

## Appellate & Writ Practice

Downey Brand's appellate and writ practitioners handle appeals in both state and federal courts and in numerous practice areas from environmental to intellectual property, construction to healthcare, and employment to real estate.

We are equally adept at handling appeals where we have been extensively involved in the trial court proceedings as we are at stepping in as appellate counsel to defend judgments obtained or seek reversal of unjust results in the trial court. When appropriate, we match experts in the substantive law with appellate specialists to handle the appeal in the manner which gives our client the greatest probability to prevail.

Effective arguments in the trial court often do not translate to winning arguments on appeal. In the superior courts, the trier of fact (whether judge or jury) is looking for justice. On appeal, the court looks for legal error. An appellate lawyer brings a unique set of skills and a fresh perspective to your case.

### Certified Appellate Specialist Jay-Allen Eisen

In 2017 Downey Brand expanded its appellate expertise by bringing in highly-regarded appellate specialist Jay-Allen Eisen. Certified by the State Bar of California as an Appellate Law Specialist, Eisen has been counsel in more than 300 appeals and appellate writs, and his name appears on over 120 published decisions. He has handled cases in every District Court of Appeal in the state, the California Supreme Court, and the Ninth Circuit Court of Appeals. Jay-Allen Eisen has been shaping the law in California through the appellate process for almost fifty years, and his presence at Downey Brand offers clients the highest level of appellate law practice.

### Civil Appeals

Appellate procedure consists of the rules and practices by which appellate courts review trial court judgments and orders. Appellate review performs several functions, including the correction of errors committed by the trial court, development of the law and precedent to be followed and anticipated in future disputes, and the pursuit of justice. In reviewing errors of the lower court, the errors focused on are of a legal nature, appellate courts will usually not disturb factual findings.

Several issues are foremost in appeals, such as what judgments are appealable, how appeals are brought before the court, what kind of argument the appealing party, appellant, will have to make to convince the appellate court to reverse the lower court (e.g., a showing that there was no "substantial evidence" to support the judgment, "abuse of discretion," "clear error," etc.), and what procedures parties must follow.

### Writ Law

The development of English Common Law relied on the courts to issue orders known as "writs" that allowed individuals to proceed with a legal action. Over time the courts also used writs to direct lower courts or tribunals, governmental officials, sheriffs, and attorneys to perform, or to refrain from performing, certain actions. In modern law, courts primarily use writs to grant extraordinary relief—that is, relief that there is no other adequate means of obtaining. A trial court's rulings before final judgment generally cannot be appealed. An appellate court may review the ruling in a writ proceeding. Most other common-law writs were discarded in U.S. law, as the courts

moved to simpler and more general methods of litigating civil actions.

A writ is obtained by petitioning the court. Appellate lawyers handle writ petitions in both the superior courts and the appellate courts on a variety of issues, including land use, professional license discipline, and other actions of government agencies. Most trial court rulings before the entry of a final judgment aren't appealable. A writ may also be available to obtain immediate appellate review of such interlocutory rulings

## Motion Law

A motion asks a court for an order during the course of a case. There are many types of motions. Some may be made orally in open court, such a motion during trial to direct a witness to answer a question. The court will usually rule on these motions immediately. But most motions (especially on issues that could decide the entire case) must be written, filed with the court and served on other parties in the case well before the court hears oral arguments. As a general rule, and depending on the jurisdiction and type of motion, the moving party has to file a motion and give the opposing party notice 20-30 days before the hearing. Motion papers will include a memorandum of points and authorities, which is the written legal argument. If it is necessary to establish facts that give rise to the motion, evidence is presented through affidavits or declarations under penalty of perjury; there is usually no oral testimony.

A party who opposes a motion has the opportunity to file and serve opposition papers. Most jurisdictions also allow the moving party to file reply papers rebutting the points made in the opposition. The court hears oral argument on the motion after all of the papers from each side have been filed and served.

Customs vary widely as to whether the court will hear oral argument. In some courts, oral argument is optional with the judge. In others, the attorneys have the right to appear before the judge to argue their cases. In some cases, the court may order the attorneys to appear. Some courts issue tentative rulings after which a party may request oral argument. Depending upon the type of motion and the jurisdiction, in a court that does hear oral argument, the court may simply issue an oral decision from the bench and may order the attorney for the party that prevailed on the motion to draft an order for the court's signature. Or, instead of ruling immediately, the court may take the matter under submission and rule on the motion after considering it more fully. The court's decision may be a simple statement that the motion is granted or denied. The court may draft a written decision and order explaining the factual and legal basis for its ruling. In some cases, the court may simply fill out a standard court form with checkboxes for different outcomes.

Motions are similar to appeals in an important respect. Appeals are presented on written briefs that set out the parties' legal arguments as to why a trial court's judgment or order should be reversed or upheld. Likewise, a memorandum of points and authorities in support of a motion sets out legal arguments why the court should grant or deny the motion.

Known for their ability to persuasively write and orally advocate their client's position, our appellate lawyers are often frequently on board in trial proceedings to brief and argue everything from routine discovery motions to dispositive motions such as demurrers and summary judgment motions, and often in limine motions where specific evidentiary issues may decide the outcome at trial.

## Substantive Areas

Downey Brand offers appellate expertise from lawyers who have prosecuted and defended civil appeals, writs, and motions in a broad range of areas, including:

- Administrative law
- Amicus advocacy
- Business litigation
- Civil procedure issues
- Civil rights and constitutional law
- Construction law
- Employment law
- Environmental law
- Family law
- Land Use
- Personal injury
- Probate law
- Products liability
- Professional licensing
- Real estate litigation

## Selected Experience

- After defeating a motion to dismiss brought by union seeking to preclude Downey Brand's client from going forward with his claims for defamation and intentional infliction of emotional distress based on union's distribution of flyers in client's neighborhood, Downey Brand successfully defeated union's appeal. In a published opinion, Third District Court of Appeal agreed with Downey Brand's argument that union's distribution of flyers was not constitutionally-protected activity, and upheld trial court's denial of union's motion to dismiss client's claims under California's Strategic Litigation Against Public Participation ("anti-SLAPP") statute. Downey Brand's victory in the appellate court allowed client to go forward on the merits of his claims against the union. *Price v. OE3* 195 Cal.App.4th 962 (2011).
- After obtaining judgment in construction defect case against builder of client's home at the conclusion of seven day jury trial, Downey Brand not only successfully defended the client's judgment from attack by builder on appeal, but also obtained rarely-awarded sanctions against builder and its attorney for prosecuting a frivolous appeal.
- In litigation involving significant corporate practice of medicine, anti-trust, and Section 17200 claims against major Northern California hospital, Downey Brand obtained reversal from the California Court of Appeal, Third Appellate District of summary judgment entered against its client, a medical group practicing at the hospital. Remand of the action back to Butte County Superior Court for a jury trial caused an almost immediate, favorable settlement for Downey Brand's client.
- As litigation counsel for property developer sued by adjoining landowner for actions related to pursuit of development entitlements from County of Placer, Downey Brand obtained dismissal of suit in its entirety at outset of case under California's Strategic Litigation Against Public Participation ("anti-SLAPP") statute, based on client's constitutional free speech and public participation rights. Dismissal was affirmed by the California Court of Appeal, Third Appellate District.
- After obtaining dismissal of claims based on alleged groundwater contamination caused by client's dry cleaning operations, Downey Brand represented client in five separate appeals brought by the City of Lodi, in both the Third District Court of Appeal and Ninth Circuit. The state and federal appellate courts struck down several provisions of ordinance enacted by the City which sought to change liability standards, burdens of proof and enforcement authority allowed by current state and federal hazardous waste laws including the California Hazardous Substances Account Act and the federal Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA).

## Trade Groups

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- American Academy of Appellate Lawyers
- California Academy of Appellate Lawyers
- Sacramento County Bar Association Appellate Law Section