Worth the Time and Effort

Preparing Effective Appeal Assessments

By Melinda S. Kollross

Given the costs of appellate litigation, sophisticated business and insurance clients are increasingly requesting a formal "appeal assessment."

When faced with an adverse ruling on a significant procedural or substantive motion—or a "bad" jury verdict—one of the first things that many clients want to know is whether they can obtain relief on appeal. Only in very limited circumstances will a quick, off-the-cuff answer from trial or appellate counsel suffice. Given the costs of appellate litigation, sophisticated business and insurance clients handling high-profile and large exposure matters are increasingly requesting a more formal "appeal assessment" from their trial counsel or any previously or newly retained appellate counsel or combinations of them. In some instances, more than one appeal assessment may be sought and considered to evaluate case strategy going forward. That is especially likely if multiple layers of insurance are involved, or if an insured defendant has a large deductible or self-insured retention.

And while appeal assessments are most commonly requested when clients are deciding whether to take an appeal from a negative outcome, the considerations discussed in this article also apply with respect to assessing whether a favorable result below is likely to be upheld on appeal. For an appellee respondent facing an appeal, the question is whether to proceed in defending the appeal through the decision, or whether a settlement should be sought prior to or during the appeal process.

For attorney–client or work-product privileges to apply, the assessing attorney (or the attorney's law firm) needs to be retained in advance, even if not previously involved in the case, and even if more than one law firm is being considered.

So what exactly is an "appeal assessment," and how should you go about preparing one if asked to do so?

Key Elements of an Appeal Assessment

An appeal assessment is a decision-making tool for evaluating whether appellate relief can and should be sought. Appeal assessments should normally be submitted in writing, unless the client directs otherwise.

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High-quality appeal assessments typically identify the issues for appeal, the applicable standard of review, the relief available if the appellant prevails, and the likelihood of winning for each issue—usually expressed as either a straight percentage (40 percent) or a range (*e.g.*, 25–50 percent, "better than 50 percent"). For cases involving a potential remand, the likelihood of success below (whether a complete victory or simply a better result than previously obtained) might also be addressed. Clients requesting an appeal assessment also typically want to know the answer to one more all-important question: how much will an appeal cost?

Appeal assessments may vary considerably in length and depth of analysis, depending on the complexity of the issues and the dollar values at stake. Each page of a written appeal assessment should be labeled with a confidentiality notice and language advising that "attorney–client and work-product privileges apply." Following is a useful framework for preparing an effective appeal assessment that will assist a client in deciding whether or not to pursue an appeal, and whether to defend or settle when facing an appeal.

Issues for Appeal

The first order of business in preparing an appeal assessment is to identify the issues for appeal. This may be a straightforward or complicated task, depending on the particular facts and procedural posture of the case. There may be a single obvious appeal issue, and based on that issue, a complaint is dismissed at the pleadings stage. Or a case may involve numerous potential appeal issues after a lengthy jury trial. Experienced appellate practitioners may identify potential appeal issues overlooked by trial counsel in the heat of the battle or forgotten post-verdict. Completing a thorough review of the trial court record is necessary to ensure that nothing is missed, regardless of who is performing the appeal assessment.

If a case involves a pre-trial motion, be sure to review the complaint or complaints and answer or answers, all motion papers briefing (including exhibits), any related hearing transcripts or reports of proceedings, and the court's ruling about them, including the order or decision, and any oral or written findings.

A comprehensive post-trial record review should examine the following:

- the operative pleadings (complaints, answers, affirmative defenses, cross-claims, or third-party claims);
- Any significant or potentially dispositive pretrial motions (including motions to dismiss, motions for summary judgment, motions in limine), trial motions (for mistrial, directed verdict), and post-trial motions (JNOV/JMOL, new trial, remittitur) filed in the case;
- All research memos and cases on potential appeal issues;
- All transcripts of trial proceedings (including evidence deposition transcripts not recorded as part of trial transcripts);
- All jury instructions, special interrogatories, and verdict forms tendered and given;
- Color copies of all trial exhibits;
- All pretrial, trial, and post-trial reports prepared by trial counsel; and
- Any appeal assessments prepared to date.

For an appellee respondent, the assessing attorney must independently investigate the record to determine whether the winning trial counsel created any errors that might lead to a reversal.

Appealability

Once the potential appeal issue or issues have been identified, one must determine whether the issues are ripe for appeal. In some jurisdictions such as New York, most non-final rulings are appealable as of right without awaiting entry of a final order or judgment. Other jurisdictions require finality or a finding of immediate appealability such as that set forth Federal Rule of Civil Procedure 54(b) to take an appeal as of right.

If an appeal as of right is unavailable, assess whether a permissive appeal may be sought and the procedural requirements for doing so. Adding the preliminary hurdle of obtaining permission to appeal will usually increase the cost of the appeal and reduce the likelihood of obtaining desired appellate relief because permission may be denied by the reviewing court without any decision on the merits.

Chance of Success

Most clients want a percentage "chance of success" provided for each potential appeal issue. The likelihood of success based on an appeal issue depends on several factors. Each is discussed briefly below.

The Standard of Review

Perhaps the single most important factor in assessing likelihood of succeeding with an appeal is the standard of review. The standard of review is the legal criteria or test that an appellate tribunal will apply when analyzing and resolving each issue on appeal. It generally refers to the degree of deference that an appellate court gives to the trial court's ruling below. The deference afforded depends on the trial court's role in rendering the decision being challenged on appeal (*i.e.*, fact finder, law determiner, litigation manager) The degree of deference ranges from no deference at all (de novo review), to almost complete deference (abuse of discretion).

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De Novo

The most favorable standard of review for a party seeking reversal is de novo. Under de novo review, the appellate court analyzes and decides an appeal issue fresh for itself, with no deference afforded to the trial court's ruling. De novo review generally applies when there are no factual disputes and the issue on appeal involves a question of law only, such as the interpretation of a statute or the application of the law to a set of undisputed facts. Orders granting summary judgment are reviewed de novo. In those jurisdictions such as New York that permit a litigant to appeal an order denying

a summary judgment as of right, review is likewise de novo.

Abuse of Discretion

At the opposite end of the spectrum is the highly deferential "abuse of discretion" standard of review. To establish an abuse of discretion, the party appealing must convince the reviewing court that no reasonable person would rule as the trial court did. It is not enough for the reviewing court to conclude that it would have decided the issue differently. Rather, it must find the ruling below to be unreasonable, fanciful, arbitrary, made without the employment of conscientious judgment, without any reasonable basis in the evidence, or devoid of reason. This is an exceedingly difficult standard to meet. Appellate judges who once sat as trial court judges may be especially reluctant to view the actions of the court below so critically.

This highly deferential standard of review applies to decisions made by a trial court in exercising its supervisory authority over procedural matters and the general progress and conduct of litigation. Other matters typically subject to an abuse of discretion standard of review include evidentiary rulings, discovery rulings, and the grant or denial of a motion for a new trial.

Generally speaking, appellee respondents have the greatest chance of prevailing on issues evaluated under an abuse of discretion standard of review.

Manifest Weight of the Evidence

While the abuse of discretion standard of review considers whether a trial court's decision was reasonable, the manifest weight of the evidence standard focuses on whether the ruling at issue is factually supported by the evidentiary record below. The manifest weight standard requires the appellate court to examine the record for some evidence to support the trial court's decision. It is typically used when a trial court has made a factual determination in reaching its decision. Because a trial court is in a far superior position to determine and weigh the credibility of witnesses, to observe their demeanor, and to resolve conflicts in testimony, the manifest weight standard accords great deference to the trial court. A decision will be determined to be against the manifest weight of the evidence only when, on review of all the evidence in the light most favorable to the prevailing party, the reviewing court finds that an opposite conclusion is clearly apparent, or the fact finder's findings are palpably erroneous and wholly unwarranted, or the decision is clearly the result of passion or prejudice, or it appears to be arbitrary and unsubstantiated by the evidence, or when an opposite conclusion is clearly evident from the record.

Under this deferential standard of review, an appellate tribunal will not reverse an order or judgment merely because different conclusions could have been drawn—even if the appellate court believes that it would have decided the issue differently—as long as there is some evidence in the record to support the trial court's ruling.

Mixed Questions of Law and Fact

Some appeal issues involve mixed questions of law and fact. In other words, the case involves an examination of the legal effect of certain facts on the ultimate outcome of the case. In such cases, a reviewing court must assess whether the trial court's interpretations of the law and the facts are correct. For example, duty is a question of law that is typically subject to de novo review. However, if the court makes certain fact findings in determining whether a duty does or does not exist, those fact findings would most likely be subject to a manifest weight standard of review. Thus, the reviewing court would give considerable deference to the trial court's fact findings, which must be upheld when they are supported by some evidence. It would then analyze the legal issue of whether such facts do or do not give rise to a duty under the de novo standard, without deference to how the trial court answered that question below.

Harmless v. Reversible Error

As seasoned appellate practitioners know all too well, not every error warrants correction by an appellate court. Only those errors that are deemed "prejudicial" will garner relief on appeal. Prejudicial errors are those that are likely to have had an adverse effect on the outcome of the litigation. All other errors are deemed "harmless." Harmless error will not be corrected by a reviewing court.

An effective appeal assessment should accordingly predict whether an appellate tribunal is likely to view alleged error as prejudicial or harmless in calculating the chance of success on appeal.

Strength of Facts

Every appeal assessment should include a brief recitation of the key facts and procedural history of the case to provide context and support an accurate prediction of the chances of success on appeal. Any known factual strengths or weaknesses should be identified and analyzed. The appeal assessment should not be an advocacy piece. Its value is in presenting "the good, the bad, and the ugly" so that a prospective appellant can make an informed decision whether or not to proceed with an appeal, and a prospective appellee respondent can choose between defending the appeal or seeking settlement. Potential waiver issues and jurisdiction problems should be addressed here. Either can sink an otherwise strong appeal; therefore, such complications should be factored into the equation when calculating chances of success on appeal.

Analysis of the Law

The chances of success on appeal also depend on whether a trial court got the law right or wrong. Thus, a brief discussion of the law pertinent to each appeal issue should be included in the appeal assessment, along with an analysis of the trial court's interpretation of the law. Did the trial court overlook or misinterpret the governing law? Did it address a question of first impression? Is its reasoning clear and compelling? Did it espouse a majority or minority view? Are the cases it relied on readily distinguishable? These are just some of the questions to be considered in assessing the legal strength or weakness of a trial court's challenged rulings.

For a client facing the appeal of a "lucky" win from a single time-pressed trial court judge, an effective appeal assessment should discuss how much harder it will be to sustain that victory on review before multiple appellate judges (assisted by numerous law clerks and staff counsel).

Predilections of the Reviewing Court

Another key factor to be considered in assessing the likelihood of success on appeal is the power and predilections of the court deciding the appeal. Does the reviewing court have any special powers making it more likely to overturn an adverse judgment or award, to consider matters not raised below, or to award certain kinds of relief? Is it generally conservative or liberal with respect to plaintiffs' jury verdicts, insurance companies, and big business? What is the standard of review for jury damages awards? Will the appellate tribunal regularly reduce and remit damages awards that it deems excessive, or does it refuse to compare damages awards and rarely, if ever, deem even the largest awards excessive? The variance among appellate courts on these matters can greatly influence the likelihood of success on appeal, especially in challenging damages awards as excessive.

In some jurisdictions, you may be able to learn the identity of the judges who will be hearing the appeal. If so, their predilections should also be considered in the appeal assessment.

Balance of Equities

Assess whether any equitable concerns such as fairness and justice favor the result that you will seek from a reviewing court. When appealing a jury verdict, consider whether the case was close on liability to the extent that any alleged trial errors may have either individually or cumulatively affected the outcome. Or was the evidence so one-sided that any identified errors will likely be viewed as "harmless" by the appellate court?

Statistics

Statistics concerning rates of affirmance and reversal or likelihood of permission to appeal being granted by a particular reviewing court may provide marginal value in some instances. However, it would be unwise to place too much reliance on these numbers, which typically represent both civil and criminal appeals, including pro se appeals, and do not take into account particulars such as the type of issue being appealed, the applicable standard of review, or the specific facts, law, and equitable considerations at play in a given case.

Precedential Value

Although not directly pertinent to estimating the chance of success on appeal, another factor that may bear on the decision whether to pursue or avoid an appeal is precedential value. Even a longshot win may be worth going for if an appellate victory would achieve a much desired change in the law from your client's perspective. On the other hand, a terrible trial court decision has no effect beyond the immediate parties. Turning it into a terrible appellate court decision with precedential value can make a bad situation infinitely worse. Such considerations should also be addressed in the appeal assessment so that a fully informed decision can be made about whether or not taking an appeal makes sense, and whether defending or settling an opponent's appeal is the best course of action.

Settlement Programs

An effective appeal assessment should also include a review of the nature and strength of any settlement programs employed in the subject jurisdiction. For example, Federal Rule of Appellate Procedure 33 authorizes the federal circuit courts of appeal to direct attorneys and parties to participate in settlement conferences before a judge or other person (such as a settlement conference attorney employed by the court's settlement conference office). Many of these Federal Appellate Rule 33 programs are quite proactive and may be able to achieve a settlement that has previously eluded the parties. Appealing an adverse judgment in a jurisdiction with a strong settlement program might therefore work as a settlement tool—in addition to whatever relief is being sought from the reviewing court. The appeal assessment should consider this possibility to facilitate informed decision making with respect to any prospective appeal.

Cost

Many clients expect an appeal assessment to include at least a ballpark estimate of the cost of prosecuting or defending the prospective appeal. Much of the information contained in the rest of the appeal assessment should assist in formulating this ballpark number. For example, an appeal with a lengthy trial record and multiple issues for appeal will generally cost more than a single issue appeal from a dismissal on the pleadings. The need to obtain discretionary leave to appeal before pursuing an appeal from an interlocutory ruling will add to the cost. It is usually (although not always) more expensive for the party taking the appeal (the appellant or petitioner) than the party defending an appeal (the appellee or respondent).

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The purpose of the ballpark cost estimate is not to provide a detailed appeal budget for litigation monitoring but to give a client something to measure against the likelihood of success (and potential precedential value in some cases) when deciding whether to take or forgo an appeal, or evaluating settlement possibilities.

Conclusion

Preparing an effective appeal assessment takes some work. That is the bad news. The good news is that devoting the time and effort needed to prepare a thorough appeal assessment at the outset of the prospective appeal process has several significant benefits. First, it facilitates informed decision making pertaining to whether an appeal should be prosecuted, defended, or settled and the potential risks and rewards associated with each option. Second, it provides a road map of what the appeal will look like in the written briefs and at oral argument. And finally, for clients requesting multiple appeal assessments from different attorneys at different firms, it may provide additional insight into determining who is best suited to do that appellate briefing and oral argument if the matter proceeds on appeal.