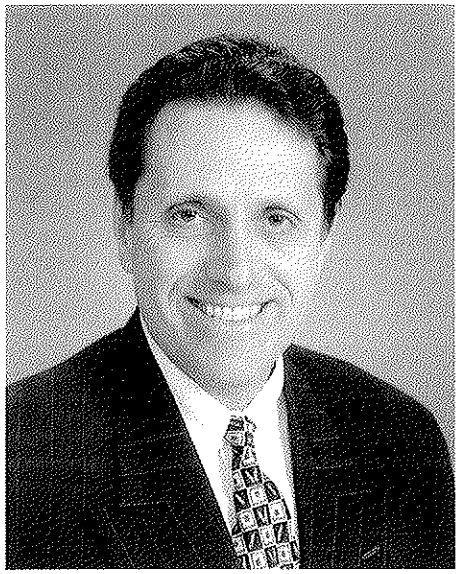
Appellate Counsel: Use 'Em or Lose 'Em

By Herb Fox



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At the Bar Association's "Meet the Justices" event last month, **Justice Ken Yegan** ruffled a few feathers when he declared that most of the cases on the Court of Appeal's docket don't belong there. The reason, Justice Yegan explained, is that the trial court is where most cases are finally won or lost, and that is where they should stay.

So why do so many attorneys file hopeless appeals? The answer, in part, is that assessing the prospects of winning an appeal requires application of the unique prism through which the reviewing courts view the trial proceedings. Experienced appellate lawyers who know how to correctly assess an appeal will typically recommend "tossing in the towel" on half to three-quarters of all cases referred to them. But trial and other attorneys with limited appellate experience have trouble gauging the prospects of reversal, and clog the system with appeals that are "dead on arrival at the appellate courthouse." *(Estate of Gilkison (1998) 65 Cal.App.4th 1443, 1449).*

Worse still are trial lawyers who may have a meritorious appeal, but blow the case because they have little experience in appellate procedure and/or have little experience in effectively putting thought to paper. A case in point was a recent local appeal from a marital dissolution property division. Appellant husband argued that the trial court improperly concluded that language in a trust instrument transmuted his separate property residence into community property. In an unpublished decision written by **Justice Steven Perren,** the Court of Appeal agreed and reversed.

Wife also appealed, arguing that if there was no transmutation of the character of the residence, she is entitled to reimbursement of over $92,000 that she gave husband from proceeds from the sale of her previous home. The Court of Appeal disagreed, but not on the merits. Instead, the Court found that wife had failed to provide an adequate record from which wife's claim could be evaluated:

As another court of appeal recently said, "[w]hen practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." [Citation]. It is also the duty of counsel to refer this court to the specific portions of the record that support each position taken. If no citation is provided, we may treat the point as waived. [Citation]. We may not give any consideration to alleged facts that are outside of the record on appeal. [Citation]. [Wife's] counsel failed to adhere to these well-established rules. Because her counsel did not provide the reporter's transcript, we do not have an adequate record with which to evaluate her contentions.

So what is a trial attorney to do if they have limited appellate experience and are faced with the possibility of an appeal? The answer – and the emerging standard of care – is to retain experienced appellate counsel to assess the merits of an appeal and, if the appeal is to proceed, assume responsibility for preparing the record and the briefs.

A wonderful treatise on the role of appellate counsel and this emerging standard-of-care can be found in *In re Marriage of Shaban (2001) 88 Cal. App.4th 398*, where husband argued that the trial court awarded his former wife excessive attorney fees for responding to husband's appeal. Husband asserted that the award was excessive because "most of the work that would have to be done by appellate counsel on appeal had already been done in connection with the trial."

Justice David Sills of the Fourth District Court of Appeal in Santa Ana took this opportunity to explain why "[a]ppellate work is most assuredly not the recycling of trial level points and authorities." Appellate briefs receive much greater scrutiny than trial-level pleadings; they are read by several justices as well as by research attorneys who conduct independent legal

research and scour the briefs for errors in reasoning and misstatements of fact and law. Appellate briefs also provide an opportunity to argue that the existing law should be changed – something trial courts cannot do.

Further, because appellate courts ask whether the trial court committed a prejudicial error of law, the appellate practitioner is "on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities."

The *Shaban* court concludes that the upshot of these considerations is that appellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product. [footnote omitted] Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value.

While Justice Sills was quick to point out that "substandard" does not mean below the applicable standard-of-care, he added that "low level work should hardly be treated as the norm."

The relationship between substandard appellate work and an attorney's standard-of-care is fodder for another time. But prosecuting an appeal that should not have been filed; failing to pursue an appeal that could be won; or losing an appeal because of unfamiliarity with appellate procedure, may all be breaches of duties to our clients.

And it all can be avoided by a consulting with experienced appellate counsel!

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The unpublished case is *In re Marriage of Van Der Spees, Court of Appeal case Nos. B172115 and B173250.* **Gary R. Ricks** and **Brigham J. Ricks** represented husband; **D. Oscar Barnes** represented Wife.

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In the September issue I wrote about the Great State Street Wars between **Bill Levy** and his former partner **Richard Berti**. That war continues. On October 27, 2004, the state Supreme Court granted Levy's Petition for Review in SB *Beach Properties v. Berti (2004) 16 Cal.Rptr. 3rd 204.* The issue as framed by the Supreme Court is: Does a trial court have jurisdiction to consider a motion for attorney fees under Code of Civil Procedure section 425.16 if the action was voluntarily dismissed before the special motion to strike was filed?