



# Ten things every trial lawyer must know about appeals

## *A primer for success in California's appellate courts*

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If you find yourself heading towards appeal – either seeking to overturn an unfavorable trial court ruling or to protect a hard-earned victory – how can you capitalize on your appellate opportunity? How do you maximize your chances of prevailing on appeal while avoiding the many pitfalls? How can you impress your appellate panel – three decisionmakers who are unfamiliar with your case, who haven't seen your performances at depositions, hearings, and trial, and who may not have presided over a trial in years, if ever?

### 1. When can I appeal?

**Do I have an appealable order, and is my notice of appeal timely?**

There are two ways to get a California appellate court to overturn a ruling of a trial court – by direct appeal and by writ.

First, a notice of appeal must be timely filed. It must be filed within a certain number of days of the entry of the order being appealed. (Cal. Rules of Court, rule 8.104(a); Cal. Rules of Ct., rule 8.108(b).) These deadlines are enforced strictly, because they are jurisdictional; if you miss your deadline, the court lacks jurisdiction to entertain the appeal. In some circumstances, these deadlines can be tolled, but only by the timely filing of certain post-trial motions.

To appeal, you must have an appealable order. As a general rule, only an order that is final (i.e., disposes of all issues against all parties) is appealable. A few exceptions are set forth by statute. (See, e.g., Code Civ. Proc., § 1294(a)

(order denying motion to compel arbitration is an appealable order). Sometimes determining whether an order is final, and thus appealable, can be difficult, as when the trial court dismisses the case by minute order, but fails to issue a signed order. (See, e.g., *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730.) Appealing a nonappealable order puts you at risk not just of wasting time and money, but also of losing your opportunity to seek a writ. By the time the appellate court dismisses your appeal, it may be too late to seek proper appellate review.

A writ is very different from an appeal. Review by writ is extraordinary, equitable and discretionary. Whereas you have an absolute right to appeal, the appellate court has discretion to not hear a writ petition, and to leave resolution for a later appeal. (See *Hightower v. Superior Court* (2001) 86 Cal.4th 1415, 1440.)

Although an entire article could be written just about writ practice, for now, simply remember that writs are rarely granted because they require a showing of serious legal error that could not possibly be remedied by later appellate review of a final order. (See generally *Omaha Indem. Co. v. Superior Court* (1989) 208 Cal.App.3d 1266, 1269.)

### 2. Should I bother to appeal?

**What will the appellate standard of review be?**

A threshold question is whether, weighing the costs and benefits of appealing, you even want to take an appeal. Many lawyers approach this question thinking that if they just get a second shot at the issues in front of a new jurist, they will win. It's not that simple.

One significant factor is the appellate standard of review. We have heard appellate jurists frequently complain that lawyers ignore the appellate standard of review and instead wrongly assume that the appellate courts are free to simply override any trial court ruling that differs from how the appellate jurists themselves might have decided things, had they been serving as the trial judge. This kind of mistake is a strategy for failure on appeal.

There are various appellate standards of review. Legal issues are generally reviewed de novo (e.g., motion to dismiss, motion for summary judgment), which means the appellate court takes a fresh look, with no deference to the trial court's decision. Factual issues generally get abuse of discretion review, which is significantly more deferential to the trial court, with reversal only where "no judge would reasonably make the same order under the same circumstances." (*In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377.) So even though you may have received an unfortunate ruling from the trial court, just because you're in front of new decisionmakers doesn't automatically mean the slate is wiped clean.

Other standards such as clear error, substantial evidence, and arbitrary and capricious may apply, depending on the circumstances. Mixed questions of law and fact can be subject to two different standards of review. And sometimes the line between what is a "question of fact" and a "question of law" can be blurry. (See, e.g., *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1187.)

Whether the applicable standard of review is your greatest strength or your worst enemy, you always need to know what it is, so you can deal with it head-on.



### 3. What is the cost of appellate counsel?

As you consider whether to appeal, you may be concerned about the cost of retaining appellate counsel. To make things easier, you'll want a retainer agreement that accounts for the possibility of an appeal. Retainer agreements often allow for a higher contingency fee if the case is appealed. (For example, both authors of this article handle many appeals on a pure contingency-fee basis.) Building in a higher contingency fee in the event of an appeal gives you the flexibility to hire appellate counsel without diminishing your own fee, or instead, to forge on handling the appeal yourself and possibly get paid more for all the extra work you're about to do.

In medical-malpractice cases, because of MICRA's fee caps, plaintiffs' attorneys sometimes note explicitly that the representation does not include appellate work, and that the client must separately pay appellate counsel for their work. Otherwise, the fee for the appellate service will be taken out of the capped fee for all work. Renegotiation of an existing retainer agreement understandably meets with skepticism from the courts, as the new agreement is construed against the drafter (you) and must not violate a fiduciary duty. (See, e.g., Cal. Rules Prof. Conduct, rule 3-300; *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917.)

For this reason and others, we recommend you try to build into *all* of your contingent fee agreements the extra contingency fee for appeals. Better safe than sorry.

### 4. Is my record in order?

**Did I properly preserve all relevant arguments? Did I order the necessary transcripts? Am I properly compiling the record?**

One of the more challenging aspects of appellate practice is proper handling of the record. This aspect requires not

only technical and logistical facility with the nuances of appellate procedure while you're compiling the record, but also the foresight at the trial court level to anticipate appellate issues and preserve all potential arguments.

First, during the trial court proceedings, you need to be on the lookout *to preserve appellate issues that you might otherwise accidentally waive*. Normally, any error pressed on appeal must have been raised in the court below. For example, if the defendant in a medical malpractice case fails to properly invoke the MICRA non-economic damages cap, and you win damages exceeding the cap, the defendant cannot argue on appeal that MICRA requires a reduction of the damages. (*Moore v. Preventive Medical Group, Inc.* (1986) 178 Cal.App.3d 728.) Likewise, if you fail to allege the proper level of scienter to justify a higher award, you cannot raise that argument for the first time on appeal. (*Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538.) If the trial court neglects to rule on an issue, be sure to get it to do so at some point, because otherwise you may be deemed not to have pursued the issue, and thus waived it. (*People v. Morris* (1991) 53 Cal.3d 152.) There are a few exceptions to this rule, but very few indeed, so be sure to preserve everything you can.

Second, once you have filed your notice of appeal, you need to properly compile the record. Order all necessary transcripts. Be sure that the particular declarations, documents, deposition transcripts, etc., have actually been filed in the trial court so that they will become part of the record on appeal. Appellate Rule 8.120's list of certain mandatory items requires some care to understand and comply with. Since it's the appellant's duty "to present an adequate record," (*Kurinjij v. Hanna & Morton* (1997) 5 Cal.App.4th 853, 865), noncompliance with these rules risks dismissal of the appeal on this ground alone.

### 5. Why did I win (or lose) at trial?

**Am I getting fresh eyes to see a balanced assessment? Should I trust an appellate lawyer who wasn't there at trial?**

In approaching your appeal, take a step back and consider why the trial court and/or jury decided as it did. This can be challenging, because you are intimately familiar with the factual nuances of the case, each witness's strengths and weaknesses, your client's credibility or charisma, opposing counsel's tactics and style, the procedural twists and turns that got you here, and all the other details that made this case the exciting journey it was during the years of litigation. But much of that may be irrelevant to the appeal.

As you move from the chaotic jungle of the trial court to the more-rarified legal monastery of the appellate court, much of the colorful detail that gave life to the case before judge and jury may recede and be relegated to a mere footnote, at most. By necessity, the appellate court focuses only on a sliver of the case – only the order appealed and the issues raised by it. While the record may be voluminous and important, the appellate panel will want to home in on the precise question before it, and rule only on that.

This reality requires every trial lawyer to do something difficult – to try to step back and view something you feel passionately about, and have been vigorously fighting for, with dispassionate eyes. At first blush, you might think that an appellate lawyer is in a poor position to evaluate your case, because he or she "wasn't there" and doesn't know all the nuances of what has transpired throughout your fight for justice. But guess what? Neither were any of the jurists who are going to be deciding your appeal! Counter-intuitively, the specialist familiar with appellate practice but new to the case is likely the ideal person to give you



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a fresh perspective on your facts and arguments, to assess your chances, and to help you prevail.

Put simply, one of the trial lawyers' greatest assets – their mastery of the facts of the case – can become their greatest vulnerability on appeal. Appellate jurists often bemoan the seasoned trial lawyer (and novice appellate lawyer) who considers the appeal an opportunity to reargue the facts and explain why the trial court failed to appreciate the equities of the case. The comparatively ignorant appellate lawyer, however, approaches the case just as the appellate panel does – with a fresh perspective.

Even if, for whatever reason, you don't delegate the appellate aspect of the representation to an appellate specialist, it is immensely valuable to get fresh eyes on your case. Have a trusted colleague who isn't familiar with the case take a look. He or she might see things – strengths, weaknesses, opportunities – you hadn't thought of. He or she may also help you think of a new way of framing the issue to allow you to protect your hard-earned victory or win a clean reversal of a negative outcome. Bringing in an appellate counsel or another set of eyes isn't "letting go" of your case; it's caring enough about the cause to add new strength to your existing strength.

### **6. How can I write an effective appellate brief?**

A key to winning your appeal is writing a clear, concise, direct brief.

Appellate jurists appreciate a litigant who can convey the essence of their argument with *clarity*. That encompasses both structure and expression. A brief that meanders without a clear logical structure will infuriate the judge. This is not a closing argument. Leave out swagger, bombast and overstatement. Use a transparent organization. Then, in fleshing out your argument, convey your meaning crisply. Word choice is crucial.

*Conciseness* is vital. Use as few words as necessary. Avoid details that may have been interesting below but aren't relevant to the issue(s) on appeal. Avoid adverbs. Avoid reiteration. Don't repeat yourself. Don't say things twice or three times. See how annoying that is?

In general, your writing should be formal, polished, and expert. Appellate jurists – much more so than trial judges – live and breathe the written word. They pore over briefs for hours at a time, constantly reviewing the cases to tease out nuances from lines of authority, immersing themselves in the statutes to master the precise text and divine legislative intent, and even taking the time to ponder the musings of commentators in treatises and law review articles. Appellate jurists also typically have a stable of bright, energetic law clerks at their disposal, assigned to them personally or the court itself. And these jurists don't handle hundreds of cases at once. They don't have to rule quickly on flurries of motions or objections at trial. They generally only hear oral argument from a handful of lawyers in perhaps a dozen cases a month (each lawyer getting only about 5-15 minutes to speak). They are focused like a laser on your and your opponent's briefs.

If your writing is meandering or unclear, or redundant, or bombastic or overwrought, the appellate panel deciding your appeal will know about it and will hold it against you and your client. The impression you make on the judges and their clerks will not be tempered by your silky *voir dire*, your piercing cross-examination, or your impressive annihilation of your opponent's expert at deposition.

For these reasons, crisp presentation of your written argument – articulate writing, correct grammar and spelling, and proper citation format – is vital. *The single most common complaint we hear from appellate jurists is that many lawyers do not write well, and it makes the appellate courts' jobs more difficult and more frustrating.*

You don't want angry and frustrated people deciding your client's appeal.

### **7. What further submissions should I make?**

#### **What motions should I make? What supplemental authority should I submit? What about amicus briefs?**

Unlike the trial courts, appellate courts generally despise motion practice. There is little room for gamesmanship, and the courts don't want to handle petty squabbles. If you need to supplement the record, be sure the supplement satisfies the precise materials allowed under the Appellate Rules. In addition, you should file supplemental authorities only if they are new and relevant. Otherwise, tread carefully.

In addition, *amicus curiae* (friend of the court) briefs are sometimes filed. An *amicus* brief can be a powerful force in support of your argument. *Amici* are usually from nonprofits (e.g., ACLU, MALDEF, EarthJustice) or membership organizations (SFTLA, CAOC, AAJ, NELA, CELA, and the seemingly ubiquitous Chamber of Commerce). Corporate defendants have been increasingly successful at lining up support from *amici*, but the plaintiffs' bar seems to have lagged behind. If your appeal has potential implications beyond your particular case, an *amicus* brief in support could be extremely helpful.

### **8. How should I prepare for oral argument?**

#### **Should I do a moot court?**

Presenting an oral argument in an appellate court requires substantial preparation. Merely re-reading your briefs beforehand and "winging it" at oral argument is a good recipe for emerging with a humiliating war story. Appellate oral arguments are often intense, high-pressure affairs – and the pressure is qualitatively different from the pressure at high-stakes trials. You should expect to



encounter three whip-smart, engaged jurists who can – and often will – interrupt you frequently to pepper you with factual and legal questions, posit hypotheticals, and sometimes deliver blunt challenges that may seem to allow no response.

Therefore, whenever possible, you should include a moot court in your prep. Find a mix of lawyers to help – people with varying levels of familiarity with the law and facts. Have them read all the briefs and fire tough, pointed questions (remaining “in character”). This will help you practice delivering the crisp, direct answers you’ll need for the oral argument. You won’t have time for a long soliloquy. Your responses should be able to fit on bumper stickers, not encyclopedias. And by all means, *answer the questions posed to you* – don’t dodge or evade. That won’t work.

### **9. Should I retain appellate counsel?**

Since your client probably won’t be familiar with the different, specialized skills of trial lawyers and appellate lawyers, he or she will likely delegate this decision to you. Put simply, you need to weigh the benefits of remaining focused on your trial work, the appellate lawyer’s expertise, and the advantages of a fresh perspective against the costs of bringing in a new member of the litigation team. Given appellate counsel’s knowledge of the intricacies of the appellate process, familiarity with the preferences and tendencies of the appellate jurists themselves, and facility in writing appellate briefs and presenting oral arguments to appellate panels, the benefits may well outweigh the costs.

We’ve encountered very few trial lawyers who regret having sought the assistance of appellate counsel, but we often hear trial lawyers say – after they’ve had great verdicts or great opportunities slip through their fingers on appeal – that in hindsight, they probably shouldn’t have handled the appeal themselves. In recent years, the defense bar has amassed an impressive record of appellate victories by enlisting the help of appellate specialists, but the plaintiffs’ bar has not always pursued this strategy. Licking its wounds, the plaintiffs’ bar is now beginning to play catch-up.

### **10. When should I start thinking about bringing in appellate counsel?**

#### **Is it too late?**

Be proactive. The earlier appellate counsel can share their insights, the better. In fact, they can even help in the trial court: Preserving arguments for appeal, helping develop the record and positioning your case for victory.

Great plaintiffs’ trial lawyers relish deposing the negligent doctor, outmaneuvering the unscrupulous opposing counsel in discovery, cross-examining the swindling CEO, and delivering a rousing closing argument. They spend their lives training and practicing for it. Great appellate lawyers enjoy their more “bookish” pursuits, and develop their expertise along the way. Each species of lawyer has its own particular strength. For the sake of your clients and our shared cause of justice, make the most of your opportunities by considering all your appellate options and choosing the best approach for each situation.



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