



T. Peter Pierce, Richards, Watson & Gershon

LITIGATION AND APPEALS

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Peter Pierce speaks to us about how he prepares his clients for the Court of Appeal and how he demystifies the often confusing process.

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RWG delivers practical advice and solutions tailored to the unique needs of public entities. Working seamlessly across offices in Los Angeles, San Francisco, Orange County, Temecula, and the Central Coast, our dedicated team of experts provides the full scope of public law services.

What are the top three things you must take into account when attempting to demystify the appeals process for clients?

First, clients who have lost (or won) their cases often believe that an appeal is a “do over” of the proceedings in the trial court. This is usually not the case. Unlike the trial court, the Court of Appeal is not weighing evidence in a search for the truth; the Court of Appeal is searching for error. The Court of Appeal will find reversible error, only if the trial court made a mistake serious enough that there is a reasonable probability the outcome would have been different absent the mistake. Otherwise, the error will be harmless and the judgment will be affirmed. I explain this to the client and then advise on the chances of the Court of Appeal finding reversible error.

Second, I manage the client's expectations as to what winning the appeal means in practical terms. Often, winning on appeal does not mean winning the case on the merits. It might mean reinstatement of a dismissed case, a chance to amend a complaint, a new administrative hearing, or a new trial. I explain the possible outcomes on appeal to avoid unpleasant surprises when the appeal is decided.

Third, clients who have lost in the trial court often want me to include in the opening brief every possible ground for reversible error. With few

exceptions, I urge clients to authorize me to select the best two or three issues for convincing the Court of Appeal that reversible error has occurred. An opening brief is as good as its weakest argument, and weak arguments distract from stronger ones. Better to pick only the ones with a reasonable chance of success and leave the Hail Mary for church.

What would you say are common reasons to why cases are taken to appellate courts in California?

A significant number of clients choose to appeal because they feel jurors or the trial judge did not understand their position or listen carefully enough to their case. There are many reasons why they may feel this way. I have had clients complain that they lost because the trial judge did not specifically address all of their legal arguments and factual points in the decision. Then, when they lose on appeal in a more thorough opinion, they are satisfied that, at a minimum, their position was understood and carefully considered.

Institutional clients often appeal to establish a particular legal principle that will benefit them in future litigation. Of course, there is always the risk that the opposite of the desired principle will be established on appeal, so I work with clients to carefully evaluate the pros and cons of attempting to move the law in a particular direction.

What would you say is the key behind having a positive decision made after taking a case to the appellate court?

Favourable law and facts create the most obvious path to a successful outcome on appeal. But in many cases, the law and facts do not dictate a clear outcome. There can be close calls. In those cases, several factors are key in maximising your client's chances of success. First, be scrupulously honest with the facts and the law. Do not oversell your case; you will lose credibility. Second, do not be afraid to concede points that are unnecessary to win the appeal. This will help build credibility. Third, do not be an idiot in your brief(s). Personal attacks designed to cast aspersions on the opposing party or opposing counsel invariably boomerang to reflect poorly on the attacker. They pave a fast track to losing all credibility. They distract the court as well, so avoid them.

What should corporations take into account prior to taking their case to appellate courts?

Corporations should always be mindful that litigation is a way of business in the United States, and that their practices will be frequently examined in the appellate courts. They should carefully evaluate the potential impact that legal arguments asserted today will have on their future interests. Tone is particularly important in briefs filed on behalf of corporations. Avoid appearing like the big bad defendant picking on the plaintiff with less resources. **LM**

