including trial and appellate counsel. But because of our Code of Professional Responsibility, we not only have to hear, accept and evaluate such information, including potential claims of ineffective assistance of counsel (IAC), we must also do so while keeping the client's rights and interests at the forefront.

Before pursuing a potential claim of IAC, appellate counsel should always discuss potentially questionable acts or omissions with trial counsel to rule out the existence of a valid tactical reason not reflected in the record. Careful investigation into the circumstances behind a questioned tactic will help appellate counsel evaluate whether the trial attorney in fact had acceptable reasons for the act or omission. This is usually a simple exchange of what happened and why. Trial counsel is ethically bound to cooperate in this regard. (See rules 3-400, 30700(A)(2) and 3-700(D)(1), Rules of Prof. Cond.)

If trial and appellate counsel remember to frame any and all feedback from one another regarding a defendant's case in the dual context of our shared professional responsibilities and our individual roles as the defendant's advocate, it becomes much easier to have this discussion and accept feedback which may seem oppositional or a challenge to the competency of either counsel's representation. The sooner we accept and work with such feedback, the sooner we will be able to determine whether it can be advanced to serve to our client's benefit, which is after all our common professional goal as attorneys.

“E” is for Exchange

Exchange /ikschayng/ *n.* 1. trade, transfer, switch, swap. (Oxford Dictionary, Third Ed. 2009, p. 274.)

There are cases where appellate counsel needs to reach outside the record and beyond conversations with trial counsel in order to glean an effective understanding of a case. In such circumstances, appellate counsel may benefit by viewing trial exhibits, police reports, DVDs, interview transcripts, and on occasion, trial counsel's file.

If travel time and expense are not too prohibitive, appellate counsel can go to the superior court and view the superior court file, including admitted exhibits. It is also possible for appellate counsel to have the exhibits sent to the Court of Appeal for viewing.

However, there are many instances where the value of the exhibits or other physical evidence turns out to be initially uncertain or ultimately unnecessary to the appeal, in which case it would be extremely helpful and more economical if trial counsel would provide a copy to appellate counsel upon request. Document exchange can transpire as a courtesy on trial counsel's part or as a requirement under the authority of State Bar Formal Opinion 1994-134, which provides that former counsel must make a client's file available to the client or successor counsel.

Many criminal defense attorneys, whether trial or appellate counsel, operate as sole practitioners without support staff, and must attempt to keep unbillable time and expense to a minimum in order to generate a just income. With that thought in mind, when any kind of substantial document exchange transpires which results in out-of-pocket costs to the providing counsel, recipient counsel should appreciate the time and expense incurred in transferring the materials and should offer to cover or split such out-of-pocket costs as a matter of courtesy.

Cooperative exchange furthers everyone's objectives.

Conclusion

In summation, the "A.C.E." approach is meant to provide fuel for thought and an adaptable framework from which trial and appellate counsel may build a positive, practical and professional relationship. It is also meant to remind us that despite the adversarial nature of our profession, we must not forget to balance the scales of justice with the equally important notion that our clients will be better represented and the criminal justice system will be better served when we practice law with a sense of civility and consideration for one another.