

Hello, I'm Julie Schumer. I'm an appellate law specialist practicing in the state of California.

If you have just been convicted, is there any hope? The answer is yes. There are a number of potential post-conviction remedies. Historically, a person falsely accused of a crime is represented by a trial attorney in the trial and if convicted, the same attorney also conducts the sentencing hearing. Once the defendant is sentenced, however another attorney specializing in appeals attempts to correct any injustices that may have been committed during the trial by the lawyers, the judge or the jury. This is done in the Court of Appeal. While this practice of using the same attorney in the sentencing hearing and in the trial and a different attorney in the Court of Appeal is a standard practice, this kind of representation fails to provide the defendant with a full range of resources for post-trial remedies. But even excellent appellate attorneys are not experts in highly specialized cases such as child abuse cases. Here's one example: During a trial, the prosecution may call a medical doctor to the stand to testify that erythema was found on the alleged victim's hymen and that this is proof of sexual abuse. While an experienced defense attorney knows that these statements are bogus and must be rebutted by scientific studies and medical witnesses, most appellate attorneys would not know. Without a knowledgeable child abuse trial attorney to evaluate testimony to spot such issues, the grounds for an appeal could easily be missed. A powerful appellate team also requires an investigator who specializes in child sexual molestation and abuse cases. If for example, the prior defense trial attorney failed to conduct an investigation that was necessary to prepare the case, this failure could cause information that could have lead to an acquittal or was necessary for proper rebuttal not to have been presented on behalf of the client. Again, another grounds for appeal. Failure to do so could lead to a reversal based on incompetency of counsel. In order to correct this error, an investigation must be conducted by someone who is experienced and knowledgeable in molestation cases to determine if critical evidence was in fact overlooked to the detriment of the client's defense. It is the job of the appellate specialist to establish the legal grounds for reversal of the case based on information gathered by the investigator and analyzed by the trial attorney.

Without all three members, someone wrongfully convicted of child abuse or molestation could easily lose his chance of a successful appeal. Those three members are an experienced molest investigator or an abuse investigator, the experienced trial attorney and the experienced appellate attorney working together as a team. Well, if such a strategy appears more expensive, it's actually a financially competitive alternative to the traditional appellate process because timely and expert advice is concentrated earlier in the process for better chances of reversal.

What is a motion for new trial? A motion for new trial is the first opportunity to overturn a conviction and have a second chance to fight the charges in front of a new judge and

jury. This motion is made before the trial judge and therefore does not take the long time that it takes to have an appeal processed. The motion has two purposes: The first is an attempt to have the case reversed by the trial judge..... The second is to have all appealable issues raised pre-sentencing at the trial court level in order to pursue these issues later if the new trial is not granted.

In other words, things that were missed during the trial could be put on the record during the motion for new trial so that they could be appealed at a later time. It is critical that this motion is presented before sentencing if the client is to have the most convincing information before the judge.

Furthermore, having an appellate attorney at this stage, will ensure that all appellate issues will be raised in order to pursue them later should it be necessary. In other words, the appellate attorney becomes involved before the case is out of the trial court.

What does a motion for a new trial involve? Your team must obtain and thoroughly review a transcript of your trial to determine what legal errors were made. Such errors include the wrongful admission or exclusion of evidence, jury instruction error or jury misconduct. Your appellate team can conduct additional investigations to uncover the evidence needed to prove such errors and then will prepare a written brief of all of these issues and justifications for reversal being supported by affidavits and legal authority. This must be presented before the sentencing. In the case of a judicial error, for example, a judge will rarely grant a new trial based only on mistakes he or she made. Why would he do that when he has already decided he was correct in the first place? However, building a comprehensive case of appellate issues increases the chances that a judge might grant a new trial because the motion is based on a variety of issues and not just his or her own mistakes.

Finally, raising all pertinent issues at this stage, assures that the client's best defense is presented and that those points are preserved for federal court review should that be required at a later date.

All too often, even if the Appeals Court has ruled that an error has been committed during trial, it is found that error does not require reversal, or that it was not raised before sentencing and that the prosecution will then argue that the defendant has waived his right to appeal that error because he did not first address it before the trial court.

What about judgment and sentencing?

That is a post-conviction process also. After a defendant has been convicted, he or she must be sentenced. What determines one's sentence? The first issue to be resolved is if the defendant is eligible for probation or if the law requires that he serve a prison term. Even though the defendant is eligible for probation, the court is not required to give it and may not grant it. The court's decision is governed by a set of rules that lays out the factors that a judge must consider before granting or denying probation. At this stage, your team of attorneys will gather evidence to present to the judge at the sentencing hearing to support the factors that can legally lead to a granting of probation. It is also an

opportunity to find or present any evidence that mitigates or rebuts evidence presented by the prosecution at the sentencing hearing. In cases where the law requires a state prison commitment, the trial court must determine the length of the state prison sentence. Again, the trial court is governed by a set of rules or rules of court. Once more, your attorney will gather evidence lessening the sentence, what is called mitigation as well as evidence to rebut the prosecution's evidence that favors increasing the sentence or what is called **aggravation**.

In most cases, the judge has three sentencing options: the mitigated sentence, the normal sentence and the aggravated sentence. If there are multiple counts, the judge must decide if the sentences will run concurrently, meaning at the same time or consecutively meaning one followed by the other. As before, the judge has rules which govern his decisions.

One of the major roles your trial team plays during the sentencing hearing, is to ensure that the court is properly advised of the options available and the circumstances that limit the court's discretion. As the sentencing law of California is extremely complex and convoluted, it is important to have both the appellate and trial attorneys input to ensure that the defendant spends the least amount of time required by law. Every year saved at this stage is one year the defendant does not have to spend in prison. Well, even if sent to prison you can apply for bail on appeal.

Following the judgment and sentence phase your attorney will file a notice of appeal and call also file an application for bail pending appeal. The standards for bail on appeal are very different from the standards for bail pending appeal. An appellate attorney who is an expert in this area will know how to present evidence to make the client's case for bail as strong as possible. That way, should the trial court unjustly deny the bail request, it can be reviewed in the court of appeal.

What is this thing called an appeal? An appeal is very different from a trial because there is no jury and there is no new evidence presented. The appellate court can only review errors contained in the record on appeal which is why the motion for new trial is so important. You can add additional things at that time before you get to the appeal. The Court of Appeal determines if a legal error was committed that caused prejudice to your case. If the finding is in your favor, a new trial is warranted. The Court of Appeal does not decide if the jury made a mistake of fact in deciding your guilt. This is a common misunderstanding by the public. The appellate case will be decided by a three judge panel, primarily on the basis of written documents called briefs that have been filed by your team of attorneys as well as the prosecutors. It is critical that the attorney handling this part of your case have excellent research and writing skills as well as the ability to carefully select and frame the issues that are the most powerful and convincing. Special rules governing appellate court procedures differ greatly from those of the trial court and require expert knowledge and experience to address properly. Even though an oral argument may be presented before the decision is rendered, the appellate judges have usually already come to a tentative decision based upon the written briefs. This is why it's so important that the briefs be of top quality. This appeal may be the last opportunity

to overturn a conviction and ultimately regain your freedom. The skills of your attorney are critical for this to happen. At the time of the appeal, the trial attorney passes over the leadership of the team to the appellate attorney. The appellate attorney continues to draw on the expertise of the other members to guide the appellate attorney in selecting appropriate appellate issues and the evidence to support those issues. In other words, the trial team assists the appellate attorney in spotting the issues. The trial attorney is relied upon by the appellate attorney in setting up the appeal. It is now the appellate attorney's turn to present the issues in writing. This team approach ensures that all skills necessary in post-conviction stage are available to the client at all times.

What are the steps in appealing your case? An appeal is a multi-step process that can take several months or even years. Your team will obtain and thoroughly review the transcript of your trial which is your record on appeal. The attorney will also review the trial court's files and all relative exhibits that were introduced at trial to determine if the record on appeal is complete. In other words, does the Court of Appeal have everything it needs? If anything is missing, the appellate attorney will move to augment the record on appeal and make sure that the missing material is sent up from the Trial Court to the Court of Appeal. Once the complete record is on file with the Court of Appeal, the opening brief is prepared and filed. This is the key document in an appeal. It sets forth succinctly yet persuasively procedural and factual summary of the case along with carefully selected appealable issues developed along with arguments and appropriate legal authority supporting them. The prosecution then has an opportunity to file a respondent's brief that addresses those specific points made in the defendant's opening brief. After reviewing the respondent's brief, your attorney has a chance to file a reply brief to reply to the prosecution's arguments.

After the briefing stage is completed, the Court of Appeal reviews the record of all briefs as well as provides the parties the opportunity to request oral argument if necessary. The presentation of the argument takes place in front of a three judge panel that will decide the case. Once the case is finally submitted to the Court of Appeal the decision usually follows within 90 days but it can take longer. Should the decision be against the defendant a petition for a rehearing may be filed. The reason for this is that you read the court's decision and you find where they made errors of logic or law and you want to draw this to their attention. If rehearing is denied, a petition for review could be filed with the California Supreme Court within a given timeframe. If that fails there is still the possibility of going to federal court for review, but only if you have federal or constitutional issues.

Now you've just heard that no additional evidence can be added to the record. In other words: no new testimony. Whatever happened at the trial level is what goes up on appeal. There is however, an extraordinary method of getting evidence added after the trial and that is what is referred to as "a writ". Your case may present the potential for writ relief. Most commonly writs are used in conjunction with an appeal as a vehicle to present to the Court of Appeal any facts or arguments based on information that is outside of the record. A post-conviction writ can be used to establish issues that affect the defendant's right to be properly and fairly tried such as: the denial of the right to the

effective assistance of counsel, lack of lower court jurisdiction to try the defendant even if such a defense was not asserted at the trial court, suppression of material evidence by the prosecution resulting in the denial of a fair trial. In other words, after the case is over, you find out the district attorney had evidence then you can present it to the court of appeal in a writ. This is referred to as presenting newly discovered evidence. Also, proof could be introduced through the writ for an invalid or excessive sentence or an invalid probation condition. The conduct of trial counsel and its impact on a fair proper trial are related to ineffective assistance of counsel claims. The issues most commonly addressed in this kind of writ are failure to conduct a proper investigation, failure to present known and helpful witnesses, failure to make proper objections, and the failure to disclose a conflict of interest which is later discovered.