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Should You Appeal? Top 10 Things to Consider

By Robert J. Stumpf Jr., Karin Vogel and John Brooks

It's no fun to lose, particularly in a trial court. When you do, your first instinct may be to appeal. That may be just fine, but sometimes it isn't. Before you take that next step, here are 10 questions to consider:

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1. Is Your Order Actually Appealable?

If you have a final judgment and there is nothing left to be determined, the answer to this question is an easy "yes." Most appealable orders also are specifically listed in Section 904.2. Other orders, like anti-SLAPP orders and orders denying arbitration or vacating an arbitration award, are also appealable under their own statutory schemes, (CCP Sections 425.16(i) and 1294.) But most interlocutory orders are not made appealable by statute. If they are appealable, it's because they are the equivalent of a final judgment. One example is a written, signed, and filed order of dismissal or nonsuit. If doubts remain about the appealability of an order, the safest course is to file an appeal. Otherwise, you may lose your ability to do so.

2. What's the Standard of Review?

What standard the court of appeal will apply—de novo, substantial evidence, or abuse of discretion—is critical, often a show-stopper. The most appellant-friendly standard is de novo, where the reviewing court decides the issue for itself and gives no deference to the trial court's ruling. Examples: statutory construction, summary judgment rulings, and the interpretation of contracts. The other two are uphill fights. "When the trial court's factual determination is attacked on the grounds that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination," as in *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873. Examples: whether a doctor was negligent or an engineering error caused a collapse. Showing an abuse of discretion, e.g., that a trial court's ruling "exceeded the bounds of reason" or was "arbitrary and capricious," may be even more difficult. Examples: evidentiary rulings, the amount of a fees award and most discovery rulings.

3. Could an Appeal Make It Worse?

Yes. If there is a money judgment in a California state court, interest will run on the judgment at 10 percent per year. You may also have to post a bond to stay enforcement, which can be expensive. The opposing party could cross-appeal seeking to undo any part of the case you won. Your appeal will also result in a written opinion, possibly published, which could shape the law in a way that hurts your client and others in future disputes. And the unkindest cut of all: you could win a new trial and do even worse the second time around.

4. Have the Key Issues Been Preserved?

Even the sharpest legal mind and best honed rhetoric cannot resurrect

an argument that was not properly preserved. You can lose an appeal for this reason alone. Good news, though. Unlike the need to file a timely appeal, record preservation is not jurisdictional. Reviewing courts also have considerable leeway deciding to "save" an argument that was arguably waived. Some issues, particularly questions of law, can usually be considered on appeal even if not raised below. Here are some common examples of not preserving an issue for review: Ignoring record preservation at the motion stage, not focusing on motions in limine, not objecting, not devoting sufficient time to preparing and objecting to jury instructions, giving short shrift to verdict forms, not requesting a statement of decision, and not moving for a new trial on the grounds of excessive or inadequate damages.

5. Can Your Client Post a Bond to Stay Enforcement?

Some rulings, like mandatory injunctions, are automatically stayed once the losing party files an appeal. Others are not. Most money judgments are not stayed unless the appellant files a bond, usually equal to one and one half times the amount of the judgment. If an appellant does not post a bond that meets the requirements of the statute, the trial court has no discretion to grant a stay. The court of appeal can do so, but obtaining a writ of supersedeas from a reviewing court of appeal is not easy.

6. Will an Appeal Stay All Other Proceedings in the Trial Court?

With some exceptions, an appeal automatically stays trial court proceedings related to the subject on appeal. Important examples are appeals of an order denying an anti-SLAPP motion or a motion to compel arbitration, where filing an appeal will stay trial court proceedings while the appeal is pending. The most important exception is that to stay enforcement of a money judgment, you will probably need to post a bond. An appeal also does not stay a prohibitory injunction.

7. How Much Will It Cost?

A good rule of thumb: assume it always will cost more than you expect. Writing succinct and persuasive briefs takes time, even if the issues have been briefed below. And the time spent preparing a strong brief should not be shortchanged. Appeals usually are won or lost on the briefs. One factor that may enter the equation is whether there is a contractual or statutory ground for attorneys' fees. If so, fees typically may also be recoverable by the winning party on appeal, a risk factor that is an important part of the analysis in deciding whether to appeal.

8. How Long Will It Take to Get a Decision?

It is not unusual for the appeal process to take 18 to 24 months before a decision. Maybe longer. It's rare the court of appeal will grant a motion to expedite an appeal. If the California Supreme Court grants review, you'll need to add at least two more years to your timetable.

9. Could Filing an Appeal Help to Prompt a Settlement?

Often the appeal causes the parties to view the legal and factual issues in a case in a new light. And, emotions tend to be less heated on appeal. Plus, most parties recognize there always is some risk the appeal will not turn out well. These conditions often make settlement on appeal at least as viable, perhaps more so, than in the trial court. While appealing mostly in hopes of prompting settlement is not a good idea, the possibility of settlement on appeal should always be part of the decision-making process.

10. Should You Seek Help From an Appellate Specialist?

In cases involving a substantial issue or high stakes outcome, the answer is usually yes. You don't want to hear: "Once again this court's patience is sorely tried by an inability or refusal to understand the purpose and rules governing the appellate process," as in (Lindemann Maschinenfabrik v. American Hoist & Derrick (Fed.Cir. 1990) 895 F2d 1403, 1405.) "Trial attorneys who prosecute their own appeals may have tunnel vision. Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice." (*Estate of Kilkison* (1998) 65 Cal.App. 4th 1443.) Appellate specialists can add a fresh perspective and a wealth of experience.

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