CHAPTER 1: INTRODUCTION

A. The Importance of Meeting with an Appellate Attorney

A person who wants to appeal (the "appellant") or who must defend an appeal (the "appellee") is best protected by meeting with an attorney who knows and works in appellate law (an "appellate attorney"). If an appellate attorney is not available, this Handbook should be consulted immediately upon entry of an order that may be the subject of an appeal.

B. The Final Judgment Rule and Why it is Important

A "final" judgment or order is a written order entered by a trial court (or "lower tribunal") which ends the case and leaves nothing left to be done except to follow what the final judgment or order requires the parties to do. In contrast, a "non-final" order does not end the case and usually cannot be appealed right away. For example, if the trial court rules against a party on an issue or motion before trial or at trial, the party normally has to wait, and often cannot appeal, until the trial is over and the court has entered a final judgment. After that, the party normally has a right to bring an appeal to challenge the final judgment, and, in the appeal from the final judgment, the party usually can also challenge any ruling or non-final order entered before the final judgment. So, with some exceptions, appeals generally can only be brought from a final judgment. This is called the "final judgment rule." Final judgments are discussed here, as well as in Chapter 8 on the Appellate Process Concerning Final Appeals. Some of the exceptions to the final judgment rule are covered in other Chapters of this Handbook, such as Chapter 9 on Appeals from Non-Final Orders, and Chapter 10, Extraordinary Writs.

The final judgment rule is very important to an appellant because an appeal has deadlines and time limits that must be followed. For example, there is a time limit for filing an appeal, and a party who fails to file an appeal within that time limit may lose or "waive" the right to appeal. Thus, one of the important reasons to consult or retain an appellate attorney, if one is available,

is to find out whether a specific order can be appealed, and, if so, whether the appeal has to be filed right away.

C. The General Procedures for an Appeal

An appeal is begun by filing a “notice of appeal” within the deadline required by the Florida Rules of Appellate Procedure. If this time limit is not followed, a person may not be able to appeal. The failure to timely file a notice of appeal is called "waiving” the right to an appeal. In Florida, the time limit for filing a notice of appeal from a final order or judgment generally starts to run when the lower tribunal enters or "renders" the final judgment or order ("rendition"). The appellant usually has 30 days from the date of “rendition” to file a notice of appeal. *See* Florida Rule of Appellate Procedure 9.110(a)&(b) (civil and final administrative law cases); Florida Rule of Appellate Procedure 9.140(b)(3) (criminal cases); *see also* Florida Rule of Appellate Procedure 9.020 (definitions); Florida Rule of Appellate Procedure 9.030 (jurisdiction of the courts).

The time limit for filing a notice of appeal is a “jurisdictional” deadline. This means that if the notice of appeal is not filed within the time limit, the appellate court usually will not have the power, or “jurisdiction,” to hear the appeal, and the appeal will be dismissed. The rest of the deadlines, such as the time limits for filing the briefs, are also important and should be followed, but many are not “jurisdictional.” This means the appellate court still has the power to hear the appeal, but it may decide to dismiss for a party’s failure to follow the rules and procedures for the appeal.

After filing a notice of appeal, the appellant then has 10 days to file what are called "directions to the clerk" and "designations to the court reporter." *See* Florida Rule of Appellate Procedure 9.200(a)-(b). The directions to the clerk are directions telling the lower tribunal clerk

what the appellant wants to have included in the record on appeal. Putting together the record on appeal is discussed in detail in Chapter 3 of this Handbook.

The party opposing the appeal, the "appellee," generally has 10 days from the filing of the notice of appeal to file a "cross-appeal." A cross-appeal is filed if the appellee believes the lower tribunal made a mistake in not granting all of the relief the appellee wanted. *See* Florida Rule of Appellate Procedure 9.110(g) (civil and final administrative law cases); Florida Rule of Appellate Procedure 9.140(b)(4) (criminal cases). If a cross-appeal is filed, the parties are called, "appellant/cross-appellee" and "appellee/cross-appellant."

It is important to understand the difference between a notice of appeal and a notice of cross-appeal. A notice of cross-appeal is only filed in cases where the appellee believes the lower tribunal made a mistake in not granting all of the relief the appellee wanted in the specific final judgment or final order being appealed. But, if the appellee believes there is another, separate final order or final judgment in the same case that was erroneous or did not grant all of the desired relief, then the appellee must file his or her own notice of appeal from that order, not a notice of cross-appeal. And, again, any notice of appeal must be filed within 30 days of the date of that final judgment or order.

Once the notice of appeal is filed, the lower tribunal clerk prepares the record on appeal and sends it to the appellate court. Fifty days after the notice of appeal is filed, the lower tribunal sends the appellate parties (the appellant and the appellee) an "index" to the record on appeal. The index to the record on appeal is a list of everything in the lower tribunal/court file, with page numbers, that the clerk of the lower tribunal will be sending to the appellate court. The record on appeal, which is discussed in more detail in Chapter 3, is made up of the documents—such as the pleadings, pre-trial motions, orders, discovery, and evidence ("exhibits")—that were filed and made part of the "record" in the lower tribunal. It usually also has transcripts of the hearings that

the lower tribunal judge held and transcripts of any trial, if the hearing or trial was "transcribed" (typed-out by a court reporter), and if one of the parties filed those transcripts with the lower tribunal. *See* Florida Rule of Appellate Procedure 9.200.

There are also time limits for filing appellate briefs. Appellate briefs are the written arguments of the appellant and the appellee that are presented to the appellate court. The arguments in an appellate brief must be limited to the matters contained in the appellate record. The appellant's initial brief is generally due 70 days after filing the notice of appeal. *See* Florida Rule of Appellate Procedure 9.110(f). The appellee's answer brief is then due 20 days after the initial brief, and the appellant's reply brief is due 20 days after the answer brief. *See* Florida Rule of Appellate Procedure 9.210(f). If the appellant needs more time to file a brief, the appellant usually may file a motion for an extension of time with the appellate court (usually for 30 or 60 days), so long as the motion for extension is filed before the deadline for the brief. Before filing a motion for an extension, the appellant is generally required to contact the opposing party to ask if the opposing party will agree or object to the motion for an extension. The motion for extension should, in addition to requesting the extension, also state whether the opposing party objects or agrees to the extension. The same general procedure for seeking extensions would also apply to the answer brief and the reply brief.

The appellate briefs are filed with the appellate court before oral argument. Oral argument is like a formal hearing before a trial judge. The main differences are that appellate oral arguments are usually heard by a "panel" of three judges and arguments are limited to those contained in the appellate briefs and supported by the appellate record—no new evidence or arguments can be made. The party seeking to present oral argument must file a "request for oral argument" in a separate document, generally not later than 10 days after the reply brief is due. *See* Florida Rule of Appellate Procedure 9.320. After the parties have filed their briefs, and if a request for oral

argument was made, the appellate court will decide whether to grant oral argument. Appellate courts do not always grant a request for oral argument. If oral argument is not granted, the case will be decided based on the arguments in the appellate briefs, without holding an oral argument. If the appellate court grants a request for oral argument, the appellate court will send an order or notice of oral argument, which will state the date and time of the oral argument and how many minutes each side will have to argue their case.

It is important to remember that appellate courts do not take new evidence or consider new arguments. An appeal is based on what happened in the lower tribunal. Appellate courts decide whether the trial judge made mistakes or "errors" below, such as in admitting or excluding evidence. Appellate courts also generally do not consider arguments that were not made to the lower tribunal. If an argument or objection was not made to the lower tribunal (at a time when the lower tribunal could "fix" the reason for the objection), the appellate court usually will not consider the argument for the first time on appeal, unless the error was "fundamental," meaning it usually must have destroyed the fairness of the whole case.

Litigants should also understand that there have been many changes in the appellate courts and rules over the years in Florida. These changes include limiting the number of pages allowed in appellate briefs to 50 pages for the appellant's initial brief, 50 pages for the appellee's answer brief, and 15 pages for the appellant's reply brief. *See* Florida Rule of Appellate Procedure 9.210. The appellate courts generally will not allow briefs that go over these page limits. Requests for an increase in the page limits can be made, but they are rarely granted. The time allowed to present any oral argument is very limited. Most appellate courts allow only a set number of minutes for oral arguments, usually 10 or 20 minutes per side. At oral argument, the parties must make their argument within the time allowed by the court.

An appellate court's consideration of the issues and arguments raised in an appeal will be framed by what is called "the standard of review." The standard of review determines how much weight or deference the appellate court will give to, or how strictly it will question, the lower tribunal's rulings. The greater the deference, the harder it will be to convince the appellate court to find the lower tribunal's decision was a mistake. Appellate courts give great deference to a lower tribunal's findings of fact. This is because the trial judge or jury, and not the appellate court, had the best opportunity to observe the witnesses and determine, first hand, how truthful the witnesses appeared to be. Appellate courts will normally not find the lower tribunal's findings of fact to be a mistake unless the appellate courts decide the findings of fact are not supported by "competent, substantial evidence" or are "clearly erroneous."

Appellate courts also give a lot of deference to issues below that involve both law and facts, such as rulings about what evidence will or will not be allowed during trial. As to those kinds of matters, a lower tribunal has discretion, and appellate courts generally will not find such rulings to be mistaken unless an "abuse of discretion" is shown, meaning no reasonable judge would have made the same decision under the law and facts.

Finally, appellate courts review pure legal issues with the least amount of deference to the lower tribunal. This is called the "de novo" standard of review. Under this standard, appellate courts decide for themselves what the law says and what the decision of law should be. The reason so little deference is given when reviewing a pure legal issue is because appellate courts are in just as good a position to decide the law as lower tribunals.

D. Conclusion

Given the complex requirements and procedures for an appeal, it is important for an appellant to carefully consider whether to go ahead with an appeal without the help of an appellate lawyer. By hiring an experienced, qualified appellate lawyer who understands the law

and rules of procedure, a party may increase their odds of winning and may save money in the long run. If the appellant cannot locate an experienced appellate lawyer, then the appellant should read this Handbook cover to cover, as well as other appellate books, as soon as the appellant gets an order that the appellant wants to appeal. In that way, the appellant has important information to decide whether the appellant can even appeal, whether the appellant must appeal right away, and, if so, the time by which the appellant must act and the procedures for doing so.

Finally, it must be remembered that the law and rules of procedure change frequently. A self-represented or "pro se" litigant is responsible for following the current laws and rules of procedure. Thus, a pro se litigant should review the most current laws and rules in addition to this Handbook, as some laws or rules may have changed. As just one example, the rules in the area of serving (sending) documents to other parties by e-mail and filing documents electronically with the court are still developing and changing, especially as to pro se litigants. Currently, service by e-mail is available for pro se parties if certain procedures and requirements are followed. *See* Florida Rules of Judicial Administration 2.514(b) and 2.516(b). In addition, most courts now allow (but do not require) electronic filing by pro se parties. *See* Florida Rule of Judicial Administration 2.525(c)-(d). The requirements for electronic filing, even when it is available, often vary in different courts. Accordingly, pro se parties interested in electronic filing should consult the website or clerk's office of the particular court to find out if electronic filing is allowed, and, if so, the requirements for electronic filing and service by e-mail. *See also* Florida Rules of Judicial Administration 2.516 and 2.525(c)-(d).

Unless e-mail service or electronic filing is allowed, service or filing of a document must generally be done by mail or personal delivery (to the other party for service, and to the court for filing). So, in addition to consulting the most up-to-date version of the rules of procedure (available on The Florida Bar's website at http://www.floridabar.org/tfb/TFBLegalRes.nsf/) and

other laws, a pro se litigant should also consult the website or clerk's office of the specific court to find out if electronic filing with the court and/or service of documents to other parties by e-mail may be allowed, and to find out if the court may have additional requirements specific to that court.