

## SOLUTIONS

## Should Trial Lawyers Handle Their Own Appeals?

The answer, generally, is no. Providing good client service may include finding other attorneys who concentrate in appellate work to take on clients' cases that are appealed after trial.

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A trial attorney may have good reasons for wanting to handle appeals for his or her own cases. It's only natural to want to finish what one started, and it may seem impossible to get an appellate attorney up to speed on all the facts of a complex case. However, it is commonly accepted wisdom that attorneys generally should not handle the appeals of cases that they litigated at the trial level. Following are some considerations trial attorneys should bear in mind when deciding whether to handle an appeal themselves.



### The Forest Through the Trees

When a lawyer tries a case himself or herself, it is easy to get caught up in it, often shutting out opinions from others. As the Second Appellate District of the California Court of Appeals explained:

"We also observe that trial attorneys who prosecute their own appeals, such as appellant, may have 'tunnel vision.' Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice."<sup>1</sup>

A lawyer who concentrates solely on appellate work can give more objective advice on whether an appeal should be pursued at all.

You know how sometimes a potential client calls you and starts in the middle of his or her story and you have no idea what he or she is talking about? Trial lawyers tend to do that in their appellate briefs. They are so familiar with a case that they forget how to 1) talk to someone who doesn't know the case at all and 2) take a fresh look at which legal arguments are likely to be successful on appeal.

### Minding Your P's and Q's

Appeals are handled much differently than trials, and the audience for court pleadings is different. Rather than one judge reviewing briefs, there might be three or sometimes even seven. As California's 4th Appellate District explained, "For better or worse, appellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge."<sup>2</sup>



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resolution.*

Judges at the appellate level have fewer time constraints than those handling trials and often have more staff who can do research and identify reasoning errors, misstatements of law, and misquotations of authority. Additionally, appellate courts have the ability to "do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention."<sup>3</sup>

### Spending Time at the Library

Appellate courts allow more pages for briefs than do trial courts, which often means more time spent doing research on parties' legal positions and how the case fits with a particular area of law. "Appellate counsel will have much more freedom to explore the contours

and implications of the respective legal positions of the parties.”<sup>4</sup>

While briefs at the trial level might include citations to a case or two, briefs at the appellate level are much more substantively challenging, and the research should be as thorough as possible. The time required to hash out arguments, a process that is necessary for appeals, is more than most trial attorneys have.

### Haven't We Met Before?

When an appellate brief is comprised of trial points and authorities without any additional research, the product is *always* inferior. As the court said in *Shaban*, “The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product.”<sup>5</sup>

Regurgitating arguments from a trial that had an undesirable outcome is likely to lead to the same result on appeal. An appellate specialist can present the same points as those raised at trial in a brief that forces a new analysis. She can simplify a whole case into a few strong points of error and build a strong argument for the judges. In the same way that you would not expect an appellate specialist to make a strong cross-examination of a difficult witness without any training or experience, trial attorneys often are not equipped to present appellate points in a succinct, clear, and persuasive manner while applying the correct standards of law.

### Be Cool, Man, Be Cool

When handling an appeal, it is easy for a trial lawyer to get caught up in the emotion of the whole case. Losing doesn't feel good. But the feelings of resentment and betrayal, among other things, can get in the way of the appeal. When a potential client starts telling you that the police or district attorney or NASA has it out for him, you think he's unbalanced, right? (Even if later it turns out the space program does have an issue with his patented foil-helmet design.) Well, when a trial attorney writes an appeal and lets his or her emotions show through, the reader gets the same cringe effect. This undermines the chances that the arguments made on appeal will be successful.

### Another Bite at the Apple

Finally, an appeal is not a trial. A common mistake that trial lawyers make in appeals is pleading to the appellate court like it is a jury. Multiple standards of review may be in play, and it is not always clear how these standards fit together given the various arguments made in a single appeal. As California's 4th District Court explained in *Shaban*, “[B]ecause the orientation in appellate courts is on whether the trial court committed a prejudicial error of law, the appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities.”<sup>6</sup>

Usually, there are choices to make – ways to frame the relationship between the standards that heavily influence whether the court will focus on law or fact. Appellate lawyers are better versed on using opinions and findings from other cases to optimize the presentation of law and fact, so it doesn't come off as a trial lawyer just trying to get another bite at the apple.

### Conclusion

The bottom line is that appellate lawyers do appeals for a living. Qualified appellate lawyers know the “ins and outs” of the entire appellate process and have a rapport with appellate courts. They know which case law an appeals court is going to find persuasive, can do the in-depth research necessary, and are experienced in working with trial lawyers to determine the most likely path to relief on appeal. At the very least, trial lawyers who are dead set on litigating their own appeals should consult with an appellate attorney who can assist them in avoiding the pitfalls described above.

### Endnotes

<sup>1</sup> *Estate of Gilison*, 77 Cal. Rptr. 2d 463, 467 (1998).

<sup>2</sup> *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (2001).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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