The Appellate Process

by **Gary J. Cohen**

The Appeal: "We've Only Just Begun . . ."

The civil lawsuit (a lawsuit between people or corporate entities for money) is filed. Months later, during which the lawyers have made countless tactical and legal decisions, the long and complicated trial has been completed. The jury, after reviewing all the evidence and listening to the arguments of the lawyers, has announced the verdict. A judgment, based upon this verdict, has now been entered for one of the parties. After all this, the litigation is over, and the dispute has been resolved, right?

Not necessarily. Many clients—both those who have won and lost at trial—are surprised to learn that the answer is "no." In many cases, the fight has just begun. This is because clients have the option, after the trial is over, to begin a whole new legal process called "the appeal."

What is an Appeal?

An "appeal" happens when an appellate (or "higher") court is asked to review the decision of the "lower" court. Appeals allow litigants to have trial decisions reexamined and, in some cases, reversed. In other words, a judgment for the plaintiff can be ordered to be changed into a judgment for the defendant, and vice-versa.

The basis for an appeal is that a mistake occurred during the trial process that "tainted" the decision. As such, the decision was unfair, and should be "done over."

The United States Constitution has been interpreted to require one appellate court, if asked via a "notice," to review a lower court decision. But that may not end the process. A subsequent "higher" appellate court may be "petitioned" by a party to review the decision of the first appellate court. This subsequent appellate court can decide for itself whether or not to review the initial appellate court decision.

Where do I Appeal?

To understand the proper court to which an appeal should be directed, one must understand this country's "dual court system." There are basically two court systems in the United States: 1) the state system; and 2) the federal system.

A. THE ARIZONA STATE SYSTEM.

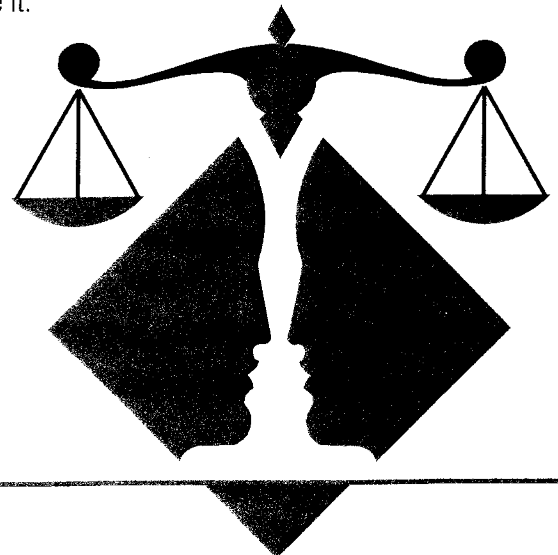
The state court system consists of 50 independent court systems—one for each state. Each state system consists of three primary courts. These three primary courts are called, generally, from lowest to highest: the trial court, the state court of appeals, and the state supreme court.

In Arizona, the state trial court is called the "Superior Court." Each of Arizona's 15 counties has a Superior Court located in the county seat. Lawsuits filed there are decided by motion or trial. The Arizona "Superior Court" also hears appeals from "sub-courts" that have jurisdiction over certain matters such as "small claims" courts, "city courts" and county "justice courts."

Appeals from decisions in the Arizona Superior Court are typically directed to the "Arizona Court of Appeals." In rare cases, an appeal may be directed from an Arizona Superior Court directly to the Arizona Supreme Court (discussed below). The Arizona Court of Appeals consists of two divisions. "Division One" is located in Phoenix. "Division Two" is located in Tucson. Although the court of appeals sits in two independent divisions, it is a single court. Division One reviews appeals from the Superior Courts of Maricopa, Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo and Apache counties. Division Two decides appeals from the Superior Courts of Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham and Gila counties. There are 15 appellate judges in Division One. Division Two has six appellate judges. Each division randomly assigns a panel of three of its judges to decide each appeal in that division.

The "Arizona Supreme Court" is the highest court in Arizona's three tiered state system. That court hears appeals from both divisions of the Arizona Court of Appeals. There are five judges in this Court. All five decide every appeal before it.

The United States Supreme Court in Washington, D.C. oversees all 50 of the highest state courts. This court is commonly referred to as "The Supreme Court." As such, an appeal from the Arizona Supreme Court is directed here. The Supreme Court consists of nine judges. All nine decide every appeal before it.



B. THE FEDERAL SYSTEM.

The trial—or lowest— courts in cases filed in the federal system are called "District Courts." There are 89 District Courts in the 50 states. District Courts also exist in Puerto Rico, the Virgin Islands, the District of Columbia, Guam and the Northern Mariana Islands. In total, there are 94 District Courts. There are three divisions of the federal District Court in Arizona: 1) Tucson; 2) Phoenix; and 3) Prescott. The Tucson division of the District Court consists of Pima, Cochise, Santa Cruz, Graham and Greenlee counties. The Phoenix division of the District Court consists of Maricopa, Pinal, Yuma, La Paz and Gila counties. The Prescott division of the District Court consists of Apache, Navajo, Coconino, Mohave and Yavapai counties.

Appeals from District Courts are directed to one of thirteen Circuit Courts of Appeal. Eleven of the Circuits are numbered 1-11. The 12th and 13th Circuits are the District of Columbia Circuit and the Federal Circuit. The Federal Circuit handles appeals in patent cases and Claims Court cases. Appeals from all three divisions of the District Court in Arizona are directed to the Ninth Circuit Court of Appeals. The Ninth Circuit is headquartered in San Francisco. It is the largest geographic federal circuit, encompassing nine western states (Montana, Idaho, Washington, Oregon, California, Nevada, Arizona, Hawaii and Alaska) and two Pacific territories (Guam and the Northern Mariana Islands).

The Ninth Circuit has 28 positions for regular active judges. As with the Arizona Court of Appeals, a randomly assigned panel of three judges decides each appeal before it.

The United States Supreme Court in Washington, D.C. oversees all 13 of the federal Circuit Courts. As such, appeals from all of the Circuit Courts of Appeal are directed to the Supreme Court.

Why do I Appeal?

Appeals are filed by a party who believes he was improperly judged in the trial court because a mistake occurred during the trial process that makes the decision unfair. The appealing party asks the appellate court to either a) completely reverse the decision of the trial court into a decision in the appealing party's favor; or b) order the trial court to withdraw the prior judgment and conduct a brand new trial.

When do I Appeal?

A party that wants to appeal a trial court's final decision must do so not later than 30 days after that court enters its judgment. This time period may be extended by the filing of certain post-trial motions. The appellate court will not consider appeals that aren't filed within the allowable time frame.

How do I Appeal An Adverse Decision From The Trial Court?

A party that wants to appeal a trial court's final decision is called "the Appellant." The other party subject to the Appellant's appeal is called "the Appellee."

To effectuate an appeal from the trial court, the Appellant must file a document with that court, called a "Notice of Appeal," along with a filing fee. This "Notice" is short and simple. It must: 1) state the title of the court and the action; 2) specify the party or parties taking the appeal; 3) designate the judgment, order or portion thereof from which the appeal is taken; 4) name the court to which the appeal is taken; and 5) be signed by the attorney or, if unrepresented, the party.

When judgment of the trial court is for money or for property not otherwise secured, the money or property is generally subject to collection (through use of the legal mechanisms such as garnishment, execution, etc.) by the party in whose favor the judgment was entered, even though an appeal has been filed. This can be prevented by the Appellant if he can somehow obtain a "stay." The general rule is that an appeal from an unconditional money judgment does not negate the right of the judgment creditor to attempt to collect from or execute on the assets of the judgment debtor. An Appellant wanting to "stay" any attempt by the Appellee to collect the judgment pending appeal should file a "supersedeas bond" in an amount approved by the trial court. This bond may be filed either before or after filing the notice of appeal. The supersedeas bond should be for a sum sufficient to cover the full amount of the money judgment, plus the anticipated costs, interest and attorneys' fees expected to be incurred on appeal. As a general rule, two years' interest on the principal amounts owed, and costs, should be added to the judgment and covered by the supersedeas bond. The amount of security required for the bond may be determined either by agreement between the Appellant and Appellee or a motion to the trial court.

What Happens After I Give Notice That I Am Appealing The Trial Court's Decision?

Once a "Notice of Appeal" has been filed, the trial court generally loses jurisdiction to enter any orders. The clerk of the trial court gathers the "record on appeal" and delivers it to the appellate court. The "record on appeal" consists of the original papers, exhibits, minute entries and other objects filed with the trial court, and a reporter's transcript of all proceedings before the trial court.

The "record" is vital to every appeal because the appellate court is not allowed to consider anything that is not a part of "the record" made to the lower court. As such, making a proper trial court record is essential to making arguments on appeal. Failure to raise a specific

(continued on Page 6)

(continued from Page 5)

ground of objection before the trial court precludes the appealing party from arguing that ground on appeal. The theory here is that trial courts should first be given the opportunity to avoid any mistakes before an appellate court can determine that a mistake was made.

Once the record has been transmitted, the appellate court notifies the appealing party to pay a docketing fee. The parties then file their legal "briefs" with the appellate court. The word "briefs" is a misnomer, as these documents are bound "books" as large as 14,000 words. The briefs set forth the legal issues, the parties' positions on those issues and the facts and legal authority supporting the party's position. The appellant files the first, "opening," brief. The appellee then files its "answering" brief. The appellant then files a "reply" brief.

Any party to an appeal may request oral argument, which can last anywhere from 10 to 30 minutes. But an appeal may be decided without oral argument if the appellate court determines it to be unnecessary. An appellate court will not consider attempts to raise in oral argument issues not properly asserted in the briefs. By the time oral argument takes place, the judges are thoroughly acquainted with the briefs, the record of the lower court, and the case law. The judges are ready to fire questions at oral argument and they expect the lawyers to give responsive answers, not evasions. This means advocates had better know every nuance of the facts and case law. The judges' last impression of a case is the oral argument, so its importance cannot be underestimated.

All Appellate Courts now have mediation programs, designed to give parties before the court the opportunity to negotiate their disputes at the outset of the appellate process. Compromises often allow the parties to achieve more creative resolutions than normally available on appeal, while also reducing their expenses and avoiding unnecessary delay.

The mechanics of decision-making differ in each of the appellate courts. In the Arizona Supreme Court, all participating justices discuss a case in conference and make a tentative decision as to its disposition after oral argument and prior to its assignment to a specific justice for opinion preparation. In Division One of the Arizona Court of Appeals, the case is assigned to a specific judge or staff attorney for preparation of a draft opinion, which is circulated to the other judges in the department prior to pre-conference and oral argument. In Division Two, the case is assigned to a specific judge to prepare a draft opinion, which is circulated to the other judges in the department prior to oral argument and which, if all parties to the appeal agree, is circulated to the parties prior to argument. In the Ninth Circuit, the judges' law clerks prepare memoranda about the appeal, recommending a particular decision to the judges, before oral argument. When the judges walk off the bench after oral argument, they go straight to a conference room to decide the fate of all appeals heard that morning.

The appellate court rules on the appeal via either written "decisions" or "opinions." "Opinions" are rulings that the appellate court determines are so significant that they become published in official legal reports. Only these officially published opinions have value as legal precedent. Unpublished "decisions" are not considered binding precedent and, as such, may not be cited as authority by lawyers to a court. Recent appellate court "decisions" and "opinions" from the various appellate courts may be found on the internet:

- *United States Supreme Court:* www.supremecourtus.gov
- *Ninth Circuit Court of Appeals:* www.ce9.uscourts.gov
- *Arizona Court of Appeals, Division One:* www.state.az.us/co/
- *Arizona Court of Appeals, Division Two:* www.apltwo.ct.state.az.us/

Attorneys' fees on appeal are recoverable if the underlying claim allows for their recovery by statute, decisional law or contract. Attorneys' fees on appeal may also be awarded as a sanction, when an appeal is frivolous, meant to delay, or is an infraction of the appellate rules.

The successful party on appeal may also recover costs incurred for the appeal. These costs include all filing fees, copying and computerized research.

Within 15 days of the appellate court's ruling, a party may ask it to reconsider its decision. Thereafter, a party may file a petition for review with the next highest appellate court.

Statistically, only about 10-20 percent of civil cases are reversed on appeal. But that statistic is misleading. Appeals of "simple" issues are lost most of the time. However, the more complex the legal issue, the better an appellant's chances of obtaining a reversal. For a number of reasons, more complex cases are given much closer scrutiny by appellate judges.

Conclusion

Clients cannot be too comfortable after a decision in the trial court. This decision could get completely reversed or withdrawn for a new trial on appeal. Good trial lawyers must be knowledgeable about the appellate process, they need to know how to "make the record" on certain legal issues to preserve the right to raise those issues on appeal. In addition, a lawyer needs to avoid making errors in the trial court so that a favorable judgment in that court will not be reversed on appeal.