

Should I Appeal That Judgment?

The dismissal of your case, the granting of summary judgment in your opponent's favor, or an adverse judgment after a bench or jury trial are often shocking milestone events in litigation that force the client and attorney to ask: "Should I appeal that judgment." The decision to appeal an adverse judgment, however, is not one to be taken lightly. To compound matters this decision is made after losing – a time when emotions often run high.

Appeals are costly, they take a long time to resolve, and usually, the odds are against you. Yet, many times an appeal is the right strategic decision for the case. Below are some of the issues that attorneys and clients should consider before making this important decision.

1. Is the order appealable?

Not every judgment or order may be appealed. When contemplating a possible appeal, the first thing to consider is whether your judgment or order is appealable. For cases in California state courts, Code of Civil Procedure § 904.1 contains a list of orders that may be appealed, which includes final judgments, certain orders made after judgment, and other specific types of orders. Many orders, however, may not be appealed; orders of contempt, for example, are not appealable. In federal courts, 12 U.S.C. § 1291 provides that the appellate courts have power to hear appeals from "final decisions," with some exceptions, such as appeals from orders granting or refusing injunctions.

2. How long do I have before I have to file an appeal?

The cardinal rule of appeals, regardless of whether the appeal is in state or federal court, is that if you do not file a timely Notice of Appeal, you *cannot* appeal. Period. The appellate court has no jurisdiction to consider your appeal if it was not timely.

In California courts, parties normally have 60 days to file a notice of appeal after the clerk or a party mails notice of entry of the judgment, but some appeals are subject to a shorter time frame. For example, in certain types of election cases, the deadline is 10 days instead of 60 days. Therefore, it is important that you check the rules to make sure you know the deadline for your particular type of case.

In federal courts, in civil cases where the United States is not a party, the time to file a notice of appeal is normally 30 days after entry of the judgment or order.

3. Do I need to obtain a stay of the judgment?

California Code of Civil Procedure section 916 states the general rule that filing an appeal stays proceedings in the trial court, including enforcement of the judgment.

There are so many exceptions to this rule, however, that an automatic stay is uncommon. Money judgments, for example, are *not* automatically stayed on appeal. That means that if the other party has obtained a money judgment against you, he or she may take steps to *enforce* that judgment against you, even if you have appealed the judgment. You can obtain a stay of the judgment usually by posting a bond or other form of security. The trial courts also have discretion to order stays in many cases.

4. What are my chances of winning on appeal?

Most appeals are not successful. For example, the California courts of appeal will reverse the judgment in civil appeals only about 20 percent of the time. An appellant in a civil case therefore has a one-in-five chance of winning, in general.

Appeals are not a second bite at the apple. This is not your opportunity to re-litigate the case. The issues on appeal are normally limited to the issues that were raised in the trial court; you cannot point to any new evidence; and the appellate courts will analyze the legal issues from a different standpoint, often giving deference to the trial judge's rulings or the jury's findings. Therefore, it is always a good idea to have an attorney review the record and evaluate the issues on appeal, as early as possible, to determine your chances of prevailing on appeal.

5. What will it cost and how long will it take?

Appeals are expensive. The court costs alone can be staggering. For example, let's say you are appealing a California judgment after a ten-day trial. It will cost you \$655 to file the notice of appeal. If you choose to make the trial transcripts part of the record on appeal—and in most cases, you will need to do so—you will have to deposit another \$6,500 for the court reporter to prepare the transcripts and file them with the court of appeal, since the rules require a deposit of \$650 for transcripts of each full day of trial. So, before you have spent a penny of attorney's fees on the appeal, you have already spent over \$7,000 in costs.

The attorney's fees can also be significant. Preparing an appellate brief requires a significant amount of work, including reviewing the trial transcripts in detail; reviewing all of the pleadings and evidence; conducting in-depth legal research; and drafting a compelling, persuasive brief. And for appellants, there are two briefs to file: an opening brief and a reply to the other side's brief. If the court hears oral argument, that is another added expense as well.

Appeals can also take a long time to resolve. The latest statistics from the Judicial Council 2007 Court Statistics Report show that the median time for a civil appeal in the California appellate courts takes 431 days, from the filing of the notice of appeal to the filing of an opinion.

6. If I win the appeal, what happens?

An appellate victory may be significant only for the litigants involved in the case or it may result in a published decision creating precedent. Sometimes litigants file appeals without thoroughly considering what will happen if they win. Even if you are successful on appeal, you may not have necessarily won the case. In many situations, an appellant who prevails on appeal will be given a new trial, and there is no guarantee of a better outcome. For example, in *Hasson v. Ford Motor Company*, 32 Cal.3d 388 (1982), the jury originally awarded the plaintiff \$1.1 million; Ford successfully appealed and obtained a new trial. But after the new trial, the jury awarded the plaintiff over \$9 million, and that award was affirmed on appeal. Ford could have saved more than \$8 million in damages and the cost of the appeal if it had not appealed that first judgment.

7. If I lose, what are the consequences?

Just as it is important to determine what happens if you win the appeal, it is also important to consider what may happen if you lose. A California money judgment accrues interest at the rate of 10% per year, which means that if you have appealed a judgment of \$100,000, and that appeal takes one year, full satisfaction or payment of the judgment will cost an extra \$10,000 in interest alone. Further, in some cases, the losing party can end up being liable for the prevailing party's attorney's fees on appeal. So, in addition to your own attorney's fees and costs, you may have to pay the fees and costs of the other party.

9. Should I try to settle?

Litigants should always consider the possibility of settlement before pursuing an appeal, for all of the reasons discussed above. And even though the winning party has a judgment in hand, and may feel confident that the judgment will survive an appeal, a settlement may still be preferable. The appellate process will take a long time, and it could be difficult to collect the judgment, and there is never any guarantee that the judgment will be affirmed. There are usually incentives for both sides to settle.

Most of the California appellate courts and the Ninth Circuit, have mediation programs to help parties reach a settlement, often at little or no cost to the parties. These are outstanding programs, with well-trained mediators, and high rates of success in settling cases. Attorneys and parties should therefore consider utilizing these mediation programs at the outset of any appeal.

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