# *Whether to Appeal in Civil Cases*

*by Beth E. Kennedy*

Whether to appeal is the first question in the appellate process. And often, it is also the most important one.

The presence of an error alone is not a sufficient reason to appeal. Indeed, all trial courts err. This is true because the judicial system has chosen efficiency at the expense of correctness in some circumstances. For example, consider what happens at trial when an evidentiary objection is made. The trial judge does not have time to stop the trial and research the issue extensively before issuing a ruling. The system, by design, places trial judges in an impossible position. Lawyers should warn clients not to expect error-free litigation.

> *"[A]sk yourself: Did the trial court err, or are you just dissatisfied with the result? Answering this question early and honestly can sometimes save significant resources."*

In light of these realities, deciding whether to appeal requires more than the identification of an error. It involves an evaluation of the potential costs, the potential benefits, and the probable result after the appeal. Below are questions every potential appellant should ask before deciding to file a notice of appeal.

### What are the potential costs?

The costs of an appeal can extend beyond the financial cost of paying counsel to submit briefs and present oral argument. In some cases, an appeal presents a risk that your client will have to pay the opponent's attorney fees under a statutory or contractual fee provision. Depending upon the nature of the case, it can also create stress and prevent closure for your client during the long appellate process.

### What are the potential benefits?

Victory in the appellate court doesn't always mean your client has obtained the result he wants. Reversal on appeal could end the case in your favor, but it could also simply provide another opportunity to prevail in the trial court. If a new trial is the best result you can achieve on appeal, then deciding whether to appeal will require you to consider your likelihood of success in the new trial, along with the costs of a second trial.

### What is the probable result?

Attempting to determine the probable result after appeal is more complicated than predicting the likelihood that your argument will prevail. For example, even the best legal arguments can fall flat when faced with appropriate procedural bars. Lawyers should warn clients that the appellate courts will not correct every error that the trial courts make. Instead, lawyers should consider a number of questions when analyzing the probable result after appeal:

**Basis for Appeal**

The first step is of course to identify and analyze the trial court's errors to determine whether it is worthwhile to

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proceed. But also ask yourself: Did the trial court err, or are you just dissatisfied with the result? Answering this question early and honestly can sometimes save significant resources.

**Jurisdiction**

Would the appellate court have jurisdiction over your appeal? On one hand, your appeal may be too late. The trial court may be able to extend the deadline, but don't count on it. Utah R. App. P. 4(e).

On the other hand, your appeal may be too early. If there is not a final judgment in your case that triggers the right to appeal, your appeal may be dismissed without prejudice. But it can sometimes be difficult to figure out whether you have an appealable ruling. The supreme court has issued a few opinions recently that help to answer that question:

- *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶¶ 9–16, 297 P.3d 619 (identifying the requirements for a final, appealable judgment)
- *Butler v. Corporation of President of the Church of Jesus Christ of Latter-day Saints*, 2014 UT 41, ¶¶ 17–19, 337 P.3d 280 (stating the conditions for appealing from an interlocutory order)
- *Garver v. Rosenberg*, 2014 UT 42, ¶¶ 7–15, ___ P.3d ___ (discussing the effect of a premature notice of appeal)

**Preservation**

Are your issues preserved? In other words, did trial counsel notice the errors and give the trial court an opportunity to correct them? If not, you should probably not challenge them on appeal. *In re Guardianship of A.T.I.G.*, 2012 UT 88, ¶ 21, 293 P.3d 276 (explaining that an issue is preserved for appeal only if it was specifically raised in a timely fashion and with "supporting evidence or relevant legal authority"). Unpreserved issues can serve as the basis for reversal only in very limited circumstances – if "the trial court committed plain error or exceptional circumstances exist." *State v. Nelson-Waggoner,* 2004 UT 29, ¶ 16, 94 P.3d 186.

**Re-creating the Record**

Is trial counsel's objection on the record? In some cases, trial counsel has made the relevant objection in chambers or in a document that is not in the trial court's docket – for example, counsel may have handed the objection to the judge in open court. If the objection is not in the record, you will need to determine whether the record can be re-created to show that the issue was preserved. Utah R. App. P. 11(f), (g). If you do not re-create the record, then you are likely out of luck. *State v. Prawitt*, 2011 UT App 261, ¶¶ 9–10, 262 P.3d 1203.

**Standard of Review**

What standard of review will the appellate court apply? If the standard of review is deferential to the trial court, it will not be enough for you to convince the appellate court that it would have reached a different result. For example, if the error was in a finding of fact or the admission of evidence, then the error must be fairly straightforward and serious to warrant relief. But if the standard of review is not deferential, then the appellate court's opinion is all that matters. And if the error was in giving a certain jury instruction or in the interpretation of a statute, then your chances are considerably better. In other words, your chances of reversal increase as the deference given to the trial court decreases.



**Prejudice**

Did the error influence the outcome of the case? Put differently, if the trial court had not erred, is there a substantial likelihood that the outcome would have been different? If the error was harmless, it will not warrant reversal. Utah R. Civ. P. 61; Utah R. Crim. P. 30(a).

In some cases, determining whether the error was harmless hinges upon what is in the record for the appellate court to consider. For example, if you claim correctly that the trial court erred in excluding your expert witness, but you do not place in the record what the expert would have said had he or she testified, then you probably cannot demonstrate what impact that testimony would have had at trial to show that the outcome likely would have been different.

**Cross-Appeal**

Is your opponent likely to file and prevail on a cross-appeal? If you prevailed on any issue before the trial court, filing an appeal could prompt your opponent to file a cross-appeal, potentially jeopardizing your partial victory.

**Alternate Grounds for Affirmance**

Could the appellate court affirm on alternate grounds? If your opponent presented more than one basis for prevailing below, but the court only ruled on one, the appellate court in some circumstances may affirm the ruling on one of the remaining grounds. If this is a possibility, you should consider the merits of each alternate ground and determine whether it was raised sufficiently in the trial court to permit the appellate court to affirm. *See, e.g., Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225.

Ultimately, these factors operate to favor the party who prevailed in the trial court. This makes the question of whether to appeal in civil cases a complex one. If there is any question, it is almost always a good idea to file a timely notice of appeal. Filing that simple document will preserve your right to appeal while you assess whether it will be worthwhile to move forward. If the answer turns out to be "no," you can dismiss your appeal. But either way, reaching the answer requires a complex cost-benefit analysis and some familiarity with the appellate process.