

**WHY APPEALS AND WRITS
SHOULD BE HANDLED BY
APPELLATE SPECIALISTS**

By

Charles Bond

BONDCURTIS LLP

821 Bancroft Way, Berkeley, CA 94710

Telephone: (510) 841-7500

Facsimile: (510) 841-5022

**WHY APPEALS AND WRITS
SHOULD BE HANDLED
BY APPELLATE SPECIALISTS**

by
CHARLES BOND

Appellate lawyers are specialists. They practice before particular courts, with particular, highly technical rules and procedures, using very different skills than trial lawyers. The State Bar now recognizes appellate law as its own specialty, and for over two and a half decades the California Academy of Appellate Lawyers has been dedicated, as a peer-group, to recognizing attorneys whose expertise and frequency of appearance before the higher courts warrant designation as appellate specialists.¹

Because appellate law is now recognized as a specialty, all lawyers handling appeals are held to the higher standards of appellate specialists.²

In general, trial lawyers should not handle appeals and writs, just as appellate lawyers generally should not try cases. The ideal combination is to have an appellate expert serve as a member of the trial team, and to have trial counsel remain an active part of the appellate team. This approach best serves the client's needs since there are intellectual and functional differences between the two types of lawyers.³

By nature, appellate lawyers are different than trial lawyers. Appellate lawyers are more

¹Charles Bond has 25 years appellate experience and is a member of the California Academy of Appellate Lawyers and a Board Certified Appellate Specialist. He and his firm win approximately 90% of the appellate matters they handle.

² *Horne v. Peckham* (1979) 97 Cal.App.3d. 404, 414 (“If [a practitioner] fails to perform professional services without the aid of a specialist, it is his further duty to have the knowledge and skill ordinarily possessed, and exercise the care and skill ordinarily used by specialists in good standing in the same or similar locality and under the same circumstances.”)

³ While this article admittedly makes broad generalizations about trial and appellate counsel, the characterizations made in this article are derived from over two decades of experience in working with and observing trial and appellate lawyers.

oriented toward research, strategy, and written advocacy, while trial lawyers tend to be more fact-oriented, not so bookish, but highly skilled in verbal persuasion.

Appellate advocacy is fundamentally different from trial advocacy. First, an appeal is not a re-trial of the case. Many trial lawyers who handle their own appeals forget that an appellate court is only interested in the legal correctness of the trial court's proceedings; as a result, when trial lawyers prepare appellate briefs they tend to re-try the facts on appeal. Fact-based arguments, however, are usually irrelevant, and can actually be counterproductive on appeal.

All too often the trial lawyer is too close to the case to have the perspective necessary to argue the case appropriately on appeal; the trial attorney is prone either to be persuaded by the correctness of his or her arguments made below, or to lose real interest in the case once the verdict has been rendered.

The standards of appellate review, which restrict the scope and focus of appellate court's scrutiny, are often unfamiliar to trial counsel, resulting in briefs and arguments that miss the mark. The standard of review varies depending on the ruling being challenged and affects not only how the evidence is viewed by the reviewing court, but the presumptions and intendments that are given against or in favor of the trial court's rulings. Much like the burden of proof at trial, the standard of review can alter the outcome of a case. Working with these standards of review is a regular aspect of the appellate specialist's job, while trial counsel, even if familiar with the rules, may be less aware of and less comfortable with the application of the standards.

Normally, an appellate expert can handle an appeal more efficiently than trial counsel. First, *efficiency* depends on the results: Even though hourly rates of appellate specialists tend to be slightly higher than trial lawyers' rates, the appellate specialists' outcome on appeal is often better. If a client's hourly legal fees on appeal are lower, but the case is lost, has the case really been handled more efficiently than an appeal that costs slightly more but is won? Second, having the lawyer who tried the case write the appellate brief does *not* usually save money. The process of record analysis and brief writing are (or should be) virtually the same, regardless of who handles the appeal. For example, all factual references must be cited precisely to the record, so a thorough analysis and indexing of the record are required by whoever writes the appellate brief. These processes can now be greatly facilitated by specialized computer programs used by many appellate experts (programs with which trial lawyers may or may not be familiar). Likewise, all legal research, whether done at

the trial level or generated anew, must be rechecked for thoroughness on appeal anyway. Computerized research (usually used with greater frequency and efficiency by appellate lawyers) can significantly enhance the depth and breadth of the research. In short, appellate attorneys routinely use different tools to make their work more definitive and, therefore, more persuasive.

Then there is the question of time dedicated to the task. To fashion and write a strong, persuasive brief, large blocks of uninterrupted time are necessary. Normally, the busy trial attorney is heavily scheduled and suffers constant interruptions, and thus has difficulty finding time to properly prepare an appeal. As a result, the appeal is all too often shunted to a less experienced associate, with the ironic result often being that the higher the case goes in the courts, the lower the level of attorney primarily handling it. This pattern is clearly not efficient nor in the best interests of the client.

Some clients and claimspersons try to distinguish between “big” and “little” appeals, sending only their “big appeals” to appellate counsel. Unfortunately, there is no such thing as a “little” appeal. Every case taken to a higher court whether by writ or appeal—regardless of its dollar value—could result in a published opinion that could alter state or federal law. Insurance carriers, trade groups and professional associates spend millions of dollars each year lobbying to influence state laws. Yet one aberrant decision from a Court of Appeal or Supreme Court can do far more damage than ten bills out of the Legislature or Congress. Recognizing that every case could reshape the law, experienced appellate counsel carefully analyze the ramifications of issues on appeal to assess their potential impact on the client and the clients’ industry, and advise their clients and craft their arguments accordingly.

Just as studies in medicine show that specialists who handle the highest volume of a given procedure usually have the best outcomes and the greatest efficiency, the rise of the appellate specialty in law recognizes these truths: The greater the volume of appellate cases, the higher the degree of specialization; the more repetitive the procedures, the more efficient the lawyers become; and the more practiced the specialists, the better the outcomes for the clients.

In sum, the concentration of appellate work in the hands of appellate specialists will serve to raise the level of advocacy on behalf of the client, and provide greater long-term cost effectiveness through improved efficiencies and better results.

BONDCURTIS LLP

821 Bancroft Way, Berkeley, CA 94710

Telephone: (510) 841-7500

Facsimile: (510) 841-5022