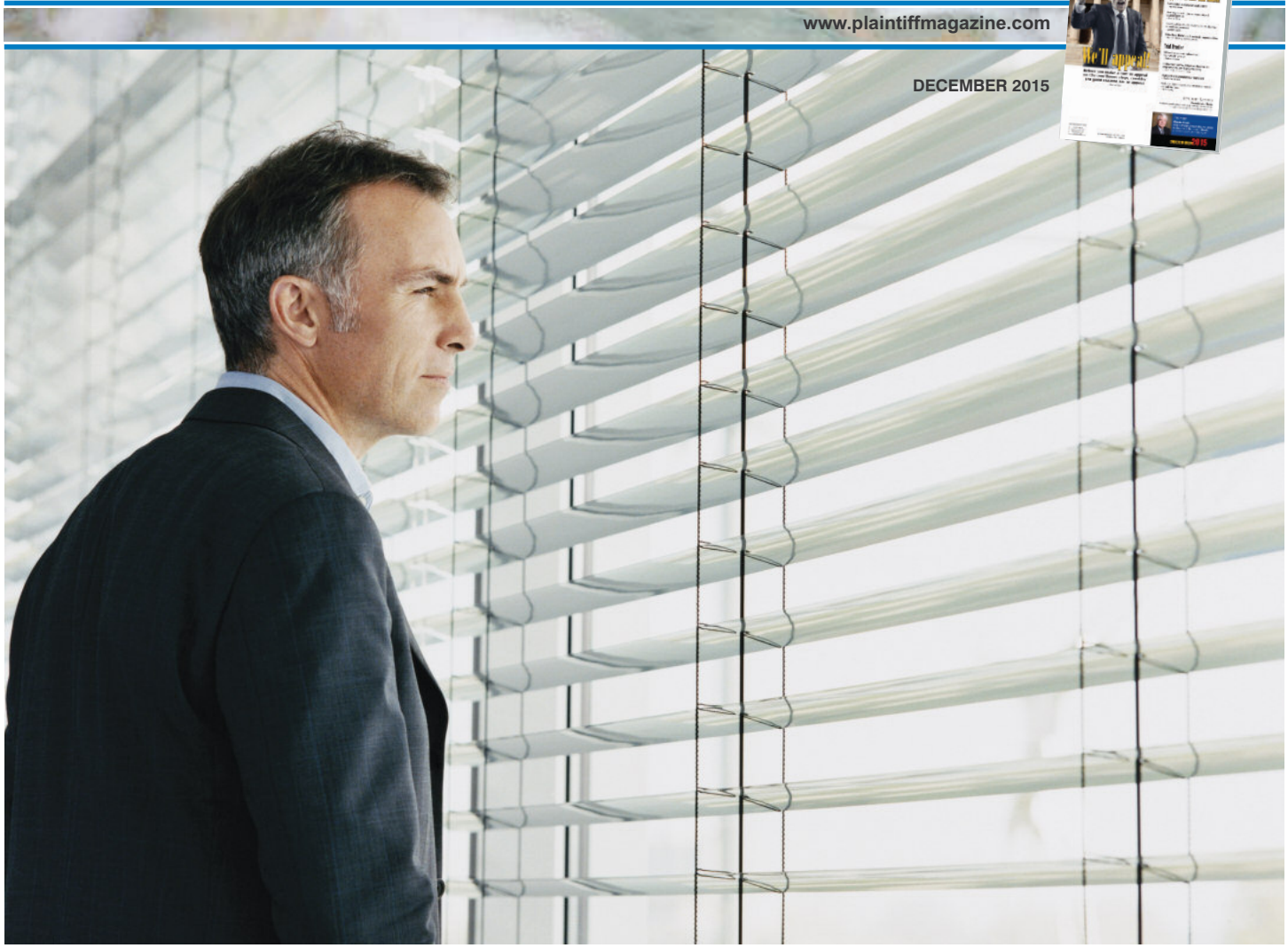

10 good reasons not to appeal

There are times when taking an appeal doesn't make sense

By Donna Bader

After a trial is over, you can count on at least one dissatisfied party. At times, there may be even more. The plaintiff may believe he or she was not awarded enough money. The defendant may believe the jury did not understand the defense. I have heard both parties proclaim, "I am not done yet, I am taking this all the way to the Supreme Court!"

Those unhappy litigants don't understand the appellate process or the function of the appellate courts. Mistakes are often made during a trial. Some will have no significant impact on the results, while others might be prejudicial mistakes that changed the outcome of the trial. After the jury renders its verdict, each party and attorney will be busy dissecting the case to determine if an appeal should be brought.

As an appellate attorney, I welcome an appeal. That's how I get paid. I don't get paid to tell people not to appeal. That is one reason that potential clients believe me when I tell them an appeal is ill-advised. Why would I deprive myself of an income by giving out such silly advice? The truth is that for every case I take, I have to tell three other potential clients not to appeal.

There are times when making an appeal doesn't make sense. As I often tell my clients, there are two distinct aspects to an appeal. One aspect is to determine if there are meritorious grounds for the appeal. If there aren't, then ethical rules prohibit me from handling the case. The other aspect of an appeal is what I call the "financial" decision.

Let me list ten reasons why I might advise a client not to appeal:

[1] There are no meritorious grounds for an appeal.

Let's say the plaintiff has obtained a judgment against the defendant. The

defendant may be unhappy with the verdict, but there are no real judicial errors to challenge or prejudice to the defendant. The jury just didn't buy the defendant's version of events. The defendant may want to appeal just to gain some leverage in future negotiations or to delay payment.

Two problems: ethically I can't file appeal on that basis. Nor can I file an appeal for the plaintiff simply to give him or her leverage to settle a case. The second problem is that pursuing an appeal for the wrong reasons – harassment, improper delay, bad faith, etc. – can open the door to sanctions against both the lawyer and the appellant.

Appellants and their attorneys may be subject to sanctions for pursuing an appeal that is "frivolous" or "taken solely for delay." (Code of Civil Procedure (herein C.C.P.) § 907; C.R.C. rule 8.276(a)(1).) While a client may be sanctioned for pursuing an appeal to harass the other party or delay the effect of the judgment, the attorney faces an additional ground: that the appeal has no merit, meaning any reasonable attorney would agree the appeal is totally and completely without merit. (*In re: Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) I am not interested in risking my license to file an improper appeal. In addition, my retainer agreement provides that I can withdraw if I discover the appeal has no merit or it is being pursued for an improper purpose.

[2] The appeal is based on lack of substantial evidence.

There are three major standards of review for appeals: legal error, abuse of discretion, and substantial evidence. An appeal could involve a combination of these standards.

Beware of the appeal that is limited to substantial evidence. It is the hardest type of appeal to win. Appellants appealing on this ground face "a *daunting burden.*" (*Whitely v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

Appellants can recite all of the evidence in their favor, quickly dismissing or ignoring respondent's evidence. I always point out that an appeal is not a retrial; the Court of Appeal is looking for judicial error. The appellate court is bound by the trial court's resolution of disputed factual issues and must affirm the judgment so long as the judgment is supported by "substantial evidence." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The appellate court will not reweigh the evidence or reexamine disputed facts. It also does not concern itself with credibility determinations, leaving that to the superior court.

The term "substantial" evidence is really a misnomer. The court is looking for some reasonable evidence. "Substantial evidence" must be "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value . . . 'Obviously, the word cannot be deemed synonymous with 'any evidence.'" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) In considering this type of appeal, the appellate court will look at the entire record, not just the facts that favor the appellant. More often than not, those facts are in the record.

[3] The trial court indicates the appellant lacks credibility.

If the lower court's order or statement of decision indicates the appellant lacks credibility, I am always reluctant to pursue appeals when the trial court has made it clear the appellant is not to be believed. While it is true the court of appeal does not engage in credibility determination, to me it is a bad sign. If the appellate court is waffling on an issue, I believe it will come down in favor of the party who has more credibility or even sympathy. It is rare that I have won an appeal when the appellant has been branded a liar.

[4] The client doesn't have enough money to pay for an appeal.

Most appellate attorneys are not big risk-takers and will want to get paid up front for handling an appeal. The conventional wisdom is to ask for a retainer large enough to cover the hours required to get the appeal on the road and file the opening brief. If the client fails to pay any more money, at least the attorney has been paid up to this step and may seek to withdraw before the closing brief is due or oral argument is scheduled.

Some appellate attorneys will take cases on a contingency basis. If I am considering a contingency fee basis, I would prefer to represent the respondent. The odds are in favor of affirming the judgment, so there is a good chance of winning and getting paid. Of course, the contingency fee is usually at least three times greater than that of payment up front, to compensate the attorney for the risk and deferred payment, so the appeal becomes more expensive to pursue. If you are representing the appellant, the odds are against reversal, so you'd better believe in your client's chances on appeal.

Some clients are better equipped financially to handle an appeal. If your client is saving cash for a child's education or is already living on the edge, then maybe they can put that money to a better use. I don't want clients to bankrupt themselves or borrow money trying to pay for an appeal.

Sometimes the cost of obtaining the reporter's transcript is enough to end an appeal. When clients are on the fence about an appeal and money is limited, I ask them to get estimates from the court reporter to help with the financial decision.

[5] There is an attorney's fee provision in the contract or statute.

Attorneys' fees can be a major expense in a lawsuit. When an attorney first tells a client that the prevailing party can win attorneys' fees, it is just an abstract concept. In my experience, the clients don't seem to pay much attention to it, first because they believe they will win and *they* will get the fees. Since no amount has been awarded, the client cannot envision how high fees can go.

While there may be a limit, attorneys' fees can be very high and represent more than the actual award.

The same can be said for costs. The costs of litigation are very high these days. That is one reason clients will opt for mediation and settlement. Every case now seems to require one or more experts. The charges can be astronomical and most clients are unable to pay for all of the costs. The loss of a case with high costs could and has bankrupted attorneys. Attorneys have to be careful in selecting cases where they are required to advance costs.

When a client comes to me with a case involving an attorney's fees provision, I tell them that if they lose, they may end up paying the other side's attorney's fees on top of mine. If they take my fees and double them, even adding in 10-20 percent, then that is what the appeal may potentially cost. If they are not in a position to take that risk, especially given the odds against them, they should stop the appeal.

[6] The record is not adequate to show judicial error.

The appellant has the burden of showing judicial error on an adequate record. (*Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1209.) If the record doesn't show the error, stop right now. If you have a substantial evidence challenge, but no record of the trial court proceedings, you are probably done. You may consider a settled statement, but it is generally doubtful you can file a statement that would support a substantial evidence test. The settled statement is an inferior replacement for a full reporter's transcripts. You have the burden of showing judicial error. If you cannot, then your appeal is a waste of time.

[7] The error is harmless, not prejudicial.

Plenty of mistakes can occur during a trial. After all, attorneys are human and so is the judge, who must make snap decisions from the bench. Can you imagine how long a trial would be if the judge had to call a recess to research every objection or point of law? To rise to the level of a meritorious appeal, you must have two things: judicial error and prejudice. If the error does not affect the party's substantial rights and will not change the ultimate outcome of the case, then an appeal is a waste of time. (C.C.P. § 475; California Constitution, article VI, section 13.)

[8] The client does not have the emotional stamina to appeal.

Litigation is an endurance sport that requires plenty of stamina. Some clients cannot escape the cloud of litigation. I have had clients come in with transcripts that have *hundreds* of post-it notes and multi-colored tabs. I have had married clients who spent a lot of time fighting over the litigation: one wanted to call it quits, the other wanted to fight until the end of time. Litigation can cause the break-up of a marriage or irretrievably damage relationships. I have even advised some clients to seek counseling during the appellate phase because they need to prepare themselves for some sort of closure in the event they don't receive a favorable result.

[9] The judgment is not automatically stayed and the client cannot afford a bond.

Pursuant to Code of Civil Procedure section 917.1, money judgments are not automatically stayed on appeal and require a bond or undertaking to stay enforcement of the judgment. (See C.C.P. §§ 916-923 for circumstances where a stay is automatic.) The failure to obtain a bond to stay enforcement of a judgment can be enough to end even a good appeal. What have you gained if the respondent obtains the full amount of the judgment and then spends it before the case is reversed? Typically, the amount of the bond or undertaking must be 1-1/2 times the judgment. (C.C.P. § 917.1(b).) If no bond is posted, the judgment creditor can enforce the judgment, dragging the judgment debtor back to court for collection proceedings. Some clients may file a bankruptcy petition to obtain a stay, but this can complicate the case as well.

[10] The client cannot afford a retrial.

Quite often, the best I can do for a client is to obtain a new trial. If the client paid for costs plus an hourly rate, then he or she should expect to pay almost the same costs again and perhaps almost the same in attorney's fees. The first trial may have wiped out the client, who was hoping for a big win at the end, and then has to face the possibility of a second trial. I explain to my clients that a judgment or order may close the door to trial. My job may be limited to opening the door and getting the client back into the courtroom. Unless the issue can be dealt with by the appellate court, I am not saving my clients money by appealing; I am simply giving them another chance at trial.

Of course, there may be more reasons not to appeal, but these are the ten most common reasons. Share these with your client and fully explore these reasons before deciding to go ahead with the appeal.


Bader

Donna Bader is a certified specialist in appellate law with 30 years experience, practicing in Laguna Beach. She is the former editor-in-chief of Advocate and Plaintff magazines, and is the author of An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial. www.anappealtoreason.com