The Likelihood of Success (or Failure)

The Evaluation of Judgments for Appeal

By Anthony J. Russo

A useful pre-appeal checklist, as well as insights on the chances of winning and costs of losing an appeal.

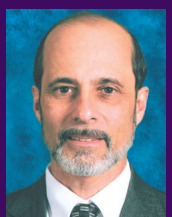
The lawyer's work is not over when a judgment is entered. Win or lose, both parties must know whether that judgment will withstand an appeal. If the judgment is built on reversible errors, why would the losing party not appeal? And how could the winning party, knowing its victory was vulnerable, rest? And so, win or lose, the lawyers must assess the judgment, and the clients must understand whether that judgment would likely stand or fall on appeal. Because litigation is not science, the outcome of an appeal cannot be predicted with certainty. But that is not to say that a judgment is beyond evaluation. It is not just "another throw" of the dice, as Andrew Bierce defines "appeals" in his *Devil's Dictionary*. Lawyers can provide a client with more than an off-the-cuff, simple percentage-chance judgment of winning or losing. Facts, not intuition or hopes, must guide analysis of the judgment.

This article provides a pre-appeal checklist of questions that, when answered, provide the lawyer with a consistent, comprehensive, and more objective means of evaluating a judgment, enabling the lawyer to more reliably foretell the likely fate of the judgment in the appellate court. The lawyer can use this checklist as an outline for the post-judgment report to the client. The client can use it to assure the judgment has been thoroughly vetted.

Appeals are conducted according to established rules and procedures. Each appellate case is based on an unchanging record. The results of past appeals of similar judgments are documented in case opinions, and that precedent can be used to forecast the likely treatment of the client's fresh judgment. Analyzing this large, but not infinite, volume of information, the lawyer can methodically develop a sophisticated, more objective, and helpful analysis of the judgment. If the client lost the judgment, then the client can use this forecast in deciding whether to appeal, or instead to just pay and move on. If the client won the judgment, the client can decide whether to fight any appeal, or instead work towards a settlement.

The Quick Look: What Do the Numbers Say?

While a percentage estimate of success is a



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useful shorthand device for expressing the outcome of a considered judgment, it must not be mistaken as constituting considered judgment. That said, both lawyer and client should have a feel for the raw affirmance and reversal rates in the appellate court that will review the judgment. These numbers provide an important indication of the appellee's advantage and the appellant's burden.

The United States Department of Justice, Office of Justice Program, and its Bureau of Justice Statistics (http://www.ojp.usdoj.gov/bjs/pub/ascii/agctlc05.txt), provides a comprehensive evaluation of the fate of civil appeals in the federal court system. And each circuit court generates its own annual reports of its caseload, case dispositions, time to resolution, and similar useful information. More information may be obtained with a telephone call to a circuit court administrator, or the appellate court mediator. Many state appellate court administrators maintain similar records, and a phone call to the clerk's office can yield a trove of helpful information about rates of reversal and affirmance of judgments based on summary judgments, verdicts, dismissals, and the like.

What Is the Error, Exactly?

If the work of a trial court is to determine the truth, then the work of the appellate court is to find and correct error in the trial court's processes or rulings. Appeals are taken from specific, identifiable rulings, not from the general result of a trial court proceeding. The appellate court will not embark on a second, wide-ranging voyage in search of the truth. It will examine only rulings on motions or objections that have been preserved and presented by the appellant.

The list of potential errors is as long as the list of orders a trial judge makes in the course of a case. Whatever the suspect ruling may be, it must be isolated in the record, meaning the exact language in the written order, or the exact line and page from the trial or hearing transcript, must be identified. The language must be confirmed to actually constitute a ruling, and any transcript that contains the verbal ruling must be confirmed to be a part of the record.

This process requires the lawyer to assess what we might characterize as the quality of the ruling, because not all rulings are created equally. The life of a case in the trial court may contain dozens of motions, written or spoken, and as many hearings and rulings. Each hearing likely contains colloquy where the trial judge converses with, and questions, counsel. The judge may ruminate aloud, and may appear to rule, and then may refine or even reverse the ruling. The issue may be addressed in multiple hearings and motions. And what do the written orders issued after the hearing say, and are they consistent? Is the written ruling complete and clear, and was it superseded by subsequent rulings, waiver, or rendered moot by events? All these circumstances affect the vitality of a ruling, and will affect how the appellate court will view it.

Isolating the ruling is half the task. The other half is confirming exactly how the ruling is erroneous. The lawyer must be able to plainly explain whether and how the trial court ruling was, or was not, erroneous. Did the trial court apply the right statute or case precedent? Was the contract or statute properly construed? Were the appropriate legal principles applied to the right facts? Were the facts properly admitted? This is the stuff of legal research and analysis. If this work is performed soon after the judgment is entered, the lawyer can provide superior counsel to the client who will then enjoy a superior vantage point as they move into the post-judgment phase of the case.

Can the Appellant Show the Error Was Harmful?

Litigants are not guaranteed a perfect trial, and not every mistaken ruling requires correction. To serve the goals of economy and common sense, an appellate court will not reverse a judgment if the result would have remained the same even if the erroneous ruling had not been made. This universal principle is embodied in the harmless error rule, stated explicitly in Fed. R. Civ. P. 61: "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

Ask, can the appellant show the appellate court a direct connection between the erroneous ruling and the challenged judgment? Assessing whether the harmless error doctrine applies to a ruling is more art than science because of the inherent uncertainty attending predictions of outcomes dependent on multiple variables. Perhaps a party placed great hope in the expected factual testimony of a witness, and the witness was improperly barred from testifying about those facts. But perhaps the facts found their way into the record in some other fashion. Did the improper exclusion make any difference? Perhaps some count in the complaint or an affirmative defense was improperly stricken on the eve of trial, but the party could not adduce evidence on a key element of that claim or defense. What would be the ultimate harm?

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Counseling a client that an error was harmless may not be welcome news to the client who is mightily distressed by an obvious error, and who is filled with hope that the adverse judgment can be reversed on the back of the trial court's mistake.

Was This Error Preserved?

Error will be corrected by an appellate court only when it is preserved with an appropriate objection, with certain limited exceptions. If the error is not preserved, it is, in essence, waived. This principle promotes greater accuracy in trial court proceedings by forcing the parties to provide the trial judge with an opportunity to correct any error before the ruling is made final, or the judgment is entered.

Lawyers know preservation requires objections, and in some cases, such as juror selection and jury instructions, preservation requirements can be complex and arcane. Mistakes are easy to make. Sometimes objections are withheld as a tactic to avoid emphasizing a point to the jury, or to avoid starting an evidentiary battle that cannot be won at that point in the case. Objections may not appear to be justified or required at the time of the hearing, but only with the benefit of hindsight.

When the post-judgment review of the record shows the lawyer failed to timely or fully or properly object, the lawyer should understand whether the omission was justified, an intentional gambit, or an error. Frank communication between lawyer and client on these sensitive topics is required, because either the lack of preservation can be worked around, or the issue must be dropped. An issue not preserved will not prevail, and taking it to an appellate court will only succeed in undermining the court's confidence in the balance of the party's presentation.

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What Standard of Review Will the Appellate Court Apply?

To appreciate the true risk and burden on appeal, the parties must understand the distinct standard of review the appellate court will apply to the variety of rulings and findings that may be appealed. The principal standards include the substantial evidence rule, the clear error rule, de novo review, abuse of discretion, plain error, and harmless error rules. FED. R. APP. P. 28(a)(9)(B) requires the parties to state in their briefs "a concise statement of the applicable standard of review." The historical note to this 1993 amendment explains that "requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard."

These standards dictate the deference that will be accorded the trial court or trier of fact, and the burden the appellant must meet to obtain appellate relief. No analysis of a judgment would be complete without careful consideration of the standard of review. For purposes of illustration, a jury's verdict that is supported by substantial evidence, meaning any evidence that a rational person would conclude supports the finding, will not be reversed, even if other substantial, conflicting evidence has been presented. Attacking a jury's verdict means showing a total lack of proof on some essential element of the claim or defense, a task that may be insurmountable for an aggrieved litigant.

To illustrate the subtlety that can attend this analysis, when this same fact finding is performed by a judge, the appellate court will set the finding aside only if it is clearly erroneous, FED. R. CIV. P. 52(a), "[T]he canonical formulation of the clearly erroneous standard is that it requires for reversal that the reviewing court have 'a definite and firm conviction that a mistake has been committed.'" *Reynolds v. City of Chicago*, 296 F.3d 524, 527 (7th Cir. 2002).

In contrast to the great deference accorded the trial judge's or jury's finding of fact, is the lack of deference given to the trial court's legal rulings. *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991). Appellate courts are ideally suited to review legal decisions and correcting legal errors. Everything the appellate court needs for this task is contained in the finite record and the collected jurisprudence of the jurisdiction.

The standard of review of mixed questions of law and fact is less settled, more nebulous, and thus presents a greater challenge in evaluating a judgment and predicting the course of an appeal. Many federal circuit courts will review these decisions de novo, but the precise nature of the ruling alleged, whether it is fact-based, or law-based, may affect the type of review accorded by the reviewing court.

Finally, a great number of orders fall into a category of discretionary rulings. Discretion has been defined as "[t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court…." *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942). When the decision rests on the superior vantage point of the trial judge, who is familiar with the totality of the case, the behavior of the parties, and the course of proceedings, the appellate court will not disturb the ruling unless the judge has abused that discretion.

In reviewing discretionary acts of the trial judge for abuse, the appellate court will look past minor imperfections in orders and ignore reasonable alternative rulings that could have been made. "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Delno*, 124 F.2d at 967. Need it be said the party attacking such an order faces a steep climb?

This discussion is intended only to illustrate, and not to exhaustively portray, the variety and nuances of appellate standards of review. It is enough to say good analysis of a judgment will always include a thorough understanding of the standard of review the appellate court will apply to the asserted errors.

What Legal Authority Will the Appellate Court Apply?

Either the trial court did, or did not, correctly apply the right rule, statute, or case precedent. If the losing party concludes the trial court has misapplied the controlling law, then it can appeal and present a straightforward legal question to the appellate court. But what if the losing party concludes the trial judge properly applied the applicable law, but the law should be changed? Is there still a basis to appeal? "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Model Rule of Prof'l Conduct, R.3.1. Arguing for a change in the law may be justified, but the lawyer must assure the client understands the heavy burden of taking on such a position, and the unique nature of the arguments that will be made to support such a challenge.

If the victorious party concludes the trial judge has misapplied the law in reaching its judgment, what can it do? That party is duty-bound to concede error to the appellate court. "A lawyer shall not knowingly… fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by

opposing counsel." Model Rule of Prof'l Conduct, R-3.3. A strategic retreat, in the form of a negotiated settlement, may be a good alternative to the appeal. But remember, the winning party may assert any basis in the record for affirmance, whether relied on by the trial judge or not. Arguments made below that support the judgment as it is entered may be raised by the appellee. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924) ("But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.").

Finally, there may be no authority that controls the client's exact question. Or there may be conflicting authorities, giving the parties considerable leeway to make their arguments. Litigants must proceed warily into appellate proceedings if the relief they seek, or the judgment they want to uphold, is not justified by clearly applicable law.

The lawyer and client must consider the public policy behind the applicable law in evaluating the judgment. Is the statute at issue designed to protect consumers, or to discourage frivolous lawsuits? Does the appeal involve a settlement agreement or arbitration clause that courts strive to uphold, or does it involve enforcement of a contract of adhesion or a penalty clause, abhorred by the law?

The limits of legal analysis and prognostication must be respected when there is no controlling law and the general principles are in conflict. For instance, will a court uphold a plainly insufficient settlement agreement between an insured and its insurer? When no law plainly applies, and the policies guiding adjudication are conflicting, accurate prediction of the outcome of an appeal is simply unattainable.

What Is the Appellate Court's History of Disposition of Similar Appeals?

The collected precedent of an appellate court on similar questions can provide either comfort or a reality check for a litigant who finds either abundant or little precedent for the position he or she will espouse on appeal. Uncovering the recent history of the appellate court on an issue is an easy matter in these days of Internet research. If your client is a products manufacturer, how has the court ruled on other product liability cases in the past five to ten years? What was the posture of those cases as they entered the appellate system, what were the questions presented, and how were they resolved? Has the composition of the court changed since those rulings? Analyzing the prior work of a court on your particular issue provides one more objective basis for projecting the likely fate of the judgment on appeal.

What Record Evidence Supports or Contradicts the Ruling or Judgment?

The fate of the judgment often hinges on some particularly important documents and testimony. The admission and use of this evidence is controlled by a myriad of evidentiary rules and common law doctrines. Ideally, the application of those rules and doctrines was thoroughly explored during the pre-trial period. But the appellate lawyer must review the work of the trial team and the rulings of the trial judge to determine anew whether the evidence was properly authenticated and admitted, if used, or if refused, then properly proffered.

This process requires the lawyer to review the testimony, study the exhibits, and match the elements of a cause of action or defense to specific admitted evidence. Documenting the line and page of testimony, or the specific critical exhibits, assures the appellate lawyer and client can correctly analyze the strength of the evidentiary basis of the cause of action or defense, and the durability of the judgment. This work can form the basis of the parties' positions on appeal. To avoid unpleasant surprises after the course has been set and the appeal undertaken, it is better to perform this work at the evaluation stage of the appellate process, rather than at the briefing stage.

The lawyer must assure that the client understands that facts matter in different ways in different appeals. Sometimes the true facts are not all that important. If the judgment is based on a motion to dismiss, the facts alleged in the complaint, if plausible, are accepted as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). By contrast, facts sworn to, but contradicted, will block a summary judgment, but only if they raise "genuine issues of material fact that may significantly affect the outcome of the matter. . . ." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

At the far end of the spectrum, even established facts that contradict a jury's verdict can be disregarded on appeal. A judgment based on a jury's verdict will be overturned only where "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [a] party with respect to [an] issue." *Flowers v. Southern Reg'l Phys. Serv. Inc.*, 247 F.3d 229, 238 (5th Cir. 2001). A jury's verdict will be affirmed unless the facts and inferences point "so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1322 (5th Cir. 1994).

What Can Be Accomplished with an Appeal?

"Winning" in the appellate court can mean many different things. Appellate courts do more than simply affirm or reverse judgments, and the lawyer must assure that the client is familiar with the array of relief that an appellate court may provide, and what outcomes are possible. Only by knowing the options can the client make an informed decision on how to proceed. The appellant client who thinks that a reversal would mean a judgment in its favor may not be happy winning only a new trial to be conducted by the same judge who entered the adverse judgment in the first place.

The client must also understand that an appellate court can affirm a judgment with or without an opinion, or it can reverse on some, but not all, issues raised. It can remand a case for further proceedings, with or without specific directions. Knowing the history of dispositions of prior, similar cases in the appellate court can be a useful guide to forecasting the treatment of your client's case.

The parties should not overlook the value of mediation during the appellate process. Post-judgment mediation is a far different affair from pre-judgment mediation. If the pre-judgment mediation were akin to a game of poker, then in post-judgment mediation, the hand would be finished, all the cards would be face up on the table, the size of the pot would be known, and one player would have won all the chips. This makes for a different kind of mediation.

And because the focus of the appeal will be far narrower than the focus of the trial, there will be far fewer variables to consider, often facilitating the decision-making process at this stage of the case.

Two Questions for the Corporate Client: Do I Want to Transmute This Judgment into Binding Precedent, and Am I Being Consistent Across Jurisdictions?

For the corporate litigant, an adverse judgment can be financially painful, but that pain goes no further than that single case. But what if that judgment contains an interpretation of the company's standard contract, or a ruling on the legality of a regular business practice? An appellate opinion that affirms or reverses such a judgment will constitute binding precedent that can have a wide effect on the company's business. The company's decision to appeal, and the position to take on appeal, must be based on a thoughtful review by the company's in-house counsel. Outside counsel can facilitate this review with the analysis suggested by this checklist. But, in the end, appeals that involve corporate policy or core business processes or practices are a matter requiring direction from the corporation's leadership.

The corporate client must also consider the legal position it has taken in cases involving its core business practices or standard contracts in other jurisdictions. Outside counsel may not be aware of the company's litigation strategies or history in all jurisdictions. Many corporations maintain national monitoring counsel for just this purpose. It hardly need be said that if the corporation asserts contradictory legal positions in different jurisdictions, it can suffer far more than mere embarrassment when the contradictions are made known to the court. Finally, these concerns matter to both parties. The savvy opponent of the corporate litigant will know the corporation's litigation position elsewhere and must be able to gauge the corporation's perception of the importance of the appeal.

What Will an Appeal Cost, and Is It Worth It?

Not every judgment must be appealed. Sometimes a judgment is too small to matter, or too important to leave to the appellate court. The client must decide whether to engage the opponent at the appellate level, or instead forego a possible appeal, or settle a vanquished opponent's claim. The lawyer can help the client make this decision by providing a projection of the likely expense, time frames, and possible outcomes of an appeal.

Experienced appellate lawyers can usually project the likely number of hours they will need to prosecute various types of appeals. Generally, the only significant cost is likely to be the expense of an appellate bond. The average time from filing to disposition can be determined by checking with the court's administrator. A simple budget for an appeal will include projections of the time to review the relevant depositions and trial transcripts, court filings, and consultations with trial counsel. Specific tasks common to all appeals include writing the client's briefs, and analyzing the opponent's briefs. Motion practice should be anticipated, although it is not usually significant. However, contested motion practice on jurisdictional questions, attorneys' fees, or motions for rehearing, can require substantial legal work.

Conclusion

Both in-house and outside counsel charged by their clients with evaluating the outcome of lawsuits, and determining whether an adverse judgment should be appealed, or assessing the prospects that a favorable judgment will be upheld on appeal, must base their analysis on facts, not intuition or hopes. Appeals are decided in accordance with established principles, case precedent, rules of procedure, and a finite record. The lawyer's analysis of these elements of adjudication will benefit from the rigor imposed by following a comprehensive checklist of questions that, when answered, provide a correspondingly comprehensive assessment of the judgment. This comprehensive assessment serves the client by providing a solid understanding of the likely outcome of an appeal.