Advising Your Clients About Appeals©
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Successful trial attorneys counsel their clients well for the rigors and risks of civil litigation. From the pleading skirmishes to the discovery disputes to the nerve-wracking moments before the court or jury announces its decision, well-counseled clients temper their hopes and expectations with the realities of life in the trial court lane.

But all too often, that wise counsel ends with entry of judgment, as trial attorneys (especially those on the short end of the judgment) fail to prepare their clients for the next level: life on appeal.

While trial counsel need not (and often should not) act as appellate counsel, they should steer their clients in the right appellate direction. Here are seven important points clients need to know about the appellate process:

- **Clients often confuse an appeal with a new trial.** It is not. Appellate courts will normally not reconsider the old evidence, hear new evidence, or decide a case on the merits *(In re Zeth S. (2004) 31 Cal.4th 396; Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal.App.4th 780)*. Nor will appellate courts normally entertain claims that a witness lied or that the judge was "unfair," thus disposing of two typical reasons why clients believe they have a good appeal.

  Clients often need to be reminded that the question not asked, the answer not given, the exhibit not offered, and (usually) the argument not made, won't make a difference on appeal.

  Instead, the primary purpose of appellate review is to determine whether the trial court committed a prejudicial error of law *(In re Marriage of Shaban (2001) 88 Cal.App.4th 398)*. And here's the rub: it's not sufficient to show that the trial court erred, because not all errors of law are prejudicial. Trial proceedings are rarely perfect, and minor errors usually do not warrant reversal on appeal *(Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeals & Writs (TRG, 2006) ¶ 8:294)*. The appellant must also demonstrate that but for the error, the result would have been different *(Civ. Pro. §475; 28 U.S.C. § 2111)*.

- **It is usually prudent to wait for judgment before seeking review.** Perhaps the trial court has denied your discovery motion; granted a motion in limine; or excluded a witness. Your client says: Let's appeal now!

  But filing an interlocutory writ petition is most often a waste of time and money, unless the issues are nearly literally about life and death. See, e.g., *Hernandez v. Superior Court (2004) 115 Cal.App.4th 1242* where the death of trial counsel made the denial of a request for trial continuance "writ-worthy."

In general, the "one final judgment" rule allows only one appeal from the judgment that disposes of the entire action, within which all interlocutory orders and issues can be raised *(Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725; Digital Equip. Corp. v. Desktop Direct, Inc. 511 U.S. 863 (1994)).*

At the same time, counsel must be careful. Some interlocutory orders are made appealable by statute, such as orders granting or denying injunctions *(Civ. Pro. §904.1(a)(6); 28 USC §1292(a)(1)).* Other interlocutory orders can be made appealable by leave of court (see, e.g., *Family Code §2025; Federal Rules of Civil Procedure 54(b)*). Still other interlocutory orders can only be reviewed by a writ petition, such as motions to disqualify a judge or to approve a good faith settlement *(Civ. Pro. §§107; 877.6)*. And a pre-trial order that results in judgment for or against one of several co-defendants might be appealable *(Oakland Raiders v. National Football League (2001) 93 Cal.App.4th 572 Pedrina v. Chun 987 F.2d 608 (9th Cir., 1993))*. Failure to timely seek interlocutory review in many of these situations will waive your right to review of these orders later.

- **The odds of reversal are slim, but not impossibly so.** In California, only about 20 percent of civil appellants win reversal. The odds of reversing a criminal conviction are even lower: only about 5 percent. But these are across-the-board statistics, reflecting in part the great number of appeals that merely challenge the trial court's exercise of discretion and so are "'dead on arrival' at the appellate courthouse." *(Estate of Gilkison (1998) 65 Cal.App.4th 1443).*

Clients considering whether to prosecute or defend an appeal need to know their actual risk, based on the particular merits of their case. This requires an objective assessment of the legal bases for the appeal, always keeping in mind the correct standards of review. Many appeals are won or lost in the battle over the proper prism through which the trial court proceedings are observed.

Clients should also be counseled on the risk of prosecuting a frivolous appeal and the value of a midcourse correction. See, e.g., *Small v. Hall's Furniture Defined Benefit Pension Plan (2000) 79 Cal.App.4th 648*, where appellant was spared an adverse cost award by dismissing a non-meritorious appeal on the advice of "experienced and competent" appellate counsel.

- **Winning isn't everything.** A prospective appellant must be advised that winning the appeal usually does not mean winning the case. Although appellate courts can enter judgment in favor of the appellant *(Civ. Pro. §906; 28 U.S.C. § 2106)*, they rarely do so. Much depends on the nature and context of the appeal. If a court of appeal finds reversible error, it will usually remand for a new trial - a foreboding concept for many litigants.

On the upside, both sides might abhor the cost of a new trial, and the formerly prevailing party's expectations might be deflated by the reversal. This all creates fertile ground for settlement.

- **Enforcement isn't everything, either.** Plaintiffs holding a money judgment are never happy to learn that the defendant has appealed and posted security, thereby staying enforcement of that judgment *(Civ. Pro. § 917.1; Federal Rules of Civil Procedure 62)*. But payment deferred can be a blessing, because that security can be more valuable than expensive and unproductive enforcement efforts. Security virtually guarantees satisfaction (with interest) if the judgment is affirmed. Security can be king compared to chasing the money.

  On the other hand, the defendant facing a money judgment is rarely cheered to learn that filing the Notice of Appeal alone does not stay enforcement. Something more - sometimes a lot more - is required. Appellants must deposit with the court cash, securities or a letter of credit *(Civ. Pro. §§ 995.710, 995.730)*; convince friends or relatives to tie up their assets by acting as personal sureties *(Civ. Pro. § 995.310)*; purchase a surety bond or seek bankruptcy court protection *(Civ. Pro. § 995.610; Federal Rules of Civil Procedure 62)*. None of these options may be cheap, easy or available.

  A defendant who cannot secure a stay of enforcement of the money judgment must weigh the value of prosecuting an appeal even after satisfying the judgment or while simultaneously battling enforcement skirmishes.

- **And speaking of money...** The good news is that the price of an appeal is typically much less than that of the trial. To the appellant, an appeal may cost between 20 to 50 percent of that spent on the trial, depending on the nature and substance of the case. The cost to the respondent or appellee is usually less, given the appellant's burdens and the appellate court's presumptions. If state or federal Supreme Court review is a possibility, however, all fee projections are off.

  But on appeal, as everywhere, clients get what they pay for. Appellate briefs are not trial-level points and authorities with a new caption. Appellate practice "entails rigorous original work in its own right." *(In re Marriage of Shaban (2001) 88 Cal.App.4th 398)*. At the same time, good appellate briefs should be "brief." Among the criticisms of briefs expressed by appellate judges, the first is, "Too long. Too long. Too long." *(Aldisert, "Winning on Appeal" (NITA, 2d Ed., 2003) § 2.4))*.

  Good appellate counsel scours the record; re-evaluates the evidence; independently researches the law; identifies the proper standard of review; locates the errors; assesses the prejudice; and prepares a tight, concise and convincing brief that drives home in a few sentences the arguments that trial counsel may have spent years developing. All this, like a short letter, takes time.

- **Take a deep breath, but don't hold it in.** Appeals take a long time, even in the quickest courts. In the state appellate courts, the median time between the filing of a civil Notice of Appeal and the filing of the decision ranges from one to two

> years. With the 9th Circuit, the median time for an appeal is 14 to 16 months. Some civil appeals take as long as three years.
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> And the process can be maddening for anxious clients, because very little seems to happen on appeal. Several months after filing the Notice of Appeal, the record is completed. Several months after that, briefs begin to be filed. Some months after that, oral argument may be held. And months later, an opinion issues.

And what if the California or U.S. Supreme Court grants review? Set all clocks back to zero and take another deep breath.