FEATURE

When Is an Appeal Appealing?

Counseling clients on whether to file an appeal in Washington

BY PHILIP TALMADGE

A client's decision whether to appeal an adverse trial court civil decision is fraught with ethical, legal, and practical considerations, and the attorney counseling the client about a prospective appeal must be aware of all of them. This article is designed to provide a short checklist to assist counsel in thinking about the appropriate questions attendant upon a Washington state court civil appeal. It also provides some informal statistical analysis of success rates on appeal in the Court of Appeals and Supreme Court.

ETHICAL CONSIDERATIONS

Appeals are different from trial work, and both are different from offering transactional assistance to a client. There are special procedural rules that apply in the appellate setting.

Foremost among the ethical rules that pertain to appellate representation is RPC 1.1, requiring lawyer competence:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [1] to that rule is particularly apt:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

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Competent transactional attorneys or trial lawyers should not assume that they are competent appellate advocates. I have seen far too many briefs and arguments by otherwise competent lawyers fail because they lack expertise in appellate procedure or in the proper presentation of issues to an appellate court. Examples like jury arguments to appellate courts, briefs that read like law review articles, or briefs that present far too many issues come readily to mind.

A consultation with counsel who focus their practices on appellate work can give both the client and trial counsel a fresh perspective on the issues in the case—a very worthwhile service before a client embarks on an appeal.

And after that consultation with appellate counsel (to whom the client is often referred by trial counsel), if the client decides to retain that appellate counsel to handle the appeal, a second ethical issue can arise. Appellate counsel's duty on appeal is, of course, to the client, as opposed to any duty to the referring trial lawyer. What happens if, in preparing the appeal, it becomes clear that trial counsel committed malpractice? Does appellate counsel have a responsibility to advise the client? RPC 2.1 relating to counsel's duty to render candid advice to the client would suggest they do. Counsel has a duty under RPC 1.4 to communicate with the client regarding the representation. Arguably, as a component of that duty, appellate counsel, not responsible for the malpractice, must inform the client if the lawyer responsible for the malpractice has not done so because it is plainly a material development in the client's case affecting any appeal and any potentially related settlement discussions.

Appellate counsel may choose to confine their representation to appellate issues only, and to thereby avoid participation in such ongoing matters as settlement discussions or related cases, but the imperatives of RPC 1.2 then come into play, including the client's informed consent. RPC 1.2(c). RPC 1.2 requires any limitation on representation to be reasonable under the cir-

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cumstances. While compliance with RPC 1.2 ensures that any limitation of the representation cannot later be second guessed, it is unlikely that appellate counsel can avoid obligations under RPC 1.1, 1.4, and 2.1 by invoking RPC 1.2.

A third consideration is an attorney's ethical obligation to present only meritorious arguments to a court. RPC 3.1. Appellate counsel must carefully assess the issues the client hopes to present in light of RAP 18.7 and 18.9(a). The client can be sanctioned for filing a frivolous appeal.[1]

LEGAL CONSIDERATIONS

An array of factors enters into the analysis of whether a case is an appropriate one for appellate review. These factors are described in considerable detail in the WSBA's *Appellate Practice Deskbook* (4th ed. 2016), chapter 3, Counseling Clients on Appeal. What follows here is a quick checklist of some critical questions to be answered by counsel in assessing the viability of an appeal:

- ***Does the case involve a final judgment or an interlocutory order?*** Washington law has long disfavored interlocutory review.[2]
- ***Was the case decided on motion or after a trial?*** In general, reversals are more likely in cases resolved by motion.
- ***What was the burden of proof on the issue?*** Where, for example, the burden of proof in the trial setting is high, an appellate court's analysis of whether substantial evidence supports trial court findings is altered accordingly.[3]
- ***What is the standard of review pertaining to the issue?*** Appellate

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courts afford differing degrees of deference to trial court decisions, from the most deferential (abuse of discretion) to the least deferential (de novo review).

Counsel contemplating an appeal on behalf of a client must analyze these factors carefully to make sure the appeal is worthwhile. Moreover, while an appeal may be worthwhile on an issue or two, it may not be worthwhile on every error the lawyer thinks the judge committed. Nothing sinks an appeal faster than presentation of *too many* issues. Not only does that prevent the careful, detailed treatment of the most worthy issues (given the word limits on briefs in the appellate rules), it is a clear signal to the appellate court that counsel has not bothered to focus on the most significant issues, forcing the court to waste its time on chaff.[4] Good appellate counsel earn their reputations by being able to separate the most meritorious issues from the others and focusing their appeals accordingly.

PRACTICAL CONSIDERATIONS

Early on in the relationship between appellate counsel and the client, appellate counsel must educate the client by answering certain very practical questions:

- How does the appellate process work?
- How long will it take for the appeal?
- How much will the appeal cost?
- What happens if the appeal is won?
- Will the case impact other cases in which the client is interested?
- Is the client able to withstand the emotional toll of an appeal?

Clients who have gone through the trial process do not always understand the appeal process. They are often unaware that an appellate court will have three or nine judges, there will be no jury, new evidence is usually not allowed on appeal, the only appearance before the judges for argument may be as short as 10 to 20 minutes per side, and, if they win, further proceedings may take place before the judge that ruled against them in the first place. Counsel should explain the appellate process to clients and also explore alternatives to appeal like post-judgment motions in the trial court and mediation on appeal, where appropriate.

With regard to the duration of any appeal, and given the long-term impacts of delays caused by the COVID-19 pandemic, it is safe to say that it will require roughly 15 to 18 months from the time the notice of appeal is filed to the time of a written decision in any of the divisions of the Court of Appeals. The time varies based on the complexity of the record, extensions granted on briefing deadlines, and the time taken by the panel to prepare an opinion. The time for appellate review may be further extended if a petition for review to the Washington Supreme Court is filed; that court usually takes four to five months to decide whether to grant review. It may then take an additional 12 to 18 months for the Supreme Court to receive supplemental briefing, schedule and hear argument, and file its decision.

Any lawyer who asserts that the client will assuredly win, or who quotes a percentage chance of winning, is a fool.

The expense of an appeal can be significant, and clients need to know upfront what costs and fees they face. Clients will have to pay for the record on appeal—the trial court pleadings (Clerk's Papers) and the court reporter's transcript (Report of Proceedings)—to be submitted to the appellate court. These can be expensive. The client will need to pay your fees, and it's advisable to be clear how much those are likely to be. If the client wants to stay enforcement of a judgment, the client must post supersedeas, a bond, or other form of financial security. That cost, too, is considerable. RAP 8.1(c). Not to be overlooked is the fact that the client will necessarily bear the other side's appellate attorney fees if their opponent was awarded attorney fees at trial, RAP 18.1(a), and perhaps additional attorney fees and expenses upon remand to the trial court. It is far better for the client to be aware of these expenses before an appeal is taken than to be surprised by them as the appeal unfolds.

STATISTICAL CONSIDERATIONS

Perhaps the most frequent question posed by a client to appellate counsel is: "What are my chances on appeal?" Any lawyer who asserts that the client will assuredly win, or who quotes a percentage chance of winning, is a fool. Such precision is belied by the reality of the appellate process and the surprises appellate judges often throw our way.

However, it is possible to state certain global, statistical chances of success. With regard to motions for discretionary review, an older Supreme Court case—*In re Grove*, 127 Wn.2d 221, 235-36, 897 P.2d 1252 (1995)—noted that less than 10 percent of such motions were granted in the Court of Appeals. I have no reason to believe that those odds have changed dramatically one way or the other in recent years.

With regard to appeals generally, there is no recent published data on an appellant's odds. Historically, the chances of an appellant securing reversal of all or a part of a trial court judgment were about 1 in 3. I wanted to test that understanding. My staff obtained data from the Administrative Office of the Courts and conducted an informal study of 2017 case results. We learned that with regard to the Court of Appeals, Division I affirmed in 74.4 percent of its civil cases that year, Division II affirmed in 60.9 percent, and Division III affirmed in 73.5 percent. These numbers are necessarily rough and do not take into consideration the cases dismissed on appeal. Nor do they reflect that in some of the cases where a full affirmance did not occur, some aspects of the trial court decision may have been affirmed. But the information is pretty clear on one point—appeals are not slam dunks for civil appellants.

As to the Supreme Court in 2017, of the 611 cases (304 civil, 307 criminal), 54 involved direct review and 557 involved petitions for review (PFRs). As to the PFRs, 482 were denied, 68 granted (14 percent),

and seven dismissed. Of the 68 PFRs granted, reversals occurred in 34 (50 percent), 32 were dismissed, and two were remanded. Out of the 557 overall PFRs, 251 were civil; 38 were granted, 209 were denied (15 percent), and four were dismissed. Of the 38 PFRs where review was granted, 13 affirmed the Court of Appeals, 23 reversed the Court of Appeals (60 percent), and two were remanded.[5] It's tough to get to the Supreme Court, but petitioners fare pretty well there if review is granted.

A client needs to appreciate that even if the appeal is successful, it is rare that an appellate court awards judgment to a party. Instead, it is far more common for the appellate court to reverse an order of dismissal or summary judgment, allowing the case to go forward, or to order a new trial. Critically, the client needs to know that this will often mean that the same judge who committed reversible error will be handling the case on remand.

There are instances where an appeal may have implications for the client in other cases. A decision in Washington may be cited for or against the client in similar litigation elsewhere. This is particularly important for institutional clients engaged in extensive litigation. Counsel should explore this impact carefully with the client.

Finally, an important consideration for many clients is the emotional toll of continuing with a lengthy appeal and potential additional trial court proceedings on remand. Some clients simply cannot tolerate the protracted litigation process, and appellate counsel must assess that tolerance. BN

NOTES

1. Streater v. White, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980); Philip Talmadge, *et al.*, "When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions," 33 Seattle U.L. Rev. 437, 451-53 (2010).
2. Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).
3. In re Disciplinary Proceedings Against Marshall, 160 Wn.2d 317, 330, 157 P.3d 859 (2007) ("Our substantial evidence review should...take into account the clear preponderance burden of proof.")
4. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs hunting for truffles buried in briefs.").
5. My firm has filed 105 PFRs since 2001; review has been granted in 22 (20.9 percent).