CHAPTER 8: THE APPELLATE PROCESS CONCERNING FINAL APPEALS

A. Introduction.

The party who loses in the trial court or lower tribunal usually has the right to appeal to a higher court. On appeal, the higher court, called the appellate court, reviews the decision of the lower tribunal, and will generally either uphold or overturn it (affirm or reverse). That process of review is known as the appeal or appellate process. This Chapter describes when and how an appeal from a final judgment or order is begun.

Appeals are an important part of the American legal system. The legal systems of all states in this country allow for at least one level of appellate review as a matter of right. The right to seek appellate review comes from the United States and Florida Constitutions. Appellate courts are set up only to review and correct errors committed below. Appeals provide checks on the trial process and help to guide judges on the law in future cases. Lower tribunal judges understand this.

To appeal from an order or judgment of a lower tribunal, the party must have lost, or at least been negatively affected by the order or judgment (this can include not receiving all of the relief requested in the trial court). The appealing party is called the appellant. To prevail in an appeal, the appellant has to show the appellate court that errors occurred in the lower tribunal proceedings, and that such errors were bad enough to reverse the final judgment or order entered in the case. Thus, it is the appellant's responsibility to (1) identify the problem or error, (2) persuade the appellate court that there is, in fact, error in the final order, judgment, or verdict appealed, and (3) show that the error is so serious that it needs to be sent back to the lower tribunal and corrected, or "reversed and remanded."

The party opposing the appeal, called the appellee, is the party that agrees with the outcome of the order or trial and will argue during the appeal that the judge's or the jury's decision should be left alone, or "affirmed." In some cases, the appellee may also disagree with a part of the final

order, judgment, or verdict and may file what is called a "cross-appeal."

The highest appellate court in Florida is the Florida Supreme Court. The next highest appellate courts in Florida are called "District Courts of Appeal." There are five district courts of appeal, covering specific adjoining counties: the First District Court of Appeal, headquartered in Tallahassee; the Second District Court of Appeal, headquartered in Lakeland with a branch in Tampa; the Third District Court of Appeal, headquartered in Miami; the Fourth District Court of Appeal, headquartered in West Palm Beach; and the Fifth District Court of Appeal, headquartered in Daytona Beach. Circuit Courts may also act as appellate courts in certain types of cases; for example, in an appeal from a county court decision, or when reviewing the actions of a county government agency.

The appellate court generally reviews the actions of the lower tribunal, not the actions of the parties. The appellate court focuses on whether the lower tribunal made the right decision. There are a variety of possible outcomes to an appeal. In deciding an appeal, the appellate court may, for example:

- Find no error and "affirm" the lower tribunal's decision, judgment, or order, thereby declaring the decision was correct and will stand as is.
- Find error, but hold it was "harmless," meaning the error did not affect the outcome of the case, and so the lower tribunal's decision is affirmed just as if there was no error.
- Find error and "reverse" the lower tribunal's decision, which often (but not always) also results in "remanding," or sending the case back, to the lower tribunal with instructions regarding further proceedings, such as a new trial or hearing.
- Find error and "modify" the lower tribunal's decision, which also often (but not always) results in "remanding," or sending the case back, to the lower tribunal with instructions regarding further proceedings.

- Affirm in part and reverse in part the lower tribunal's decision, and remand with directions for further proceedings in the lower tribunal.

If the appellate court is reversing and/or remanding the case, it will often explain its decision and the outcome in the case with a written decision, or "opinion." The appellate court may also explain its decision in a written opinion if it affirms, but it does not have to. If the appellate court is affirming, it can simply issue a short order stating that the lower tribunal's decision or judgment is "affirmed" (this is typically known as a "per curiam" affirmance).

B. The Handbook.

As emphasized from the beginning of this Handbook, appellate practice is a complex, specialized area of law that requires detailed study and research. This book is merely a beginning guide. A self-represented, "pro se," party who wants to file an appeal should seriously consider retaining an appellate attorney if at all possible. A party served with a notice that the opposing party is appealing the decision should also retain an appellate attorney when at all possible.

Just like appellate judges who work exclusively on making appellate decisions, there are appellate lawyers who only (or mainly) practice appellate law. One reason for this is that arguing an appeal is different from representing a party in a trial, and there are very different rules for taking an appeal. If a party cannot afford appellate counsel, but had the right to have a lawyer appointed to represent that party at trial, that party also usually has the right to have one appointed to represent that party on appeal. Otherwise, a self-represented "pro se" appellant or appellee will have to do deep research of the appellate and trial procedures and Florida law.

A pro se party who cannot retain an appellate attorney (or any attorney) is still responsible to follow the rules of appellate procedure and Florida law. Thus, while this Handbook can serve as a beginning point for a pro se litigant, a pro se party should not only read this Handbook from cover to cover, but also review the Florida Rules of Appellate Procedure, Florida Statutes, and

Florida case law that may apply to his or her case.

C. The Final Judgment Rule

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." 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 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.

D. Tips for Determining Finality.

Not every decision by a judge is final. Usually, only final judgments, or orders which end the case once and for all, are appealable. If the decision or order does not end the case, it probably is not a final order or judgment. During the course of a lawsuit, from the filing of the complaint through the entry of a final judgment, a lower tribunal judge usually makes many decisions that

are not "final." For example, if a party does not like a pre-trial ruling, such as on a discovery issue, the party must normally wait until the trial or the case is over and a final judgment is "rendered," before bringing an appeal to challenge the ruling. As another example, when a judge denies a motion to dismiss or for summary judgment, the case continues to move along in the lower tribunal. That is why orders denying such motions are usually considered non-final orders. Orders granting such motions may or may not be final——it depends on if the order just grants the motion, or if it also orders a final judgment (of dismissal or summary judgment) in favor of one of the parties.

Whether an order is "final" for purposes of an appeal is a confusing area of appellate law, especially in civil cases. What is final is not always clear. If there is any doubt about whether the order is final, a party should usually make sure to appeal from it within 30 days, to reduce the risk of waiving an appeal if it turns out the order was final (meaning it had to be appealed within 30 days, if ever). The following questions may help a party determine if the order is final:

1. Is the order in writing, signed, and dated?
2. Has the order been filed with the clerk's office?
3. Does the order end the case as a whole?
4. Other than the lower tribunal considering an attorney's fees or costs motion, does the order leave nothing more for the lower tribunal to decide?
5. Does the order sound final? Does it state "for which let execution issue" or "go hence without a day" or "final judgment" or "dismissal of all claims with prejudice" or "case closed"?

If the answer to these questions is "yes," the order is likely final. The below chart gives a few examples of some orders that are usually final and some that are usually non-final:

Examples of Usually Final Orders:	**Examples of Usually Non-Final Orders:**
• Order dismissing the case with prejudice • Summary final judgment which enters judgment in favor of a party • Final judgment entered on a jury's verdict after a trial • An order both awarding a party entitlement to attorney's fees and determining the amount (or an order later setting the amount after entitlement was decided) • An order denying a motion for attorney's fees after the final judgment • A final judgment awarding court costs and setting the amount	• Order granting a motion to dismiss which does not actually dismiss the case • Order granting a motion to dismiss without prejudice to amend the complaint • Order granting a motion for summary judgment which does not actually enter judgment for one party or the other, or which does not end the case • Orders denying motions to dismiss or for summary judgment • Orders ruling on discovery matters and other pre-trial orders • Orders awarding entitlement to attorney's fees but with amount to be decided later

These are just a few examples of the kinds of decisions appellate courts generally consider final, and those usually considered non-final. The table does not cover every possible order a party can appeal. A party who wants to appeal an order must research the type of order, locate appellate decisions, and find out whether that type of order is considered final and appealable or non-final and not appealable.

In sum, a final decision, also called a final judgment or final order, ends the case in the lower tribunal, usually by entering a judgment in favor of one party and against another. When in doubt, parties should retain an appellate attorney promptly after receiving the order to see whether the order is final and appealable. If the order is not final and appealable, or if a notice of appeal is not timely filed, the appellate court will not have jurisdiction over the appeal and the appeal will be dismissed.

E. How, When, and Where to File an Appeal from a Final Order or Judgment.

The right to appeal a final decision does not last forever. Similar to a statute of limitations, every court has a rule controlling the amount of time a party has to file an appeal after the final judgment. In Florida Courts, a lower tribunal's final decision generally must be appealed within 30 days, or the right to appeal is forever lost. *See* Florida Rules of Appellate Procedure 9.110(b)&(d) (civil cases), 9.140(b)(3) (criminal cases), and 9.900(a)-(f) (format).

An appeal is generally started by filing a document called the "notice of appeal" in the lower tribunal (not the appellate court), with a copy of the order being appealed attached, within 30 days of when the order or judgment being appealed was entered. The party appealing, the appellant, must also pay the filing fee. The clerk's office of the lower tribunal should have a list of how much the filing fees are for an appeal. The notice of appeal must generally be filed personally at the lower tribunal's clerk's office, unless electronic filing is permitted. A notice of appeal generally has to be received and recorded by the lower tribunal's clerk before the 30-day deadline for the appeal (not just put in the mail). A parties can usually bring a second copy of the notice of appeal and ask the deputy clerk in the clerk's office to stamp a date on it for the party's own records.

The 30-day 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 paying the filing fee, or for filing the appellate 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.

An example of the general format for a notice of appeal is contained in Florida Rule of Appellate Procedure 9.900 (forms). A notice of appeal in a civil case might look like this:

IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

Case No._____

Mr. Smith, Defendant/Appellant
v.
Ms. Jones, Plaintiff/Appellee

NOTICE OF APPEAL

Notice is hereby given that Defendant/Appellant, Mr. Smith, appeals to the Second District Court of Appeal the order of this court rendered on November 2, 2015. The nature of the order is a final judgment which is reviewable as a final order under Florida Rule of Appellate Procedure 9.110. [Attach a copy of the order appealed, per Rule 9.110(d)].

_____
Mr. John Smith
[address, e-mail address, & phone number]

Once the notice of appeal is filed with the clerk of the lower tribunal, the lower tribunal will transfer the case to the appellate court for the appeal. After the case is transferred to the appellate court, the rest of the proceedings for the appeal take place in the appellate court.

F. After Filing the Notice of Appeal, What Happens Next?

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.

G. What Does the Appellate Court Review?

Appellate courts are limited in what they can review and decide. The appellant must outline the specific question or issue it wants the appellate court to answer. The question may be as broad as, "Did the lower tribunal err in deciding in favor of the plaintiff?" or it may be very specific. Narrowing the question presented to the appellate court makes it easier for the court to fully understand what it is being asked to review and do.

It is sometimes said that, in an appeal, the actions of the lower tribunal judge are on trial, not the actions of the parties to the original litigation. In fact, the parties do not have a chance to re-litigate the case before the appeals court. An appeal is not a second trial. The trial level is the only opportunity to submit evidence, examine and cross-examine witnesses, and argue the facts and the law of the case. The appeals court only considers whether the trial was conducted properly and whether the outcome was reached by proper application of the law to the facts.

Only issues that were raised first in the lower tribunal can be argued at the appellate level. The claimed errors must have been brought to the lower tribunal's attention while the lower tribunal still had the opportunity to correct the mistake. For example, if the appellant (or his or her attorney) did not object to the error during trial, the issue has been "waived" on appeal or otherwise has not been “preserved” for review by the appellate court.

At the appellate level, the court is restricted to the record before it. *See* Florida Rule of Appellate Procedure 9.200. Only the evidence, argument, testimony, and objections considered by the lower tribunal may be considered by the appellate court. This body of pleadings and evidence are called the record. Every piece of evidence and every argument made by the parties' lawyers is recorded into one big document, the record, which is said to "close" once the trial is over and the final judgment issued. Once the record is closed, no more evidence can be included. Also, no more objections to evidence can be made. There are a few exceptions to these general

rules, but for the most part, a party cannot offer new evidence or new objections for the appellate court to consider that were not made to the lower tribunal.

The appellate court cannot reverse the decision of the lower tribunal or trial court based on a new document that the trial judge never got to see. The trial was the only opportunity to present that document. So, for example, a party can argue on appeal that the trial court should have allowed certain a document into evidence at trial, but only if the party presented the document to the trial court and objected when the trial court refused to consider it or allow it into evidence, and, after the objection was overruled also made sure the document was still filed in the court file and included in the record on appeal.

In sum, appellate courts do not take new evidence. Appellate courts decide whether the trial judge made errors based on what happened in the lower tribunal. Appellate also generally do not consider new arguments. If an argument or objection was not made to the lower tribunal, the appellate court usually will not consider it for the first time on appeal, unless the error was "fundamental," meaning it destroyed the fairness of the case.

H. A Few More Important Points About Preserving Arguments for an Appeal.

As discussed above, an appellate court generally does not consider new arguments or objections for the first time on appeal, except for fundamental errors. To preserve an issue, a party usually has to object when the issue first comes up, to give the lower tribunal a chance to fix the problem. Often, to be preserved, the same argument or objection also has to be raised again after the trial or decision in the lower tribunal, such as in a motion for new trial or rehearing. Thus, to be preserved, an argument or objection often has to be raised both when the issue first comes up (usually at a hearing or trial) and again after the trial or decision.

In a civil case where a jury trial is held, a motion for a new trial has to be filed within 15 days after the jury's verdict (<u>not</u> the judgment, which is entered later). *See* Florida Rule of

Civil Procedure 1.530(b). In a jury case, most types of objections have to be raised again in timely a motion for new trial to preserve them for appeal (this is in addition to objecting at trial or whenever the issue first came up). Examples include objections to allowing or disallowing specific evidence at trial, giving or withholding requested jury instructions, and improper closing arguments, to name just a few.

In a civil case decided by the judge (without a jury trial), a motion for rehearing has to be filed within 15 days after the final order or judgment. *See* Florida Rule of Civil Procedure 1.530(b). Objections to the judge's failure to consider certain evidence or failure to state enough findings of fact in the final order are examples of the types of objections that should usually be raised again in a motion for rehearing from a final order or judgment.

Filing a motion for new trial, a motion for rehearing, and a few other types of post-trial motions, may extend the time for filing the appeal—but **only** if the motion was both timely filed and specifically allowed by the rules of procedure. *See* Florida Rule of Appellate Procedure 9.020(i). Technically, such a motion does not really extend the time for taking the appeal; rather, the 30-day deadline for filing the notice of appeal just does not start until the lower tribunal enters an order ruling on the motion. However, if the motion for new trial, motion for rehearing, or other post-trial motion was either untimely or not specifically allowed by the rules of procedure, the 30-day deadline to file an appeal will not be extended in any way, and will instead run from the date of the final order or judgment as usual (and not from an order ruling on the untimely, unauthorized motion). One way to reduce the risk of either failing to preserve an issue or failing to timely file the appeal may be to: (1) file a motion for new trial, rehearing, or other post-trial motion, and then (2) after filing the motion go ahead and also file the notice of appeal. *See* Florida Rule of Appellate Procedure 9.020(i).

Flowchart for Final Appeals

Entry of a final appealable order

↓

within 30 days of final order:

appellant files notice of appeal with lower tribunal and pays the filing fee

↓

within 10 days of notice of appeal:

appellant files "directions to the clerk of the court" and "designations to court reporter"

appellee files a notice of appeal to cross-appeal if challenging same order

↓

within 50 days of notice of appeal:

clerk of the appeals division prepares the record on appeal and the index to the record on appeal

↓

within 70 days of the notice of appeal:

appellant files initial brief with appellate court and sends (serves) a copy to appellee

↓

within 20 days of the initial brief:

(plus five days if the initial brief was sent/served by U.S. mail or email)

appellee files initial brief with appellate court and sends (serves) a copy to appellant

↓

within 20 days of the answer brief:

(plus five days if the initial brief was sent by U.S. mail or email)

appellant files reply brief with appellate court and sends (serves) a copy to appellee

↓

no later than the date the reply brief is due:

all motions for appellate attorney's fees are filed with appellate court and sent (served) to opposing party (many miss this deadline)

↓

within 10 days after the reply brief is due:

any request for oral argument is filed and sent (served) to opposing party

↓

clerk of the appellate court may schedule the appeal for oral argument

(no specific time frame when oral argument is scheduled)

↓

oral argument is presented, if scheduled by appellate court

↓

appellate court issues an opinion

↓

within 15 days from the date of the opinion:

any post-opinion motions for rehearing, rehearing en banc, or certification are filed and served

↓

appellate court issues a decision on any post-opinion (no set time)

↓

within 15 days of a decision or order denying any post-opinion motion:

appellate court issues its mandate ending the case (and returning jurisdiction to lower tribunal)