

CLAIMS ON APPEAL:

A PRIMER ON THE APPELLATE PROCESS FOR CLAIMS
PROFESSIONALS



CLAIMS ON APPEAL: A PRIMER ON THE APPELLATE PROCESS FOR CLAIMS PROFESSIONALS

Presented by Hinkhouse Williams Walsh LLP, Chicago, Illinois

I. INTRODUCTION

II. COURT STRUCTURE

A. Trial court

1. Court of first impression
2. Fact-finding court

B. Intermediate appellate courts

1. Function is to correct errors in law
2. Appellate courts do not serve as fact finders

C. Supreme Courts

1. Courts of last resort
2. Generally cannot seek relief as a matter of right
3. Usually reserved for cases involving a conflict among lower courts or to decide issue of important public policy

III. TRIAL PROCEEDINGS

A. Goals at Trial

1. Obtain a favorable judgment while simultaneously litigating case with an eye toward possible appeal
2. Preserve all appellate issues (and maintain a clean record) or risk waiver throughout the pre-trial and trial proceedings

B. Ways to Preserve Appellate Issues

1. Dispositive Motions
2. Motions *in limine*
 - a. Can be used to seek exclusion or admission of certain evidence at trial
 - b. However, a motion *in limine* generally does not preserve an issue for appeal if there is no contemporaneous objection at least the first time the evidence is offered at trial
3. Objections During Trial And Opening And Closing Arguments
 - a. Trial counsel must balance his or her obligation to protect the record with need to act strategically in front of a jury
 - b. Counsel must lodge appropriate objections
 - c. Even reversible error will not be grounds for appeal if trial counsel does not properly preserve issue through an appropriate objection
4. Other Submissions
 - a. Draft orders
 - b. Proposed jury instructions
 - c. Use of special verdict forms
5. Post-trial Motions

- C. Make an Appellate Record during Trial
1. Anything that is not filed with the court, entered into evidence, or transcribed will not be considered by an appellate court
 - a. offer of proof for excluded evidence
 - b. record side bar conversations
 - c. make sure all objections are on the record
 - d. get necessary demonstrative exhibits admitted into evidence

IV. AFTER AN ADVERSE JUDGMENT

A. Immediate Issues

1. Post-Trial Motions/Motions for Reconsideration
2. Stay of Execution of Judgment

B. Deciding Whether To Appeal

1. Are there appealable issues
2. Evaluating the chances on appeal
3. Standard of Review--The more difficult the standard of review, the less likely an appeal will be successful
 - a. Against the Manifest Weight of the Evidence
 - b. Abuse of discretion
 - Usually for evidentiary issues
 - Pursuant to this standard of review, the appellate court gives deference to the lower court's view of the evidence, and reverses its decision on if it were a clear abuse of discretion
 - Abuse of discretion is usually defined as a decision outside the bounds of reasonableness
 - The appellate court normally gives less deference to a lower court's decisions on issues of law and may reverse if it finds that the lower court applied the wrong legal standard
 - Examples of issues reviewed for an abuse of discretion: evidentiary issues; jury instructions
 - c. De Novo
 - Court will review the lower court's decision completely
 - De novo review is used for clear questions of law
 - This may be the proper standard of review if the lower court resolved the case by granting a pre-trial motion to dismiss or a motion for summary judgment which are usually based on written submissions and not trial testimony
 - Examples of issues reviewed de novo: summary judgment; jurisdictional issues; motions to dismiss
4. Will appealing the judgment induce a settlement for less than the judgment?
5. Legal fees and costs
 - a. Attorneys fees
 - b. Supersedeas bond
 - c. Post-judgment interest (begins accruing at time of verdict)
 - d. Fee-shifting statute

- C. Use of appellate counsel
1. Issue Dependant – A strong appellate advocate often will be a wise choice for a legal issue, while trial counsel may be best suited to appeal an issue with a basis in fact
 2. Unbiased review of trial court record
 3. Cost/benefit analysis
 4. Familiarity with process
- D. Interlocutory or Final Appeals
1. Final
 - a. All issues and parties disposed of
 - b. Must appeal or judgment is final
 - c. An appeal from final judgment generally will allow appeal of all other orders or rulings made by the trial court in the course of the case
 2. Interlocutory
 - a. Judgments as to fewer than all parties or all claims
 - b. Often discretionary
 - c. Examples of critical interlocutory orders are the denial of a request for an interim injunction, or holding a party in contempt
 - d. Requirements:
 - Clear error
 - Irreparable harm
 - Inadequate alternative remedy
 - Strict adherence to technical rules

V. APPELLATE PROCEDURE

- A. Strict Compliance Is Required
- B. Stay of enforcement of judgment—supersedeas bond required to stay execution of judgment
1. Usually statutory; the amount of judgment plus interest
 2. Defending insurer often must pay for costs for but not always required to furnish depending on policy language
- C. Notice of Appeal
1. The notice of appeal required varies greatly by jurisdiction
 2. The appellant required to file notice in the appellate court or the court from which the appeal is taken
 3. The deadline for beginning an appeal is often very short, and varies by jurisdiction
 4. The timing requirement is jurisdictional and must be strictly complied with
 5. All orders to be appealed must be included
- D. The Record on Appeal
1. Common Law Record
 2. Report of Proceedings/Transcripts
 3. Exhibits

4. Parties may only include what was before the trial court
- E. Briefs
1. Framing the issues
 2. Present best arguments first
 3. Strict compliance with formatting guidelines set forth by court
 4. Must include basis for jurisdiction
 5. Statement of facts supported by record citations
 6. Clear and well-supported legal argument
- H. Oral Argument
1. Not guaranteed
 2. Should be used primarily to respond to judges' concerns about weaknesses in case
- I. Decision on Appeal
1. Possible Outcomes
 - a. Affirmance if the appellate court finds no error in law or abuse of discretion
 - b. Partial affirmance—The Court may modify some portion of the judgment
 - c. The appellate court may also remand or remit the case to the lower court for further proceedings (e.g. new trial) to remedy the defect
 2. Request for rehearing or en banc hearing
 3. Further Appeal to Supreme Court

VII. INSURER'S CONSIDERATIONS

- A. Primary Insurer's Rights and Obligations
1. Insurer's Obligation to Appeal
 - a. Absent an express provision to the contrary, the primary insurer's duty to defend includes the duty to seek post judgment relief where reasonable grounds to believe a substantial interest of the insured may be served or protected by appealing the judgment
 - b. An insurer cannot truncate its defense obligations by leaping to pay a questionable judgment or claim – it must first in good faith establish the validity of such judgment before paying out its limits and ceasing to defend
 - c. Advice of counsel is an important consideration, but it is not wholly determinative of whether reasonable grounds to appeal exist
 2. If no duty to appeal, insurer may tender limits by relinquishing all claim to the payment regardless of whether the verdict is reversed on appeal
- B. Excess Insurer's Rights and Obligations
1. Right to appeal at its own cost when primary insurer and insured elect not to appeal
 2. Right to associate in the appeal if the judgment is excess of the primary limits

SUPREME
COURTS

INTERMEDIATE
APPELLATE
COURTS

TRIAL COURT

COURT STRUCTURE

COURTS OF FIRST IMPRESSION

FACT-FINDING COURT

TRIAL COURTS

FUNCTION IS TO CORRECT ERRORS IN LAW

DO NOT SERVE AS FACT FINDERS

INTERMEDIATE APPELLATE COURTS

COURTS OF LAST RESORT

CANNOT SEEK RELIEF AS MATTER OF RIGHT

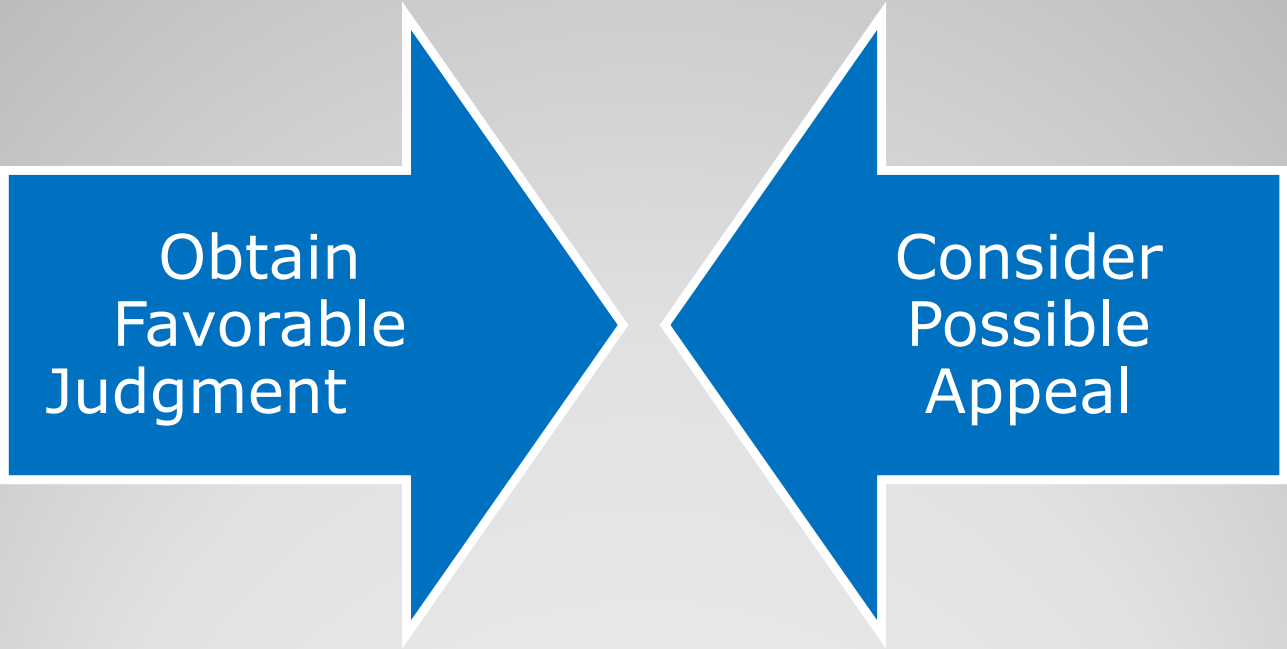
DECIDES CONFLICTS IN LOWER COURTS OR PUBLIC POLICY ISSUES

SUPREME COURTS



TRIAL PROCEEDINGS

CREATING A STRONG APPELLATE RECORD



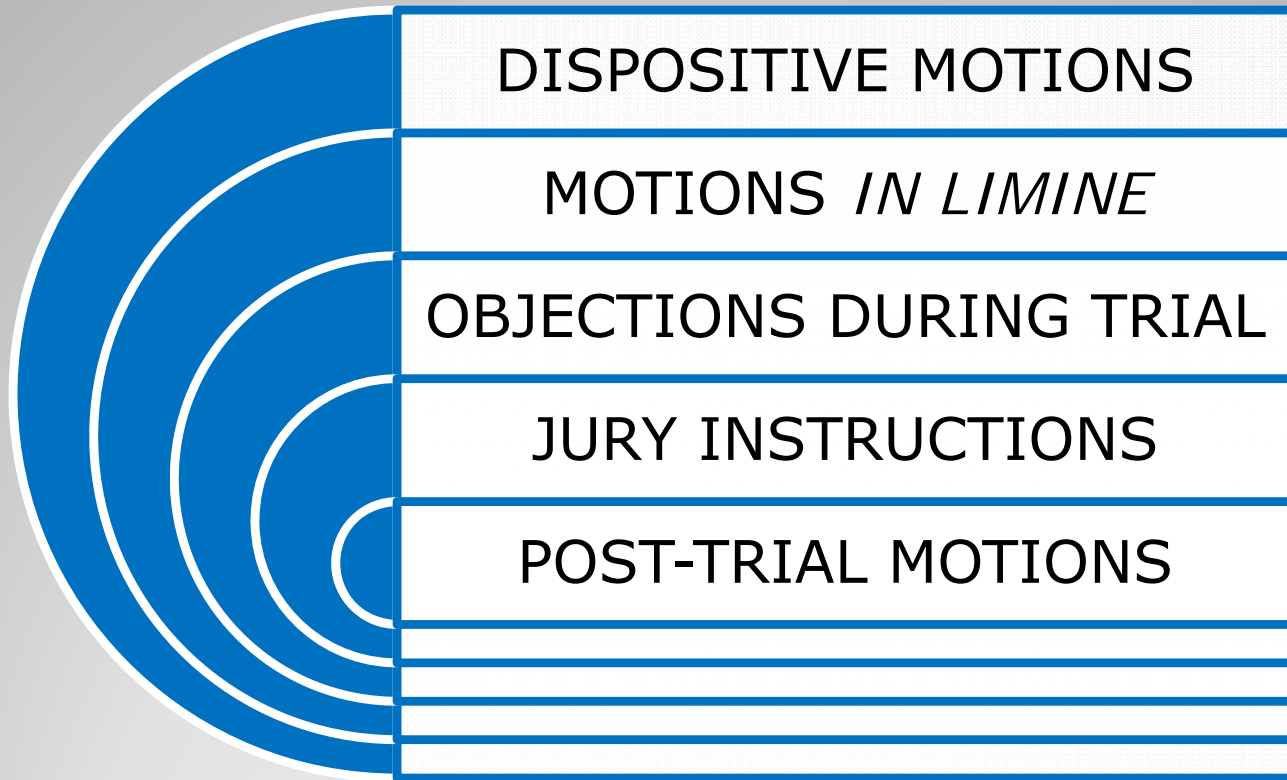
Obtain
Favorable
Judgment

Consider
Possible
Appeal

**GOALS DURING PRE-TRIAL AND
TRIAL PROCEEDINGS**

- PRESERVE ALL APPELLATE ISSUES DURING TRIAL AND PRE-TRIAL PROCEEDINGS OR RISK WAIVER
- MAINTAIN A CLEAN RECORD

CONSIDER POSSIBLE APPEAL



PRESERVING APPELLATE ISSUES

MOTIONS *IN LIMINE*

Used to exclude
or admit
evidence

Does not
preserve issue
for appeal
without
contemporaneous
objection

- TRIAL COUNSEL MUST BALANCE HIS OR HER OBLIGATION TO PROTECT THE RECORD WITH NEED TO ACT STRATEGICALLY IN FRONT OF JURY
- COUNSEL MUST LODGE APPROPRIATE OBJECTIONS
- EVEN REVERSIBLE ERROR WILL NOT BE GROUNDS FOR APPEAL IF TRIAL COUNSEL DOES NOT PROPERLY PRESERVE ISSUE THROUGH AN APPROPRIATE OBJECTION

OBJECTIONS

- DRAFT ORDERS
- PROPOSED JURY INSTRUCTIONS
- USE OF SPECIAL VERDICT FORMS

OTHER SUBMISSIONS

- AN APPELLATE COURT WILL ONLY CONSIDER:
 - DOCUMENTS FILED WITH THE COURT
 - DOCUMENTS OR TESTIMONY ENTERED INTO EVIDENCE
 - TESTIMONY OR ARGUMENTS TRANSCRIBED BY A COURT REPORTER

MAKE AN APPELLATE RECORD AT TRIAL

- MAKE AN OFFER OF PROOF FOR EXCLUDED EVIDENCE
- RECORD SIDE BAR CONVERSATIONS
- ENSURE THAT ALL OBJECTIONS ARE MADE ON THE RECORD
- GET NECESSARY DEMONSTRATIVE EXHIBITS ADMITTED INTO EVIDENCE

MAKE AN APPELLATE RECORD AT TRIAL

AFTER AN ADVERSE JUDGMENT

POST-TRIAL AND APPELLATE ISSUES

POST-TRIAL MOTIONS

MOTIONS FOR RECONSIDERATION

STAY OF EXECUTION OF JUDGMENT

IMMEDIATE ISSUES



Are there appealable issues?



What are chances on appeal?



What will be the standard of review?



Will appealing induce a favorable settlement?



What are the potential legal fees and costs?

DECIDING WHETHER TO APPEAL



Required to stay execution of judgment

Usually statutory

Equals the amount of judgment plus interest

Supersedeas Bond

- “The cost of bonds, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.”
- “premiums on appeal bonds required by law to appeal any claim or suit we defend, but we are not obligated to apply for or furnish any such bond”
- Bond premiums included within definition of “defense costs”

Sample Policy Language

- FINAL = Disposition of all issues and parties
- INTERLOCUTORY = Judgments as to fewer than all parties or all claims
 - Governed by Court Rules
 - *e.g.*, Ill. S. Ct. R. 304(a), requires finding that there is “no just reason for delaying either enforcement or appeal”

FINAL V. INTERLOCUTORY APPEAL

STANDARD OF REVIEW

- VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE
- ABUSE OF DISCRETION
- DE NOVO





The judge always wore a crown when he made rulings that could only be overturned by the “abuse of discretion” standard to let everyone know... “This is it, baby.”

c.07CharlesFincher02.19.07 Scribble-in-Law at LawComix.com

ABUSE OF DISCRETION

- Appellate court defers to lower court unless a clear abuse of discretion
- Abuse of discretion is usually defined as a decision outside the bounds of reasonableness
- Examples of issues reviewed for an abuse of discretion:
 - Evidentiary issues
 - Jury instructions

ABUSE OF DISCRETION

- Appellate court will review the lower court's decision completely
- This may be the proper standard of review if the lower court resolved the case by granting a pre-trial motion to dismiss or a motion for summary judgment
- De Novo review is used for clear questions of law
- Examples of issues reviewed de novo:
 - Summary judgment
 - Jurisdictional issues
 - Motion to dismiss

DE NOVO

ATTORNEYS'
FEES

SUPERSEDEAS
BOND

FEE-SHIFTING
STATUTE

POST-
JUDGMENT
INTEREST

LEGAL FEES AND COSTS

PROS

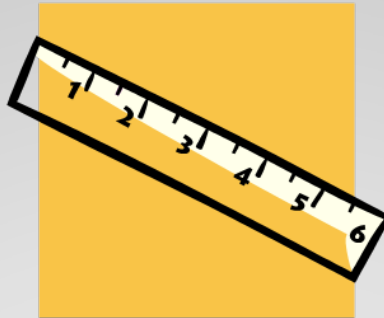
- USING APPELLATE COUNSEL IS OFTEN A WISE CHOICE FOR A LEGAL ISSUE
- UNBIASED REVIEW OF TRIAL RECORD
- FAMILIARITY WITH THE PROCESS

CONS

- TRIAL COUNSEL MAY BE BETTER SUITED FOR AN APPEAL ISSUE BASED ON FACTS
- MAY BE MORE COSTLY THAN USING TRIAL COUNSEL

DETERMINING WHETHER TO USE APPELLATE COUNSEL

- STRICT COMPLIANCE IS REQUIRED!!!!



APPELLATE PROCEDURE

- The Notice of Appeal required varies by jurisdiction.
- The appellant is required to file notice in the appellate court or the court from which the appeal is taken.
- The deadline for beginning an appeal is often very short and varies by jurisdiction.
- The timing requirement is jurisdictional and must be strictly complied with.
- All orders to be appealed must be included.

Notice of Appeal

Common Law Record

Report of Proceedings/Transcripts

Exhibits

Parties may only include what was before the trial court

The Record on Appeal

- Frame the issues
- Present best arguments first
- Strict compliance with formatting guidelines set forth by court
- Must include basis for jurisdiction
- Statement of facts supported by record citations
- Clear and well-supported legal argument

Briefs

- Not guaranteed
- Should be used primarily to respond to judges' concerns about weaknesses in the case

Oral Argument

- Possible Outcomes:
 - Affirmance – if the appellate court finds no error in law or abuse of discretion
 - Partial affirmance – if the appellate court modifies some portion of the judgment
 - Remand and Remittur – if the appellate court orders the lower court to conduct further proceedings to remedy the defect
- Request for rehearing or en banc hearing
- Further appeal to Supreme Court

Decision on Appeal

INSURER'S CONSIDERATIONS

RIGHTS AND OBLIGATIONS OF PRIMARY AND EXCESS
INSURERS AFTER ADVERSE JUDGMENT

- Duty to appeal where reasonable grounds to believe a substantial interest of the insured may be served or protected
- If no duty to appeal, insurer may tender limits by relinquishing all claim to the payment regardless of whether the verdict is reversed on appeal

PRIMARY INSURER

- Right to appeal at its own cost when primary insurer and insured elect not to appeal
- Right to associate in the appeal if the judgment is excess of the primary limits

EXCESS INSURER



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