

THE APPELLATE SPECIALIST – WHEN TO CALL ONE?

“[T]rial attorneys who prosecute their own appeals . . . 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.”

Estate of Gilkison, 65 Cal. App. 4th 1443, 1449-50 (1998) (Yegan, J.)

Judge Yegan is not alone in his assessment of appellate specialists. Judge Ruggero Aldisert of the United States Court of Appeals for the Third Circuit has stated that “[a]ppellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law. Being a good trial lawyer does not mean that you are also a qualified appellate advocate.” Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, §1.1 at 3 (Nat’l Inst. For Trial Advoc. rev. ed. 1996). And Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit concurs: “[T]he skills needed for effective appellate advocacy are not always found – indeed, perhaps, are rarely found – in good trial lawyers.” Silberman, *Plain Talk on Appellate Advocacy, Litigation*, Spring 1994, at 3.

The appellate judges’ comments above should come as no surprise. The medical profession has long recognized the value of both primary care physicians and specialists. While my wife and I have every confidence in our child’s pediatrician, if our pediatrician detects a heart murmur we are off to see a cardiologist. When our kids needed tubes in their ears we were off to an ear, nose, & throat specialist.

So, too, has the legal profession recognized the value of specialists. You probably wouldn't want a tax lawyer trying a copyright infringement action, or an employment lawyer filing a bankruptcy case.

Why is it that appellate judges believe that appellate specialists bring value to clients and litigation? For one thing, as Judge Aldisert and Judge Silberman mentioned, the skills are different. Trial lawyers must be quick on their feet, adapt to the evidence presented (or disallowed by the trial judge, as the case may be), and make judgment calls in the heat of the moment based upon existing laws that guide the trial process. Appellate lawyers have more time to digest the nuances contained in the record, and can be more reflective and concerned with policy arguments which may call for reconciling conflicting precedents or overturning existing precedent altogether.

For another, trial lawyers must make an emotional appeal to the jury (or to the trial judge, if a bench trial), knowing that the jury (or trial judge) determines disputed issues of fact. Appellate lawyers know that appellate courts do not decide disputed issues of fact, and therefore arguments based on emotion are wasted and, in fact, are counterproductive. That is not to say that the adept appellate lawyer doesn't try to bring out the emotion of appellate judges to support his or her client's cause; but that emotion must be stirred from words in the record, not on the credibility of witnesses, and must focus on the policy underlying the law, not on the motivations of the parties.

So when should a party consider bringing in an appellate specialist to help in litigation? Obviously an appellate specialist is well-versed in handling all aspects of the appeal itself – from filing or responding to a notice of appeal, to designating the record for appeal, to briefing the appeal, and to participating in oral argument if the particular appellate court schedules one. A

good appellate lawyer is also aware of trends and changes in the law that may affect a case – and the likely outcome of the appeal. The appellate specialist can – and should – provide advice to the client on which issues may be successful on appeal and which may not, and the likely outcome of an issue which, if raised, may have an impact on the client’s business or industry beyond the case being litigated.

But a savvy client – and trial lawyer – should also think about engaging an appellate specialist even earlier in the litigation process. There are two fundamental principles of appellate procedure that come into play during trial court proceedings: objections must be properly made and ruled upon to be raised on appeal, and if something is not in the trial court “record” it simply does not exist on appeal. An appellate specialist can assist the trial lawyer with preserving objections and ensuring a proper record is made in the event an appeal is necessary. By helping to create and preserve a solid record in the trial court, and allowing the trial lawyer to focus on what he or she does best – marshalling the evidence, and presenting the evidence in a persuasive way to the jury – the appellate specialist can help give a party its best chance of succeeding both at trial and on appeal.

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