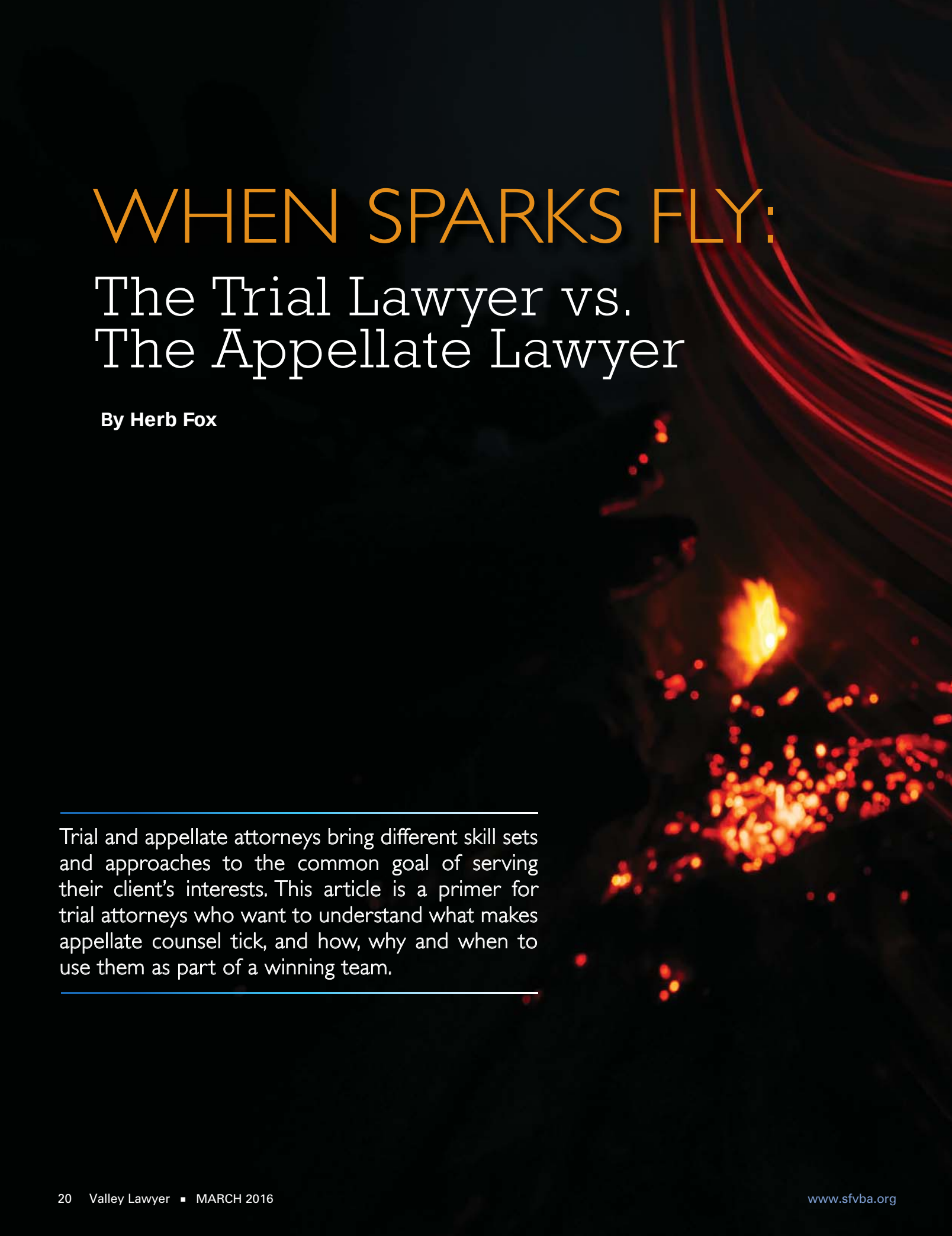
WHEN SPARKS FLY:

The Trial Lawyer vs. The Appellate Lawyer

By Herb Fox



Trial and appellate attorneys bring different skill sets and approaches to the common goal of serving their client's interests. This article is a primer for trial attorneys who want to understand what makes appellate counsel tick, and how, why and when to use them as part of a winning team.

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TRIAL LAWYERS AND APPELLATE LAWYERS share the same goal: the best possible outcome for the client. But they often operate in parallel universes. The trial lawyer's vision is typically short term: jockey for the best tactical position and aim to win. The appellate attorney, in contrast, typically takes a longer strategic view: avoid snatching appellate defeat from the jaws of trial-court victory.

The different approaches of trial and appellate counsel should mesh like well-greased gears, and they often do. But sparks can and will fly, especially when the trial attorney tastes victory and the appellate attorney sees hazards ahead. When winning trial lawyers assure the client that the trial victory was clean and that reversals are rare, appellate counsel raise the yellow flag, urging caution. Students of the appellate process know that reversals happen every day, and they have all sweated through the tedious task of saving a precarious win from reversal by arguing that a clear error was harmless.

The key to synchronizing the combined efforts of trial and appellate counsel is mutual trust and respect for the disparate skill sets and approaches that each brings to the common goal of serving the client's interests. Here then is a primer for trial attorneys who yearn to understand what makes appellate counsel tick, and how, why and when to use them as part of a winning team.

Appellate Counsel: Nurture or Nature?

Many appellate attorneys trained as research attorneys (state courts) or clerks (federal courts) before entering private practice, and most have a strong research and writing background. They are found in appellate departments of large firms, at small appellate boutiques, or as solo practitioners.

Many (but not all) are certified as appellate specialists by the State Bar's Board of Legal Specialization, which requires that they pass a six hour exam; demonstrate substantial prior appellate experience in briefing and oral arguments; maintain a significant appellate law practice; and complete specialized and additional MCLE requirements as a condition of continuing certification. It's common for appellate specialists to have decades of experience in the state and federal appellate courts and to have drafted hundreds of appellate briefs.

How Appellate Attorneys Spend Their Time

When not conferring with trial counsel and clients, preparing for oral arguments, or mastering arcane rules of state and federal appellate procedures, appellate lawyers read, research, analyze, and write. Reducing a 2,500 page trial transcript into a 20 page short story for consumption by the appellate court, tracing the legislative history of an ambiguous statute, or trying to harmonize the holdings of discordant caselaw, are examples of appellate tasks that take long hours, patience, and perseverance. What also takes time, patience and perseverance is writing high quality, accurate and succinct appellate briefs that will be critically read and dissected by three (or more) appellate judges and their research staffs.

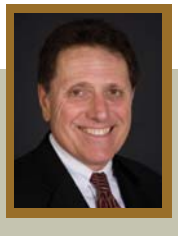
Why It Takes Time to Draft Appellate Brief Even Though Trial Brief Was a Winner

Apples and oranges all hang from trees, but that does not make them swappable. Trial briefs (or other pleadings in dispositive motions) are prospective. They tell the court what the evidence will show, and often lay out the governing law in a summary fashion. Appellate briefs are retrospective, tied down to the actual record as it unfolded at trial. They analyze, often in great detail, what law governs and why. Trial briefs persuade the trial judge why to find in favor of one party or another. Appellate briefs assist the reviewing court in identifying the correct law that applies to the case. Trial briefs will be quickly read by one judge and perhaps a research attorney. Appellate briefs will be poured over by three or more appellate justices and research staffs who will spend hours, not minutes, assessing the accuracy of the brief and the merits of the arguments.

These and other distinctions arise from the difference between trials and appeals. Trial courts resolve questions of fact; appellate courts resolve questions of law.[1]

Decades ago, a Court of Appeal explained that appellate counsel's obligation to the reviewing court is to find the applicable law, and includes the "duty to study and to discuss the available authorities, both in California and, at least where there are none in California, in other jurisdictions."[2]

Thus, appellate work is "most assuredly" not the recycling of trial level points and authorities.[3] Instead, appellate practice "entails rigorous original work in its own right."[4] Indeed, the appellate practitioner "who takes trial



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level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product."[5] As one court further explained:

> 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, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention.[6]

Further, because intermediate appellate court decisions do not bind other appellate courts, the appellate practitioner is free, in appropriate circumstances, to urge the reviewing court to reconsider and reject existing case law.[7] Trial courts, in contrast, are bound by *stare decisis* and so trial level briefs cannot urge the trial judge to disregard controlling precedent.[8]

In fact, appellate litigation is so distinct from trial-level efforts that courts determining fee awards have approved more attorney hours expended on the appeal than was incurred at trial.[9]

Attorney Who Knows the Case Best May Not Be Best Attorney to Handle Appeal

Any trial attorney is licensed to handle an appeal or writ proceeding. But knowing the case well can mean a lack of objectivity, which does not always make one the best candidate for the appellate proceeding.

A trial attorney's intimate knowledge and passion for the case and the client may well be a disadvantage on appeal. Appellate justices expect a tempered and reasoned, if not dispassionate, articulation of the facts, the law, and reasons why the outcome was prejudicial error or, alternatively, correct. Thus, appellate courts have observed that trial attorneys who prosecute their own appeals may have tunnel vision. Having tried the case, "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."[10]

Further, trial attorneys who "lack the time and interest to handle the appeal competently, or have neither the requisite expertise nor the time to become proficient in the

matter," may owe their clients an ethical obligation to advise the association (or substitution) of appellate counsel.[11]

Attorney Who Is Expert in the Area of Law May Not Be Best Attorney for Appeal

Expertise and experience in a particular area of law can be important. But the attorney whose practice focusses on an area of law may not be able to effectively communicate that law to a panel of appellate justices, all of whom are generalists. Appellate justices (except those in specialized courts such as the Bankruptcy Appellate Panel or patent case review by the federal Circuit Court of Appeals) hear cases from adoption to zoning, come from diverse backgrounds, and may not be well versed in the specialized vocabulary and technicalities of the law governing a case before them. Thus, appellate practitioners will assume that the appellate court knows little about the body of law governing the case, and will not assume in-depth knowledge of the legal issues. Appellate attorneys, who themselves are often generalists but for appellate law and procedure, are often in the best position to spoon the nuances of complex law to another generalist.

And speaking of appellate law and procedure, that is an arcane subject that appellate attorneys know well. This is especially true as for the appellate standard of review, which is the "compass that guides the appellate court to its decision" and "defines and limits the course the court follows in arriving at its destination."[12] Unlike a trial where the battle is often about the facts, in "many appeals, the most contested issue is the standard of review."[13]

For that reason, trial counsel may well want a seasoned appellate attorney to raise and argue the standard of review that is most advantageous to the client's cause.

The Client is Still the Client

When a trial attorney decides to associate in appellate counsel, it is easy to lose sight of who the appellate lawyer represents. But there should be no confusion: the client is always the client. Even where the trial attorney chooses appellate counsel and pays their fees, the appellate attorney has independent fiduciary and professional duties to the client, not to co-counsel, and must exercise their independent judgment in the best interests of the client.

There is no fiduciary duty between appellate counsel and trial counsel, apart from their duty of undivided loyalty to clients.[14] That trial counsel may pay the appellate attorneys fees makes no difference; such payment does not create an attorney-client relationship.[15] For these reasons, appellate counsel will often have the client execute the retainer agreement, and will independently apprise the client of all significant events in the appeal.[16]

Brief Writing Services: Caveat Emptor

Many trial lawyers are solicited by firms that offer to deliver a fully drafted, signature ready appellate brief, which may or may not be written by attorneys licensed in California. Although it is not per se unethical to use such services, there are caveats.

The attorney who signs a ghost-written brief thereby adopts its contents, is fully responsible for accuracy of the brief, and must retain independent professional judgment regarding its contents. It may be necessary to disclose to the client the fact that a briefing service—not the client's attorney—wrote the brief, and the attorney remains responsible for assuring that there is no breach of confidentiality or privilege, or conflict of interest created by the use of the service.[17]

Additional caveats are that the brief writing service will not appear at oral argument, and in the event of errors or omissions in the appellate process, the company will not be the subject of the appellate court's criticism, or a sanctions motion or malpractice suit. The attorney whose name is on the brief will be responsible, even if that attorney did not actually draft the brief. Bringing in an appellate specialist as co-counsel will likely insulate trial counsel from such headaches. It will also allow for a collaborative effort to develop the best appellate strategy possible, and co-counsel available to advise and handle collateral issues such as appellate stays, record preparation, and post-appeal fee and cost awards.

Who's in Charge?

This can be the most difficult question of all. It not uncommon for trial counsel and appellate counsel to disagree on the identity and number of issues to be raised, or the best response to the appellant's issues. Disagreements also arise over handling weak or sensitive issues, and for respondents, when to concede that an error occurred at trial.

While candid (if not heated) discussions of these issues and strategies are beneficial, the experienced appellate attorney usually knows best on matters such as framing an appellate argument and how an appellate court might view a particular issue or the case as a whole. Most important, appellate attorneys are probably in the best position to choose which arguments to raise and which to abandon. As a general rule, it is rare for more than three reversible errors to occur at trial, and many errors are harmless. Trial court proceedings are rarely perfect, and minor errors usually do not warrant reversal on appeal.[18]

Thus, larding an appellate brief with a long litany of grievances, while occasionally justified, more often hurts

credibility with the appellate panel. Knowing what issues not to raise on appeal—or as respondent, what issues to concede as error—can be as valuable as knowing what to raise and what to dispute.

On the same theme, appellate lawyers sometimes bring bad tidings after performing an objective and dispassionate analysis. Most of the time, trial judges do not commit reversible error, and an appeal from the adverse judgment is a waste of time and money, something the losing trial attorney does not want to hear. On the other hand, some appeals present a clear risk of reversal, something the winning trial attorney does not want to hear.

Trial attorneys should avoid the instinct to condemn the messenger. When appellate counsel advises not to appeal or, if retained to defend a judgment, signals the possibility of reversal, give that advice wide berth. Heeding the advice of appellate counsel might lead to settlement when appropriate, and may avoid costs, sanctions or worse by prosecuting a meritless appeal.

In one case, for example, the appellant retained appellate counsel and voluntarily dismissed the appeal on the recommendation of that attorney, and by doing so avoided imposition of costs on appeal. "Such a course of conduct is to be highly commended. One of the functions of a lawyer is to limit or even end litigation in an appropriate case."[19]

Professional Cooperation and Congeniality Rules

Appellate counsel are unlikely to share the antipathy and distrust that may have developed over the course of the litigation between opposing trial counsel. Perhaps more important, they are unlikely to share the hostility between the parties that often occurs, especially in highly emotional matters such as hotly contested business litigation, probate and family law cases.[20]

Thus, appellate lawyers tend to be congenial and to extend professional courtesies—such as extensions of time and cooperative record preparation—and the appellate courts expect nothing less. Antipathy and distrust between opposing counsel wastes time and energy and rarely serves client interests, especially on appeal, where there is little or nothing to gain from sharp tactics or attempts to game the system.

Appellate courts will almost never by hoodwinked by misconduct of counsel. Misstatements of fact or law, or violations of appellate rules and procedures, can and should be pointed out dispassionately and professionally. The best response to egregious violations is a motion for sanctions on appeal.[21]

Timing is Everything

The best time to consult with or retain appellate counsel depends on the nature, value and complexity of the case. The best general rule is to consider bringing on appellate counsel early, and consult often. Appealable orders can creep up early in a case (e.g., anti-SLAPP motions, injunction and judicial disqualification applications, most probate orders, and some family law orders). The need or necessity for filing an interlocutory writ petition can arise as early as an order denying a motion to quash service of a summons or motion for summary judgment[22] and continue all the way through orders on pre-trial motions in limine.[23]

Appellate input can be particularly critical in drafting jury instructions and verdict forms, drafting or objecting to Statements of Decision, and of course drafting or responding to post-trial motions. In fact, sometimes the real reason to file a Motion for New Trial is to create or preserve issues for appeal, such as jury misconduct, newly discovered evidence, and excessive/insufficient damages.[24]

For a responding party defending the judgment or order on appeal, early appellate consultation is important for a number of reasons, including a careful review of the timeliness of the Notice of Appeal and appealability. Where there is a defect, a timely Motion to Dismiss the appeal can save much time and grief for trial counsel and the client alike.

[1] *People v. Cromer* (2001) 24 Cal.4th 889, 893 – 894.
[2] *Tate v. Canonica* (1960) 180 Cal.App.2d 898, 900.
[3] *Marriage of Shaban* (2001) 88 Cal.App.4th 398, 408 - 410.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450.
[9] See *Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 622 (approving 385 hours for an appeal in a case where trial counsel incurred only 302 hours).
[10] *In re Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449–1450.
[11] Rule of Professional Conduct 3-110(C); Eisenberg, Horvitz and Weiner, Cal. Practice Guide: Civil Appeals and Writs (Rutter Group, 2015) at §1:97.
[12] *People v. Jackson* (2004) 128 Cal.App.4th 1009, 1018–1019.
[13] *Id.*
[14] *Saunders v. Weissburg & Aronson* (1999) 74 Cal.App.4th 869, 873-874.
[15] Cal. Rule of Prof. Conduct 3-310(F).
[16] Cal. Rule of Prof. Conduct 3-500; Business and Profession Code §6148).
[17] Los Angeles County Bar Association Professional Responsibility and Ethics Opinion No. 518 (2006): "Ethical Considerations in Outsourcing of Legal Services," Los Angeles Lawyer (November 2006).
[18] Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeals & Writs (Rutter Group, 2015) ¶ 8:294.
[19] *Small v. Hall's Furniture Defined Benefit Pension Plan* (2000) 79 Cal.App.4th 648, 650.
[20] *See, e.g., Patrick v. Alacer Corporation* (2011) 201 Cal.App.4th 1326, 1345n. 11 ("After many years, the parties have made it painfully clear they do not like each other. Less apparent is why they think we care.")
[21] CCP §907; Rule of Court 8.276.
[22] CCP §§418.10(c)); 437c(m).
[23] See, e.g, *Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269.
[24] Civ. Pro. §657; *City of Los Angeles v. Southern California Edison Co.* (1931) 116 Cal.App. 44, 50; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.