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PERSPECTIVE

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Appellate myths & realities

By Gary A. Watt

"Appeals are the last little step in the drama." Appellate lawyers are told this from time to time. The purveyors include clients, litigators too. The message varies in actual form: The work has already been done; there's no need to review the record, the trial team knows everything; the errors have already been identified; don't spend too much time on the brief, it need only reprise the obvious judicial missteps; don't waste money on legal research; and so on.

Such thinking can sink an appeal.

MYTH 1
The Work Has All Been Done

It's not surprising that some clients have this mindset. After all, they've been on a roller coaster ride through discovery, motions, trial and more motions. If litigation can be intense to *litigators*, it's no wonder that clients conclude the ground has not just been covered — it's been blasted to smithereens.

For those new to appellate process, the hardest thing to grasp is that they are no longer *in* the trial court. The orientation on appeal is completely different — if not bizarre. If the trial court was an obvious battlefield, the appellate court is just plain baffling: largely unseen and mostly unheard — until the grand reveal. The trial court was tasked with determining a winner; the appellate court is tasked with affirming that determination if possible (absent prejudicial error). Terms like standard of review, harmless and prejudicial error, are not only new, but as appellate lawyers know, outcome-determinant. All of this can seem strange, even unfair, to the uninitiated.

Trial courts and lawyers operate in real time, with limits on everything. By comparison, appellate briefs look like an exegesis on legal doctrine. And the brief better be a good one. "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. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's "work product" more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel's reasoning, misstatements of law and miscitations of authority." *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 409 (2001). In reality, commencing an appeal is the start of an entirely new saga, not the final scene in a multi-act play. The work is only just beginning.

MYTH 2
The Trial Team Knows Best

This is part myth, part truth. The trial team has lived the litigation and smart appellate lawyers *utilize* and *appreciate* the trial team's insights. On appeal, the trial team is a great component on everything from brainstorming to brief review. A good appellate lawyer finds ways to benefit from the trial team's experience.

But over-reliance on the trial team is dangerous on appeal. A healthy dose of skepticism is important. Sometimes, trial counsel's saturation with the dispute leads to blind spots. Unlike the trial team, appellate counsel has a level of objectivity that has not already been narrowed by the proceedings. The appellate lawyer's lack of familiarity with the dispute is an asset. Trial team perspectives are appreciated, but also investigated and verified. The value of appellate counsel's "fresh eyes" is manifest. It's not unusual to discover that an issue underappreciated by trial counsel is actually the best issue for appeal. Trial lawyer recollections do not always appear the same in the transcripts. Sometimes, fresh eyes mean a more realistic appraisal of the chances on appeal. Frankly, that is an important function — one that appellate counsel can be in a better position to convey than trial counsel.

MYTH 3

Anyone Can Review the Record

This myth is typically savings driven. But there is a grave danger here. When clients request that a less costly person review the record, a red flag is waiving. An effective appellate brief rests upon a *deep* understanding of the proceedings below. If the person who will craft the brief is not the person who reviews the record, the risk of issues and errors going *unseen* increases greatly. That could be fatal.

Good appellate work begins with issue-spotting, which then becomes issue-weaving. Leaving record review to anyone other than the brief's principal author risks sins of omission and lack of vision. That doesn't mean the less experienced (and less costly) have no role to play. A myriad of opportunities arise for *specific* assignments to chase down exact items or categories of evidence, to expand legal research, and to conduct *further* record analysis within precise contours. But such assignments must arise out of that deep understanding of the record. For it's the unknown and unappreciated that will result in a weaker hand. Success must not be sacrificed to savings.

MYTH 4

No More Legal Research

This myth turns on the notion that every applicable case must have been discussed below. While it may be true, the way in which those cases fit the new appellate narrative is not necessarily the same. *Center for Biological Diversity v. County of San Bernardino*, 188 Cal. App. 4th 603, 622 (2010) ("Given the nature of appellate work, we disagree with the court's assessment that 'the majority of the hard ground work was done in the trial court and it would be unnecessary to expend significant hours re-plowing the same field for purposes of appeal.'"). Not only might appellate counsel see the much-discussed case law differently, but there may be new legal authority by the time the appeal is in play. And there is the question of how much weight to assign any given case within the brief. The cases discussed at trial may not be the best *now* — on appeal. Other cases, discussed below or not, may take on greater relevance from an appellate perspective. The role that the authorities play in the appellate narrative is likely to be different. The weaving must continue.

MYTH 5

Attack, Attack, Attack

Anyone engaged regularly in appellate practice has met this client (and sometimes, trial counsel) now and then. The loss has real consequences. The client reviews the brief and is astonished that it fails to excoriate the judge and opposing counsel. But the appellate courts are no place for anger. If trial courts are the forum of great drama, appellate courts are insular temples more akin to monasteries. And just as a great deal of time is spent by the monastic silently contemplating the essence of things, appellate justices pride themselves on being above the fray.

Casting aspersions at trial judges and counsel in appellate briefs has the same disruptive effect as shouting at a monastery. And when it comes to appellate briefs, distraction is the enemy. Besides, many of the appellate justices were formerly trial judges — they know just how grueling the job is. *Martinez v. O'Hara*, 32 Cal. App. 5th 853, 858 (2019) ("The statements in plaintiff's appellate briefs accusing the trial court of intentionally refusing to follow the law … constitute reportable misconduct"); *In re S.C.*, 138 Cal. App. 4th 396, 412, 422 (2006) ("unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct … Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court."). To attack one is to attack all.

MYTH 6

The Briefing Is Easy

Another persistent myth is that once the record is reviewed, the briefing is easy. The truth is, a good brief is never easy. "Appellate work is most assuredly not the recycling of trial level points and authorities." *Marriage of Shaban*, 88 Cal. App. 4th at 408. Writing a compelling and convincing brief is a ton of work. Candidly, a lot of lawyers are not up to it — they simply don't have the time, patience, or persistence to bring all the strands together to create an effective appellate brief. A good brief presents the issues in a cohesive, honest, and ultimately compelling way — not by being loud or strident but by force of *logic*.

A good brief prevents rather than creates, distraction. Every single word in a brief should have a place and a purpose. Whether the appellate jurists ultimately agree with the conclusion, the brief must be perceived as trustworthy in terms of the record and faithful in terms of precedent. A good brief is easy to follow while it inexorably — and honestly — persuades. Getting there means draft, after draft, after draft. Good appellate lawyers are weavers, not scribes, and the brief is a tapestry.

MYTH 7

This Should Be Quick

Finally, clients can be shocked that an appeal may take as long as the underlying litigation. But, as should be evident from all of the above, "[A]ppellate practice entails rigorous original work in its own right." *Marriage of Shaban*, 88 Cal. App. 4th at 410. Engaging appellate lawyers early on can help with preserving issues, avoiding dead ends, ensuring the appeal is well-postured, and perhaps, saving some time. But early engagement or not, once the appeal is taken, it's time for the weavers. ■

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