Chapter 5

Appellate Practice

This chapter introduces you to the world of appeals. An appeal, as you likely know, is the way in which a lawyer asks an appellate court to review the decisions of a lower court.

The chapter begins by introducing you to the appellate brief. As we explained with respect to trial motions, before you begin any writing project, you should have a clear idea of how the end product should look. This chapter will help you envision that end product.

In addition, to write an effective appellate brief, you will need to know more about your audience and the rules that govern your appeal. The chapter thus describes the appellate process—from the initial decision to appeal to requesting review from the highest appellate court. That discussion is followed by a whirlwind tour of some uniquely appellate concepts that play into appellate brief writing.

I. Appellate Briefs

After a trial, a party dissatisfied with the results can ask an appellate court to review the trial court's legal decisions. That party would file an appeal. In that party's appellate brief, the party would explain the error the lower court made and why one or more errors should result in the lower court's decision being reversed. Although the components and their order vary by jurisdiction, the typical appellate brief includes the following components:

- Cover
- Table of contents
- Table of authorities
- Statement of jurisdiction
- Statement of the issues (or questions) presented
- Statement of the case
- Summary of the argument
- Argument
- Conclusion and relief sought
- Lawyer's signature

Each of those parts is identified in Example 5-A.[1]

1. Example 5-A shows a typical appellate brief. Although this brief was filed with the Oregon courts, the format has been changed to show what a typical brief looks like. This example does not follow the format required by Oregon's local rules governing appellate briefs.

Example 5-A • An appellate brief

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON Plaintiff-Respondent, v. RUBEN E. RODRIGUEZ, Defendant-Appellant.	Malheur County Circuit Court No. 04065087C CA A126339

RESPONDENT'S BRIEF

The cover identifies the parties, their lawyers, the court from which the case is being appealed, the court in which the appeal is being heard, and the docket numbers for the trial and the appellate cases.

Appeal from the Judgment of the Circuit Court
For Malheur County
Honorable PATRICIA A. SULLIVAN, Judge

LELAND R. BERGER #83020
Attorney at Law
3527 NE 15th Ave. #103
Portland, OR 97212
Telephone: (503) 287-4688

ANTHONY L. JOHNSON #05070
Attorney at Law
8425 SE 19th Avenue
Portland, Oregon 97202
Telephone: (503) 238-2781

Attorneys for Defendant-Appellant

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General

LAURA S. ANDERSON #88150
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Plaintiff-Respondent

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The table of contents provides an overview of the argument to come. It also tells the judge where to find the different parts of the argument within the brief.

TABLE OF AUTHORITIES

Cases Cited

Statutory Provisions

Other Authorities

RESPONDENT'S BRIEF

JURISDICTION

This court has jurisdiction pursuant to Oregon Revised Statute § 138.050.

This statement of jurisdiction establishes that the court has jurisdiction to hear this case.

QUESTION PRESENTED

Should the language of *former* Oregon Revised Statute § 809.235(1)(b), providing that a person's driver's license shall be permanently revoked if the person is convicted of a misdemeanor DUI "for a third time," be construed to preclude revoking a person's driver's license after a fourth, fifth, or other succeeding misdemeanor DUI?

The question presented states the legal question that needs to be resolved on appeal.

STATEMENT OF THE CASE

Defendant has been convicted of driving under the influence (DUI) on four separate occasions. In Oregon, he was convicted of a DUI in 1976 and 1980. While in California in 1989, he was also convicted of a DUI. Finally, last year, defendant pleaded guilty and was then convicted of a DUI when he drove with a blood alcohol content of .27 percent. At sentencing, the trial court permanently revoked defendant's driving privileges. Defendant now appeals that sentence.

The statement of the case states the facts relevant to the appeal. In some jurisdictions, this section is called the statement of facts. Other jurisdictions require both a statement of facts and a statement of the case.

SUMMARY OF ARGUMENT

After defendant pleaded guilty to a misdemeanor DUI, the trial court permanently revoked his driver's license pursuant to *former* Oregon Revised Statute § 809.235(1)(b) (amended 2005) because defendant had been previously convicted of a DUI at least two times. *Former* Oregon Revised Statute § 809.235(1)(b) requires a court to permanently revoke a person's driver's license if the person "is convicted of misdemeanor [DUI] . . . *for a third time*."

On appeal, defendant argues that the trial court was not permitted to permanently revoke his license because he had three previous DUI convictions, and the statute allowed permanent revocation only upon a third conviction, not upon a fourth. This court should affirm the permanent revocation.

First, revocation was mandatory under *former* Oregon Revised Statute § 809.235(1)(b). That statute is ambiguous because it can plausibly be read to mean that permanent revocation is mandatory in cases where either (1) a person had *only* two prior convictions for DUI, or, as the state argues, (2) a person had *at least* two prior convictions for DUI.

Because the statute is ambiguous, this court should look to the legislative history of *former* Oregon Revised Statute § 809.235(1)(b) to discern the legislature's intent. That history shows that the legislature recognized that repeat drunk drivers pose a significant danger to the public, and revocation of driving privileges is one means for protecting the public from habitual drunk drivers. Given the legislature's intention to protect the public and sanction repeat DUI offenders, construing the statute as defendant proposes, to revoke third-time offenders, but not revoke fourth-, fifth-, or more-time offenders, would be contrary to the legislature's intent as evidenced by the legislative history.

The summary of the argument, not surprisingly, gives a summary of the argument to come. Judges will return to this section if they need a quick overview of the argument.

ARGUMENT

The argument explains why the desired outcome is supported by the law and facts.

I. The trial court's permanent revocation of the defendant's driver's license was proper.

This argument provides an example of a statutory construction analysis.

At sentencing, the trial court correctly revoked defendant's driving privileges pursuant to *former* Oregon Revised Statute § 809.235(1)(b).[1] That statute provided as follows:

> The court shall order that a person's driving privileges be permanently revoked if the person is convicted of felony driving while under the influence of intoxicants under Oregon Revised Statute § 813.010 or *if the person is convicted of misdemeanor driving while under the influence of intoxicants under Oregon Revised Statute § 813.010 for a third time.*

Or. Rev. Stat. § 809.235(1)(b) (amended 2005) (emphasis added).

A. Oregon's method of statutory construction

A trial court's construction of a statute is reviewed for errors of law. *State v. Thompson*, 971 P.2d 879, 885 (Or. 1999); *Chaffee v. Shaffer Trucking, Inc.*, 948 P.2d 760, 761 (Or. Ct. App. 1997). That construction is governed by Oregon statutes pertaining to statutory construction, Or. Rev. Stat. §§ 174.010-.090, and the methodology set out in *Portland General Electric Co. v. Bureau of Labor & Industries*, 859 P.2d 1143, 1145-47 (Or. 1993).

The aim of statutory construction — both under Oregon statute and case law — is to discern what the legislature intended when it enacted the particular statute: "In the construction of a statute, a court shall pursue the intention of the legislature if possible." Or. Rev. Stat. § 174.020(1)(a); *Portland Gen. Elec. Co.*, 859 P.2d at 1146-47.

To ascertain the legislature's intent, the text and context of the relevant statutes must be analyzed first because the text and context together represent the best evidence of the legislature's intent. *Portland Gen. Elec. Co.*, 859 P.2d at 1145-46. In examining the text of a statute, the construing court generally assumes that the legislature intended the words of the statute to carry their ordinary meanings unless the phrasing of the statute suggests that the legislature intended different meanings to apply. *Id.* at 1146; *see also State v. Ausmus,* 85 P.3d 864, 869 (Or. 2003) (stating that a court usually "gives words of

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1. Oregon Revised Statute § 809.235(1)(b) (amended 2005) was amended by Oregon Laws 2005, chapter 436, section 1, and now reads as follows:

> (b) The court shall order that a person's driving privileges be permanently revoked if the person is convicted of felony driving while under the influence of intoxicants in violation of Oregon Revised Statute § 813.010 or if the person is convicted of misdemeanor driving while under the influence of intoxicants in violation of Oregon Revised Statute § 813.010 or its statutory counterpart in any other jurisdiction for a third or subsequent time.

common usage their plain, natural and ordinary meaning"); *State v. Stamper,* 106 P.3d 172, 174 (Or. Ct. App. 2005) (phrasing of statute may indicate legislature intended different meaning to apply).

The text, however, should not be considered in isolation, but in its context. *Vsetecka v. Safeway Stores, Inc.*, 98 P.3d 1116, 1119 (Or. 2004). The context of a statute includes other parts of the same statute, along with other related statutes, prior versions of the statute, prior judicial interpretations of the relevant statutory language, and pre-existing common law. *See In re Marriage of Denton*, 951 P.2d 693, 697 (Or. 1998); *Krieger v. Just*, 876 P.2d 754, 758 (Or. 1994); *Portland Gen. Elec. Co.*, 859 P.2d at 1146; *Stephens v. Bohlman,* 838 P.2d 600, 603 n.6 (Or. 1992). At this first step in the analysis, rules of construction, both statutory and judicial, may be applied to assist in discerning the meaning of the language at issue. *Portland Gen. Elec. Co.*, 859 P.2d at 1146.

If, after examining the text in context, the court concludes that the statute is ambiguous, that is, capable of multiple constructions that are not "wholly implausible," the court may resort to legislative history and, if necessary, other aids to assist in its construction. *Owens v. Motor Vehicle Div.*, 875 P.2d 463, 468 (Or. 1994) (explaining that resort to legislative history is necessary unless alternative interpretations are "wholly implausible").

If the intent of the legislature still remains unclear even after considering the text, context, and legislative history, then this court may resort to general maxims of statutory construction to resolve the remaining uncertainty. *Portland Gen. Elec. Co.*, 859 P.2d at 1146. Among these general maxims is the principle that the court will not adopt a statutory meaning that is inconsistent with the apparent policy of the legislation as a whole and that leads to an incongruous result. *See State v. Vasquez-Rubio*, 917 P.2d 494, 497 (Or. 1996) (explaining that absurd-result maxim best suited for helping court determine which of a number of plausible meanings legislature intended).

B. Oregon Revised Statute § 809.235(1)(b) is ambiguous because the phrase "for a third time" is capable of multiple constructions that are "not wholly implausible."

The subject phrase, "for a third time," is ambiguous because it has more than one plausible meaning. It could mean, as defendant argues, that (1) a person had *only* two prior convictions for DUI, or, as the state argues, that (2) a defendant had *at least* two prior convictions for DUI, and the present conviction for which revocation is mandatory constitutes the "third." The latter construction is plausible for several reasons.

First, the legislature created an indefinite reference. The indefinite article "a" is an indefinite determiner with an indefinite reference. *See* Sidney Greenbaum, *Oxford English Grammar* 165 (1996) ("The definite article is used when the speaker (or writer) assumes that the hearer (or reader) can identify the reference of a noun phrase[.] . . . The indefinite article is used when that assumption cannot be made[.]"); *see also* Ronald Carter & Michael McCarthy, *Cambridge Grammar of English* 907 (2006) ("Indefinite article refers to the determiner *a/an* that is used to express an indefinite meaning."). It is "used as a function word before . . . mass

nouns when the individual in question is undetermined, unidentified, or unspecified . . . ." *Webster's Third New Int'l Dictionary* 1 (unabridged ed. 1993); *see also Galfano v. KTVL-TV,* 102 P.3d 766, 772 (Or. Ct. App. 2004) (relying on *Webster's* definition of the article "a" in ruling that the phrase *"a* judgment pursuant to Rule 67" in ORCP 68 C(5)(b) authorizes a trial court to render a supplemental judgment after *any* ORCP 67 judgment has been entered). *Compare Anderson v. Jensen Racing, Inc.*, 931 P.2d 763, 767 (Or. 1997) (explaining that the definite article "the" functions as an adjective that denotes a particular, specified thing).

The indefinite article "a" used with the ordinal determiner "third" suggests that the legislature intended an indefinite third. The word "third" is an ordinal number; ordinals refer to positions in a sequence. *See* Greenbaum, *supra*, 199. Thus, the combination of the indefinite "a" with the ordinal "third," creates an indefinite third. Because the statute refers to an indefinite third position in a sequence, the ordinary meaning of the statutory text mandates license revocation upon any conviction, following two prior convictions.

Reading the text of *former* Oregon Revised Statute § 809.235(1)(b) in its context also leads to the conclusion that the statute mandates revocation of a person's driver's license upon any conviction after two prior convictions. The stated policies of the legislature are context within which the text of each statute should be read. *State v. McBroom*, 39 P.3d 226, 228 n.2 (Or. Ct. App. 2002) (explaining that statutory statement of general policy in vehicle code is context for interpretation of specific provision pertaining to offense of failure to drive within a lane). With respect to Oregon's vehicle code, the legislature's stated polices are to protect the public, Or. Rev. Stat. § 801.020(11)(a), to "deny the privilege of operating motor vehicles on the public highways to persons who by their conduct and record have demonstrated their indifference for the safety and welfare of others," Or. Rev. Stat. § 801.020(11)(b), and to "discourage repetition of criminal acts," Or. Rev. Stat. § 801.020(11)(c). Thus, understanding *former* Oregon Revised Statute § 809.235(1)(b) to require the revocation of a driver's license upon any conviction, following two prior convictions, is also consistent with the statute's context.

The alternate construction advanced by defendant is not consistent with the statutory context. If defendant's argument prevails, a person with a *greater* number of DUI convictions (i.e., more than three convictions) prior to the enactment of the statute would lose his or her license for a substantially *lesser* period of time than a person who has been convicted of only two DUIs before the effective date of the statute. *See* Or. Rev. Stat. §§ 809.400(1), .428(2). Not only is such a construction patently inequitable, such an eventuality would be contrary to the stated policies of the legislature to protect the public and to deny driving privileges in relation to driving offenses.

Moreover, the fact that the legislature has in other instances used the phrase "at least three times," does not mean the absence of that language here requires the court to adopt the defendant's interpretation. Previously, this court has explained that, when the legislature uses a particular phrase in one statute but not another, it permits an inference that the omission was intentional, but this court "c[ould] not say that the text speaks conclusively in that regard." *State v. Robison*, 120 P.3d 1285, 1287 (Or. App. 2005). Thus, the absence of the "at

least three time language" merely creates an ambiguity, which allows this court to consider the statute's legislative history when interpreting the statute.

C. The legislative history demonstrates that the legislature intended to mandate license revocation any time after two prior convictions.

The legislative history for House Bill 2885, which eventually became Oregon Revised Statute §809.235, reflects an intent that sanctions for DUI increase as the number of DUI convictions increases.

For example, Representative Barker, a chief sponsor of the bill, testified before the House Judiciary Committee in support of the bill. He expressed frustration with current law, which allowed courts to revoke driving privileges only upon a fourth conviction. He wanted revocation to occur sooner:

> I introduced this bill, brought this bill forward, that would revoke driving privileges after a third conviction of driving under the influence. At the present time, it's four convictions. And * * * to keep it really brief the only objections I've heard about this so far at town halls and so on in meetings with citizens in my district is they can't imagine why we're waiting for the third time, why it isn't done sooner.

House Judiciary Committee, April 3, 2003, Tape 123 Side A at 50, Internet RealOne Player at 1:51:52.

When Representative Barker carried the bill on the House floor, he explained waiting until a fourth DUI conviction to revoke a driver's license was "unacceptably tolerant towards reckless behavior":

> HB 2885 comes to you from your Judiciary Committee where it passed with a unanimous vote. Currently someone convicted of driving under the influence of intoxicants does not permanently lose their driving privileges until after their fourth conviction. This means that after the initial DUI arrest which often results in a diversion program someone has to be convicted four more times to lose their privileges. As an Oregonian and the father of two daughters I find this to be unacceptably tolerant towards such reckless behavior. As a retired police lieutenant I could tell you that someone who gets convicted of drunk driving four times has a substance abuse problem[,] and colleagues[,] they need to be off the road.
>
> This bill revokes rather than suspends the driver's license of a person convicted for the third DUI. This revocation can be appealed after ten years. I don't feel it's necessary to give you a long speech about the dangers of driving while intoxicated. Most of us know someone who's been victimized by an intoxicated driver.

House Floor Debate on HB 2885, April 10, 2003, Tape 49 Side A at 314 to 356, Internet RealOne Player at 3 6:27 to 3 9:56.

On the Senate floor, prior to passage of the bill, other senators expressed their frustration with drivers who, despite prior convictions and other sanctions, continued to drink and drive:

> Senator Stan: HB 2885 is a DUI bill that changes the penalty for conviction for DUI from suspension to revocation of a driver's license after three convictions. We understand on the first conviction an individual may go through a diversion program and have the conviction removed so it's very likely a person convicted of three DUI has also offended one other time. It's very clear that people who continue to offend in this way have a very serious addiction problem and we believe that it's important to revoke their privilege to drive and so members I urge your support of HB 2885.
>
> Senator Dukes: This is a good bill because it makes a very small incremental improvement. But I stand today in utter frustration, if you listen to the carrier when to get around to a Class A misdemeanor — which by the way folks we're not even prosecuting at the moment because we don't have enough court time to do all of that. We're going to do that after the fifth DUI, We're going to finally — it's just the penalty really small for turning someone lethal loose on the roads in Oregon. And I think that one of the failures that the legislature has made over the years is an inability to be able to deal with that. I mean after you've gone out and driven and then convicted, and driven and then convicted, and driven and then convicted — we're going to give you a Class A misdemeanor. And then if you go drive and get convicted again we'll finally get to a felony. And we'll get serious about it maybe and I just think in that process we have given people far too many opportunities to kill and maim people. And that is a mistake. However, as I said this bill is an improvement, but at this rate we're going to have a lot more deaths from drunk drivers that we could have stopped if we would simply have the guts to strengthen these laws.
>
> Senator Minnis: Mr. President I just wanted to stand and say that I agree one hundred percent with the senator from Astoria [Senator Dukes]. There were over 25,000 DUI arrests in Oregon in 2001. That is simply not acceptable. Thank you.

Senate Floor Debate on H.B. 2285, May 21, 2003, Tape 165 Side B at 16 to 74, Internet RealOne Player at 59:18 to 1:00:52.

Nowhere does the legislative history suggest that the legislature was enacting a bill that would allow revocation of driving privileges at the third conviction but not upon a fourth. Such an interpretation would lead to the incongruous result that a person with a greater number of DUI convictions would be subject to a lesser penalty.

Accordingly, this court should construe *former* Oregon Revised Statute § 809.235(1)(b) to mandate permanent driver's license revocation in cases in which a person is convicted of a misdemeanor DUI and has previously been convicted at *least twice* for DUI.

In this case, Mr. Rodriguez had three times been convicted for DUI when, on September 13, 2004, he pleaded guilty to a fourth misdemeanor charge of driving under the influence of intoxicants. Because he had been convicted for DUI at least twice before, pursuant to *former* Oregon Revised Statute §809.235(1)(b), the court properly imposed a permanent revocation of Mr. Rodriguez's driving privileges.

CONCLUSION

Final conclusions to a brief are often short and formulaic, such as this one. The final conclusion will always ask for the relief sought.

The trial court's judgment wherein defendant's driver's license is permanently revoked should be affirmed.

Respectfully submitted,

The lawyer's signature

_____
LAURA S. ANDERSON
Senior Assistant Attorney General

Attorneys for Plaintiff-Respondent
State of Oregon

The party who files the appeal is called the appellant (or petitioner). The party responding to the appeal is called the respondent. After an appellant files an opening brief, the party who won below can file a brief explaining why the trial court's decision was in fact correct and should be upheld. As a general matter, a respondent's brief includes all the same parts as an appellant's brief. Many courts, however, allow a respondent to accept parts of the appellant's brief and not repeat those parts in the respondent's brief. The federal rules, for example, state that, unless the respondent is dissatisfied with the appellant's statement, a respondent's answering brief need not include the jurisdictional statement, the statement of the issues, the statement of the case, or the statement of the standard of review.[3] Whether to accept any of appellant's statements is a strategic decision that Chapter 11, *Constructing an Appellate Brief*, discusses at more length. For now, you should know that respondent's brief usually includes all the same parts as the appellant's opening brief, but the respondent has the option of omitting a section and accepting one or more of the appellant's statements.

Finally, in some instances, the appellant or petitioner can file a response to the respondent's brief. Reply briefs are not always allowed as a matter of right.[4] If a reply brief is permitted and the respondent decides to file one, then the reply brief will look very much like the opening or responding brief. However, you will include only those parts of the brief that are necessary to respond to the opposing arguments. Usually, after a cover, table of contents, and table of authorities, the reply brief jumps straight into the argument.

Appellee vs. Respondent

"Appellee" and "respondent" refer to the same party: the party who is responding to the appeal.

The Federal Rules of Appellate Procedure use the word "appellee." "Respondent," however, is the more intuitively meaningful word. When using the word "respondent," the reader does not have to sort out the difference between "appellant" and "appellee," two very similar sounding words. For these reasons, this chapter uses the word "respondent" throughout.

3. Fed. R. App. P. 28(b).

4. For example, under the Oregon Rules of Appellate Procedure, the appellant in a criminal case is not allowed to file a reply brief without leave of court. Or. R. App. P. 5.70(3). Other jurisdictions may have similar rules.

II. The Rules that Govern Appeals

The above section describes how an appellate brief typically looks. Appellate briefs do, however, vary from jurisdiction to jurisdiction. To determine what your brief should include, you will have to consult the rules that govern appeals in your jurisdiction. These same rules will also provide other important information such as the time frame in which you must file your brief.

Keep in mind that some jurisdictions have more than one set of rules governing their appeals. For example, appeals in the federal courts of appeal are governed first by the Federal Rules of Appellate Procedure. Then, the various federal circuit courts have their own local rules that supplement the Federal Rules of Appellate Procedure. Similarly, in state courts, the state's highest court usually adopts a set of rules that govern its proceedings, while the intermediate appellate court adopts different rules for its proceedings.

Two resources can help you find and understand the governing appellate rules. First, most courts have valuable information on their websites. In addition to appellate rules of procedure, you will often find sample documents and how-to advice on courts' websites. Second, a number of good treatises on appellate practice are available, some of which address practice in certain courts (such as the United States Supreme Court or the Ninth Circuit Court of Appeals) and others that are more general. A law librarian will be able to direct you to the most suitable treatise. The bottom line for your practice: Long before you even think about writing a brief, make sure you have consulted the rules that govern the appeal.

III. The Court and Its Players: Judges, Law Clerks, and Staff Attorneys

Understanding the institution that you are addressing and the players in the appellate process will help you craft your brief to be more persuasive. A concise overview follows.

Of course, appellate courts have judges or justices. Normally, courts have an odd number of judges; however, if there are vacancies or recusals, your appeal may be heard by an even number of judges. Courts may sit in panels (usually of three judges), or the entire court may sit together (en banc).

In addition to the judges or justices, most appellate courts have two other categories of lawyers who may be involved in your appeal: law clerks and staff attorneys. Although the terminology and functions vary from court to court, law clerks are often recent law school graduates who work

Be Precise!
Know Your Judges from Your Justices

In most jurisdictions, a judge who is appointed or elected to the highest appellate court is called a "justice." A judge who sits on an intermediate appellate court is called a "judge." Exceptions do exist. In California, for example, the Court of Appeal jurists are called justices. Be sure to know the correct title for the person who will be deciding your case. It can only help.

for an individual judge for one to two years.[5] Staff attorneys are permanent lawyer-employees who may work for the court as a whole or for individual judges. Some staff attorneys have many years of experience and may have expertise in a given area of law. In most appellate courts, law clerks and staff attorneys assist the judges by conducting legal research, preparing bench memoranda (a memorandum that summarizes a case for a judge, usually prepared before oral arguments), preparing initial drafts of opinions, and editing and finalizing opinions.

When drafting an appellate brief, keep those various audiences in mind. Specifically, keep in mind that, in most cases, the judges and most of the legal staff working with the judges are generalists. That is, they are educated attorneys, but they are likely not experts in the subject matter central to your client's case. You should always assume that you know your case better than the appellate judges who will hear your appeal. Thus, in most instances, to persuade the court of your client's desired outcome, you must first educate the court about the facts of your case and the underlying law that applies to the case.

IV. The Appellate Process

Before you begin writing an appellate brief, you should also understand the overall process by which an appeal is filed, argued, and decided. This part of the chapter provides that overview.

A. The Decision to Appeal

A lower tribunal—a trial court, administrative agency, or other tribunal—has just disposed of a matter in a way that is contrary to your client's position. Do you appeal the decision?

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5. Increasingly, judges are hiring permanent law clerks. When a law clerk is hired on a permanent basis, the most significant difference between a "law clerk" and a "staff attorney" is the title. Otherwise, both are experienced lawyers assisting a judge or group of judges with research, drafting opinions, and preparing for oral arguments.

1. Whether to appeal

Lawyers should put a lot of thought in deciding whether to appeal. The first question in deciding whether to file an appeal is whether the tribunal's ruling is appealable. As a general matter, a losing party has no inherent right to appeal; rather, the right to appeal typically is conferred by statute. Usually, statutes permit litigants to appeal decisions that end the litigation but not those decisions that occur during the litigation process. For example, you may appeal after a decision granting a motion to dismiss or for summary judgment if the decision ends the litigation by disposing of all the claims before the court. By contrast, you typically may not appeal a decision denying summary judgment because that decision does not end the litigation but rather permits the case to proceed to trial.

Some exceptions do exist. Statutes permit some "interlocutory" appeals—that is, appeals before the litigation is concluded—if continuing the litigation would be particularly prejudicial to a party. For example, many jurisdictions permit a litigant to appeal a decision when a court concludes that a defendant does not have immunity from suit or when the court concludes that it has personal jurisdiction over the defendant, despite the defendant's arguments to the contrary. In both cases, proceeding to the trial would effectively deny the defendant the right to be protected from trial, and that right could not be re-gained after trial. Thus, when an interlocutory appeal is taken, the appellate court will review the specific issue permitted by the interlocutory appeal, and after the appellate court's decision, the case will either be dismissed or returned to the trial court to continue with the litigation.

Assuming that you have an appealable decision in hand, you must still decide whether you should appeal. In reaching that decision, consider whether an appeal will be worthwhile to your client:

- What is the projected cost of the appeal?
- What is the likelihood of obtaining a better outcome on appeal?
- How will the delay inherent in pursuing the appeal affect your client?
- Is another route—such as seeking a settlement or asking the trial court or other tribunal to modify its ruling—a better approach?

In short, before filing an appeal, you must carefully consider whether an appeal is the best way to serve your client's needs. Producing a persuasive brief in an otherwise ill-advised appeal may not be to your client's advantage.

2. Which issues to raise on appeal

Once you have decided that it makes sense to appeal, another decision that you will have to make before filing an appellate brief is which

issues you will raise on appeal. Many appellate briefs raise only one issue, such as whether the evidence was sufficient to support a criminal conviction, while other briefs may raise dozens of issues.

In choosing which issue or issues to raise on appeal, remember that you are not required to challenge every ruling made by the trial court or agency. Experienced appellate practitioners will choose their strongest arguments and forgo those arguments that have only a small chance of succeeding for three reasons: First, a good argument buried in a host of weak arguments may be overlooked. Second, appellate judges have a lot of reading to do; if you force them to read several arguments that have little merit, they are less likely to react favorably to the one strong argument that you present. Finally, appellate courts impose length limits on briefs. If you waste words on six weak arguments, you may not have space to make that incredible winning argument on the one meritorious issue.

Notwithstanding the general advice to limit the number of issues raised on appeal, you must sometimes raise issues that you think have lit-

Review of Agency Decisions

As you read this chapter understand that appellate courts review decisions not just from trial courts. Appellate courts also review agency decisions, and sometimes the review of agency decisions constitutes a significant part of an appellate court's docket. Although there are some differences when an appellate court reviews an agency decision, many of the same principles discussed below apply to review of agency decisions.

So that you will have a feel for how an appeal arises from an agency decision, here is a brief description of the process.

Federal and state agencies are part of their respective executive branches. After the legislature passes a statute, often the legislature will delegate to an agency within the executive branch the authority to implement that statute. For example, Congress has delegated to the Internal Revenue Service the responsibility for implementing the tax code, and the Environmental Protection Agency implements environmental laws. States often have analogous agencies, which implement state laws. Agencies implement statutes by promulgating rules or regulations.

To enforce those regulations, agencies have authority to issue orders. Disputes often arise from those orders. For example, the Environmental Protection Agency has authority to issue permits that allow parties to discharge some material into wetlands. If the permit is denied, the party seeking the permit can challenge the EPA's decision.

The process for challenging an agency decision varies greatly from agency to agency. Some agencies have an internal process for reviewing an initial agency decision. In some agencies, that review may be before an administrative law judge and be nearly as formal as a trial. In other agencies, that review is much less formal. Still other agencies provide no review after the initial decision is made. In those cases, the initial decision is also the agency's final order.

Whatever the process may be in a given agency, once the agency issues its final order, a dissatisfied party can seek review in a state or federal appellate court, depending on whether a state or federal agency issued the order. Review of an agency's final order normally skips over the trial court and proceeds directly to an appellate court.

tle chance of success. For example, when pursuing an appeal in state court, you might identify a federal constitutional claim that has been rejected by the state intermediate appellate court in previous cases. You may, though, have reason to believe that the state supreme court or the United States Supreme Court will agree with your position. In that case, you must raise the issue in the intermediate appellate court so that it is preserved for later courts to consider. In doing so, however, the savvy practitioner will acknowledge in the intermediate court that the argument has previously been rejected by that court.

B. The Notice of Appeal

The appellate process typically begins with a notice of appeal, which in federal court must be filed within 30 days after the decision being appealed is entered in the trial court's docket.[6] The exact format of a notice of appeal will vary from jurisdiction to jurisdiction. To determine the required format in your jurisdiction, consult the appendix to the appellate rules of procedure, the court's website, or a relevant treatise. Example 5-B shows you a typical notice of appeal.

The notice of appeal is filed with either the trial court or the appellate court, depending on the rules in that jurisdiction. In addition, the notice of appeal is served on the other parties to the case. With these steps, both the court and the other parties to the case are notified that the dispute has not been finally resolved and that jurisdiction now lies with the appellate court.

After that document is filed, certain timelines begin to run and certain actions must be taken before the briefs are filed. For example, in federal court the appellant must order a transcript of the court proceedings within 14 days after the notice of appeal is filed.[7]

The Petition for Judicial Review of a Final Agency Order

When seeking judicial review of a final agency order, you would file a "petition for judicial review," which is the administrative law counterpart to a notice of appeal from a trial court decision. As with the notice of appeal, the petition for judicial review of the agency order triggers certain timelines and triggers the agency's duty to transmit relevant parts of the administrative record to the appellate court.

6. Fed. R. App. P. 4(a)(1)(A).
7. Fed. R. App. P. 10(b)(1).

Example 5-B • A typical notice of appeal

United States District Court for the
Southern District of Texas

Jonathan B. Wilson, Plaintiff,	} }	No. 16-10664
v.	}	Notice of Appeal
Zal Medical Group, Inc., Defendant.	} }	

Notice is hereby given that Zal Medical Group, Inc., defendant, in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 7th day of March, 2016.

Gail Izaguirre

Gail Izaguirre
Attorney for Zal Medical Group
1100 Louisiana Street
Suite 410
Houston, TX 77002

C. The Record

At trial or during a hearing, the parties determine what evidence to submit to the decision maker, and the decision maker bases a decision on that evidence. That evidence, which usually consists of documents, exhibits, and a transcript of any oral testimony or argument, comprises the "record" in the case. On appeal, lawyers compile excerpts of the trial record (sometimes called an appendix) and submit it to the appellate court so that the appellate court can review the proceedings below.

The importance of the record on appeal cannot be overstated. With few exceptions, appellate courts may not consider evidence that was not before the trial court. Thus, when trying to persuade appellate courts, remember that if something is not in the record, it does not exist. References to matters that are not in the record may draw the ire of appellate judges and will detract from the persuasiveness of your argument.

Court rules differ regarding who has the responsibility for preparing the appendix or excerpt, and rules also vary regarding the contents of

the appendix or excerpt. Typically, the appendix or excerpt contains only those parts of the trial record that are necessary to support the arguments made on appeal; however, some appellate courts require the full record to be transmitted.

Compiling the excerpt of record requires a little bit of thought. Lawyers tend to throw everything into the excerpt, perhaps figuring, "Better too much than too little." Although that sentiment is hard to argue with, an excerpt of record that includes virtually the entire trial court file, when the only issue on appeal is an isolated legal issue, does not inspire confidence that the lawyer is taking the necessary care in the appeal. Put that extra ounce of thought and effort into the excerpt or appendix.

Do Appellate Courts Really Care About the Record?

Yes. Here's what one California court had to say about the record:

> When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two. In this case, the parties totally missed the appellate mark by failing to provide an adequate record for review.

Protect Our Water v. Cty. of Merced, 1 Cal. Rptr. 3d 726, 726 (Cal. Ct. App. 2003).

D. The Briefs

After the notice of appeal has been filed and the relevant parts of the record have been transmitted, the parties then submit their briefs. The different kinds of briefs that the parties file are described earlier in this chapter.

The rules of appellate procedure in each jurisdiction establish the amount of time parties have to file their briefs. In federal courts, and if no extension of time is granted, the appellant must file the opening brief (also called the "appellant's brief") 40 days after the record is filed. The respondent then has 30 days to submit a brief. In federal court, the appellant then has 14 days to file a reply brief to the respondent's brief.[8]

E. Oral Argument

After briefs are filed—often many months after briefs are filed—the parties may have an opportunity to present oral arguments to the court.

8. Fed. R. App. P. 31(a)(1).

Judging from movies and television, one would think that appeals are really all about oral argument. It turns out—no surprise here—that television and movies do not always depict the court system accurately. As an initial matter, many appeals are decided without oral argument; the briefs are the only opportunity the parties have to persuade the court. In addition, even for those cases in which the court hears oral argument, the briefs are almost always considered to be more important in persuading the court. Oral argument is discussed in detail in Chapter 14, *Oral Arguments*.

F. The Opinion

Finally, after briefs are submitted and after oral argument (if oral argument is permitted and if the parties elect to present oral arguments), the court will issue its opinion. The opinion is the court's explanation of its decision in an appeal.

The form of opinions varies enormously from court to court and even from case to case. The United States Supreme Court often issues opinions that run dozens or hundreds of pages in length. At the other extreme, some appellate courts issue short opinions or one-page orders that do little more than affirm or reverse a lower court's decision. Many courts also issue unpublished opinions that have little or no precedential value.

When writing an appellate brief, you should think about how you want to influence the court's opinion. For example, if you won below, you may not want the appellate court to write an opinion at all; rather, you might prefer that the appellate court summarily affirm the decision below. When writing the brief in that type of case, you would want to show that existing precedent squarely addresses all the issues raised and an analysis of those cases shows the trial court got it right. In other cases, your goal may be to convince the court to write a published opinion that will not only allow you to prevail in this case, but will also provide guidance to lower courts and litigants. Finally, there may be times when you know that you are likely to lose the appeal, but you want your brief to guide the court's analysis. In those cases, you will want your brief to help shape the court's opinion so that the opinion announces a rule that is favorable to your client's future interests, despite the loss in this particular case.[9]

G. Petitions for Reconsideration or Rehearing

If you lose an appeal in an intermediate appellate court, you might appeal to a higher court, a route that is discussed below. But, before

9. For an example of such a case see the discussion of *Canell v. State*, 58 P.3d 847 (Or. Ct. App. 2002), in Chapter 2, *The Ethical, Professional Advocate.*

doing so, you should consider whether to ask the intermediate appellate court to reconsider its decision (or rehear the case—the two phrases are often used interchangeably).

If you ask the intermediate appellate court to reconsider its decision, you have two options. If the court is one that sits in panels made up of fewer than all the judges on the court, you can ask the panel that decided the appeal to reconsider its decision, or you can ask all the judges of the intermediate appellate court to review the panel's decision. When all the judges on a court review a panel's decision, the review is called an "en banc review." Whether you request review by a panel of judges or by all the judges, court rules limit the circumstances in which reconsideration will be allowed.

If you ask a panel to reconsider its decision, the panel will usually do so only if a party can show that the panel failed to consider a salient fact or misunderstood the law. The Federal Rules of Appellate Procedure, for example, require that a party seeking panel reconsideration "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended."[10] Many state courts have identical requirements.[11]

Thus, if you wish to persuade an intermediate appellate panel of judges to reconsider, first, look carefully at the criteria for reconsideration. If your case does not meet those criteria, do not waste your time, the court's time, and your client's money in the name of zealous representation. Appellate judges do not like petitions for rehearing that simply repeat the arguments made in the briefs. If, however, the opinion clearly shows that the court missed an important fact in the record or a point of law—one that will make a difference—a petition for rehearing may be appropriate. In that case, your goal is to carefully point out to the court what the factual or legal error is and, perhaps more importantly, why it makes a difference. Appellate courts want to correctly apply the law, but, like most of us, they occasionally make a mistake. By respectfully pointing out the mistake and explaining why a different outcome is warranted, you allow the court to fix its error and you achieve a better result for your client.

If, however, the panel that decided your case reached a legally supportable conclusion, you might consider asking all the judges of the intermediate court to review the panel's decision. However, en banc review is available in only a limited number of jurisdictions. Moreover, persuading a full court to grant en banc review is more difficult than persuading a panel to grant rehearing. For example, under the federal rules, petitions for rehearing en banc are "not favored and ordinarily will not

10. Fed. R. App. P. 40(a)(2).
11. *See, e.g.*, Iowa R. App. P. 6.1204(3); Wash. R. App. P. 12.4(c).

be ordered" unless you persuade the court that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or that "the proceeding involves a question of exceptional importance."[12]

Thus, if seeking a rehearing en banc, your goal is to point out that the panel's decision is inconsistent with the decisions of other panels of the same court and that the panel's decision should be rejected in favor of the rule announced by other panels.

In summary, petitions for reconsideration or rehearing are specialized persuasive documents that are appropriate in a limited number of circumstances. By consulting the rules to determine when reconsideration will be allowed and making sure that your case meets those criteria, it is possible to obtain a better result for your client without the time or expense of seeking review in a higher court.

H. Review in a Discretionary Court

Above, we have discussed the typical appellate process as a case moves from the trial court through an appellate court. Most states, though, and the federal judiciary have two levels of appellate review: an intermediate appellate court and a supreme court.[13] Thus, after an intermediate appellate court issues its final decision in a case, a party may still request that the court of last resort—typically the supreme court—review the intermediate appellate court's decision.

We must emphasize the word "request." One of the big differences between intermediate appellate courts and supreme courts is that intermediate courts tend to be non-discretionary and supreme courts tend to be discretionary. That is, intermediate appellate courts generally have to consider every appeal that is filed, and their primary goal is to correct trial court or agency error rather than to announce rules of law. In contrast, supreme courts typically have control over which cases they review. Supreme courts usually limit their docket to those cases that represent an important issue or a conflict in the law that needs to be resolved.

Some exceptions do exist to a supreme court's ability to determine its docket. In many states, statutes will require that state's highest court to review a limited range of cases. For example, death penalty cases are often reviewed directly by the supreme court, rather than the intermediate appellate court. However, the kinds of cases that a supreme court must hear are limited. Therefore, remember that your one shot at winning may be in the intermediate appellate court; use it wisely.

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12. Fed. R. App. P. 35(a).

13. Delaware, Maine, Montana, New Hampshire, Rhode Island, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming are states without typical intermediate courts.

Be Precise!
Appellant vs. Petitioner

A party who appeals a trial court's decision and has an appeal as of right, is called an "appellant." The party responding is the "appellee" or "respondent."

By contrast, when a party seeks review in a discretionary court, the party instigating the review is called the "petitioner" not the "appellant." The instigator is called the "petitioner" because that party must petition for the right to be heard. The party responding is called the "respondent," never the appellee.

Supreme Courts

Nearly every jurisdiction designates its highest court as the "supreme" court of that jurisdiction. Exceptions, however, exist. New York and Maryland, for example, both call their highest court the "Court of Appeals." And, in New York, the trial courts are called "Supreme Courts."

For convenience, we use the term "supreme court" to refer to the highest court in a given jurisdiction.

I. Motions in Appellate Courts

Finally, many lawyers are surprised to learn that it is possible to file motions in appellate courts. As in trial courts, if you want an appellate court to take some action, you file a motion asking the court to do so. Depending on court rules, the motion should include an argument or should incorporate a separate memorandum that includes an argument. The federal rule is illustrative: "A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."[14]

What might you ask an appellate court to do? Just as with a trial court, the answer is that you may ask the court to do anything that is within its power and that will benefit your client. A few common examples include (1) a motion to file an overlength brief; (2) a motion for an extension of time in which to file a brief or other document; (3) a motion to dismiss based on mootness; and (4) a motion asking the court to take judicial notice. Court rules regarding motions generally are fairly specific, and you

14. Fed. R. App. P. 27(a)(2)(A).

should consult them before filing a motion. Most courts permit responses to motions.[15] Typically, though, appellate courts do not allow oral argument on motions.

In addition to understanding the appellate process, writing an effective appellate brief requires you to also understand several uniquely appellate concepts. These concepts include (1) appellate jurisdiction and justiciability; (2) preservation of error and plain error; (3) harmless error; (4) right for the wrong reason; and (5) standards of review. The next section explains these concepts in further detail.

V. Fundamental Appellate Concepts

Several appellate concepts shape how appellate courts handle appeals. Understanding these concepts will allow you to make an initial assessment of whether an appeal is likely to succeed and will allow you to advise your client appropriately. If you decide to proceed with an appeal, understanding these appellate concepts will also allow you to speak a language that appellate judges understand and to shape your writing to fit comfortably into the appellate setting in which it will be considered. Finally, familiarity with these concepts will also give you a deeper understanding of the many appellate opinions you will read in your legal career. What follows is a short discussion of some fundamental appellate concepts.

A. Appellate Jurisdiction and Justiciability

As with trial courts, an appellate court must have jurisdiction over a matter and the matter must be justiciable, that is, capable of being resolved by the court.

Lack of trial court or appellate court jurisdiction generally may be raised at any time, so even if the case has been tried, your most persuasive argument on appeal could be that the trial court lacked jurisdiction or that the appellate court lacks jurisdiction. You might, for instance, argue to a federal court of appeals that the federal district court never had jurisdiction over the case because the parties were adjudicating a state law matter, but were not actually citizens of different states, as re-

15. *See, e.g.*, Fed. R. App. P. 27(a)(3).

quired by 28 U.S.C. §1332(a)(1). Or, even if the district court had jurisdiction over the case, there might be an argument that the appellate court does not have jurisdiction because, for example, the district court never issued a "final decision," as required by 28 U.S.C. §1291.

Similarly, you should consider whether the case is justiciable, that is, capable of being decided by the court. Just as you might argue to a trial court that a dispute is not justiciable because the case is moot or is not yet ripe for adjudication, that same argument may be made to an appellate court. If, for example, events have occurred while the case is on appeal that would render any relief on appeal meaningless, the case may have become moot. If your case has become moot or is otherwise nonjusticiable, your strongest argument (as a respondent, of course) might be a procedural one: The case should be dismissed.

The point is that being aware of and thinking about jurisdiction and justiciability may provide you with persuasive arguments that are not related to the legal merits of the case. Sometimes the best argument is the simplest one.

B. Preservation of Error and Plain Error

Another important concept that occupies appellate courts is the principle known as "preservation of error." The general rule is that an appellate court will not consider a claim of error that was not raised at trial. That is, if a litigant wants to challenge a trial court's ruling on appeal, that same issue must have been brought to the trial court's attention, or the appellate court typically will not consider it. For example, if you want to argue to an appellate court that the trial court erred in admitting a piece of evidence, you must have objected to admission of the evidence in the trial court. Similarly, if you want to challenge the length of your client's prison sentence, the appellate court normally will not consider your argument unless you first raised the matter in the trial court.

Why require that a claim of error be preserved? First, the requirement promotes judicial efficiency by making the trial court aware of the claimed error when it still has a chance to take action to correct it. Second, the requirement ensures that the appellate court will have a complete record to review. For example, if the claim is that the trial court erred when it excluded a witness's testimony, challenging the exclusion at trial may allow the lawyer to describe the excluded evidence (on the record, but outside the presence of the jury). If, even in light of that description, the trial court still refuses to admit the evidence, the appellate court will know what it was that the trial court excluded. Finally—for judicial efficiency and just plain fairness—the rule prevents a litigant who notices a claimed error from "lying in the weeds," that is, waiting until after a loss to jump out and claim an error.

The Importance of Preserving a Claim of Error

Because appellate courts typically will not consider issues that were not "preserved," attorneys must think about appellate issues long before an appeal is filed. Success on appeal often hinges on trial counsel anticipating the arguments that will win on appeal and ensuring that a proper record is developed to support those arguments should an appeal follow. For an attorney who takes over a case on appeal and who sees a promising issue on which to base an appeal, nothing is more frustrating than to learn that the issue was not preserved by the trial lawyer. In that case, it may be necessary to abandon the appeal altogether or to rely only on issues that might be less persuasive. Therefore, trial lawyers should always assume that an appeal will follow and act accordingly.

Whether the action a lawyer took in the trial court was adequate to preserve the claim of error is something that appellate lawyers are happy to argue about and appellate courts are happy to write about. In fact, you may read appellate opinions in which the sole disagreement between the majority and dissent is whether a claim of error was preserved. What it takes to preserve a claim of error varies from jurisdiction to jurisdiction and from legal issue to legal issue. Nonetheless, a good guideline is that an objection or other action that may preserve a claim of error must be both timely and specific to preserve a claim of trial court error; how timely and how specific, however, varies with the context.

For our purposes, you should be aware of the following: (1) claims of error generally must be preserved for an appellate court to address them; and (2) appellate courts take the requirement seriously and many claims do not get addressed for lack of preservation. Thus, before proceeding with an appeal or raising a certain issue on appeal, you must consider whether the issue was preserved for appeal.

That said, some exceptions to the preservation requirement may allow an appellate court to address unpreserved claims. The most common exception is known as "plain error." If the trial court made a mistake that is so obvious that even a schoolchild would know it was an error, an appellate court may consider an argument based on that error. So, for example, if a trial court instructed a jury that it could convict a criminal defendant of a felony based on a preponderance of the evidence (rather than beyond a reasonable doubt) and that defendant was found guilty, that instruction would constitute plain error, and an appellate court could review the trial court's instruction to the jury despite a lack of preservation. Similarly, if a trial court refused to allow a jury trial even though one was required by the United States Constitution, an appellate court typically would address the error even if not preserved. But the trial court's foul-up must be obvious before an appellate court will be willing to treat it as plain error.

Be Precise!
A Note on the Phrase "Preservation of Error"

Most appellate practitioners use the phrase "preservation of error"; indeed, rules of appellate procedure use the phrase. That phrase is not quite accurate. Think about it: In the lower tribunal, a lawyer does not "preserve *error*." Rather, the lawyer preserves a *claim* or *argument* that the tribunal has committed error. Accordingly, although you will often (including in this chapter) see the phrases "preservation of error" or "preserve error" used as shorthand, remember that it is just shorthand. Accordingly, rather than writing, "Counsel for plaintiff *preserved the error* by objecting to the trial court's ruling," be more precise: "Plaintiff's counsel *preserved the claim of error* by objecting to the trial court's ruling." Appellate sticklers will love you.

C. Harmless Error

Another concept relating to how appellate courts will dispose of claims of error on appeal is known as "harmless error." Consider this example: The trial court commits an error; you object, preserving the claim of error; on appeal, you raise the claim of error, make a brilliant argument, and seek reversal of the trial court's judgment. You win, right? Not necessarily. If the trial court's error—although indisputably an error—did not ultimately affect the outcome of the case, the appellate court will not reverse the decision based on the error. Thus, if one witness's testimony was admitted erroneously, but the jury heard the same information from three other witnesses, the error in admitting the first witness's testimony may be harmless. Under what circumstances an error will be considered "harmless" varies, but all appellate courts recognize the doctrine. You should consider whether an error is harmless when deciding whether to appeal and when choosing which issues to raise on appeal. In other words, no harm, no foul.

D. Right for the Wrong Reason

Another important appellate concept is known as "right for the wrong (or a different) reason." Under this principle, an appellate court may affirm a trial court's ruling, even if the trial court's reasoning was incorrect, if the trial court ultimately reached the legally correct result. Thus, when deciding whether to appeal and when considering which issues to raise on appeal, you should also consider whether the trial court was right for the wrong reason. Similarly, a respondent who is seeking to uphold a trial court's ruling should carefully consider whether there is a colorable argument that the trial court was right for the wrong reason—sometimes, that argument may be the only one available for affirmance.

Right for the Wrong Reason: The Tipsy Coachman

Here is a bit of colorful legal history. In Florida and Georgia, the "right for the wrong reason" rule is known as the "tipsy coachman" rule. The "tipsy coachman" label comes from a nineteenth century Georgia case, *Lee v. Porter*, 63 Ga. 345, 346 (1879), in which the Georgia Supreme Court, noting that the "human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it," quoted a portion of Oliver Goldsmith's 1774 poem, *Retaliation*. That portion described "honest William . . . [h]is conduct still right, with his argument wrong . . . ."

> Here lies honest William, whose heart was a mint,
> While the owner ne'er knew half the good that was in't;
> The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honour, yet fearing to roam,
> The coachman was tipsy, the chariot drove home;
> Would you ask for his merits? alas! he had none;
> What was good was spontaneous, his faults were his own.

E. Standards of Review

The final—and probably most important—appellate concept addressed here is standards of review. Appellate judges live and breathe standards of review, so it is important to be familiar with the concept. In this section, you will learn what standards of review are and what different standards may apply to different cases. Then, in Chapter 11, *Constructing Appellate Briefs*, you will see how standards of review can inform your legal arguments.

Appellate standards of review can be described in various ways:

- The degree of deference that an appellate court gives to a lower tribunal's resolution of an issue
- The level of scrutiny an appellate court gives to a lower tribunal's determination
- The lens through which the appellate court will view the lower tribunal's determination

You are, no doubt, familiar with standards of review in non-legal settings. You may have asked a friend or colleague to review something you wrote to see if it is "in the ballpark." In that case, you are not asking the reviewer to tell you whether you have crossed every "t" and dotted every "i," but rather you seek a general level of scrutiny. Contrast that standard of review with the case in which you ask someone to look something over "with a fine-toothed comb." In that case, you are asking the reviewer to perform a very different type of review—a level of review with much greater scrutiny.

The sports world also has standards of review. For example, in the National Football League, a referee's initial call on the field may not be overruled absent "incontrovertible visual evidence" that the call on the field was incorrect. Such a standard gives high deference to the call on the field because it permits the call on the field to be overruled only when it is "incontrovertibly" clear that the call on the field was wrong. As a result, coaches are less likely to "appeal" decisions than if the standard were, say, "some" visual evidence.

As with standards outside the legal world, some appellate standards of review are more deferential to the trial court, while others are less deferential. Some allow the appellate court to substitute its view for that of the lower tribunal, while others require the appellate judge to say, in essence, "Well, I would not have done that, but in light of the standard of review, we cannot reverse." Before turning to specific standards of review, a few important points about standards of review are in order.

First, standards of review are tied to specific issues, not to entire cases. For example, if you are challenging a trial court's interpretation of a constitutional provision, the standard of review—de novo, as discussed below—is the same whether that issue arises in a securities regulation case or a death penalty case. That also means that different issues you raise on appeal may be (and often are) governed by different standards of review.

Second, because standards of review vary by issue you will need to research what the standard of review is for each issue you raise on appeal. Although it happens rarely, you may find an issue for which the standard of review is unsettled. If the standard of review is unsettled, you will begin your argument to the court by arguing for the standard of review that you believe is appropriate—and beneficial for your client. After presenting your argument about the appropriate standard of review, then, you will proceed to your substantive argument.

Third, standards of review are critically important. The standard of review for a given issue can affect everything from the decision whether to appeal, to your likelihood of prevailing on appeal, to how you couch your argument, to how the appellate court will think about your case. If you do not consciously consider (and set out) the proper standard of review for every issue you raise on appeal—and tie your substantive argument and relief sought to it—your brief will not have that special appellate flavor to it and the brief will be far less persuasive.

Various standards of review exist; the following discussion focuses on the most common standards of review that apply in appeals from trial court decisions. Be aware that different standards of review may apply to judicial review of agency decisions.

1. Rulings on issues of law

The most familiar standard of review is for error of law. Whether the lower tribunal correctly interpreted the law is reviewed de novo by the ap-

pellate court. That is, the appellate court determines "anew" what the correct interpretation is, and the appellate court owes no deference to the lower court's interpretation.[16] This same standard is also described by saying that the appellate court reviews the lower court's ruling "as a matter of law" or by saying that the appellate court's review is "plenary." If you lost in the court below—and assuming that you have a persuasive legal argument—this standard of review is the one under which you are most likely to prevail because under this standard the appellate court owes no deference to the lower court.

2. Factual findings

The second common standard of review relates to how the appellate court will consider the trial court's factual findings. A court is engaged in fact-finding—and not legal analysis—if its conclusion is based solely on the record, with no reference to a legal standard. For example, was the traffic light red when the pickup truck barreled through it? What exactly were the dimensions of the room in which the police officer interrogated the defendant, and how many hours did the interrogation last? Did the driver have three India Pale Ales before he jumped in his car and drove, or was it seven? The responses to all of those questions are findings of fact.

When an appellate court reviews a trial court's factual findings, the standard of review is significantly more deferential to the trial court. An appellate court will reverse a trial court's factual finding only if the trial court's findings of fact were "clearly erroneous." Under this standard, an appellate court will not re-weigh the evidence in the record. Rather, the trial court's judgment about how to resolve any conflicts in the record will stand, and the appellate court will reverse only if the trial court's factual determination is implausible, and the appellate court is left with a "firm and determined" conviction that the trial court's factual findings was a mistake.

The strong deference that appellate courts give to factual findings may affect the likelihood of your argument prevailing on appeal. If your

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16. Although the phrase "de novo" is most commonly used as described above, de novo review may have a different meaning in different jurisdictions, so be careful to check how the phrase is used in your jurisdiction. For example, in Oregon the phrase de novo review applies to reviewing errors of fact and not errors of law:

> In Oregon, "*de novo* review" remains tied to its origins in equity cases, which appellate courts tried anew upon the record; it thus refers to the review of factual findings. The phrase is inapplicable to actions at law, such as this case, in which there is the right to a jury trial on the facts. The [United States Supreme] Court, however, uses the phrase to refer to appellate review of the trial court's legal decisions; it contrasts that standard of review with review for abuse of discretion.

Waddill v. Anchor Hocking, Inc., 78 P.3d 570, 573 (Or. Ct. App. 2003) (citation omitted).

argument on appeal depends on the appellate court finding the facts contrary to the way they were found by the trial court, you will have a steep uphill battle.

3. Discretionary rulings

The third common standard of review is for abuse of discretion. For some rulings, no rule of law provides a single correct disposition. Rather, a trial court may choose from among a number of legally justifiable actions. In those cases, unless the trial court made a choice that is outside those that are legally available, an appellate court will not disturb the trial court's choice.

The abuse of discretion standard is often applied to a trial court's decision about court processes because trial courts are permitted significant leeway when managing courtroom proceedings. Assume, for example, that a rule of civil procedure states that, upon proper request, the trial court must give a party oral argument on any motion. Assume that the rule also states that the court may determine the amount of time the party may have for oral argument. Whether a trial court chose to give a party 15 minutes or 90 minutes, the appellate court would be unlikely to consider either ruling to be in error; that choice is within the "sound discretion" of the trial court. If, on the other hand, the trial court gave a party only 30 seconds for oral argument on a complex issue, that choice might constitute an abuse of discretion. In the first instance, the trial court chose from among legally permissible options, while in the second case, the trial court's choice was outside the range that the rule permitted.

Other decisions regarding court processes to which the abuse of discretion standard of review might apply include a court's decision to grant (or deny) motions to amend a complaint; to amend a judgment; to seal court records; or to grant a continuance.

Trial courts also often have leeway with more substantive decisions. For example, Federal Rule of Evidence 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Because weighing those considerations requires a court to choose from among more than one permissible outcome, rulings under Federal Rule of Evidence 403 are reviewed for an abuse of discretion. As a rule of thumb, if a lower court takes an action pursuant to a statute or rule stating that the court "may" do something, the action probably will be reviewed for an abuse of discretion.

Like the clearly erroneous standard for factual findings, the abuse of discretion standard of review is deferential to the lower tribunal. On balance, however, the abuse of discretion standard is probably slightly more favorable to the party who lost below than the clearly erroneous stan-

dard. An appellant may be slightly more likely to persuade an appellate court that a trial court abused its discretion than that a trial court's factual finding is clearly erroneous.

4. Mixed questions of fact and law

Things in standard-of-review land get murky when considering mixed questions of fact and law. The United States Supreme Court has "noted the vexing nature of the distinction between questions of fact and questions of law,"[17] and commentators have written volumes on the subject of the proper standard of review when the two are combined. This section addresses the issue briefly, simply to provide a feel for it.

In many cases, a trial court must perform a three-step process to resolve an issue before it. First, it must determine the facts. As you know, the standard of review for that part of the process is very deferential, and the facts as found by the trial court will not be disturbed on appeal, absent "clear error." Second, having determined the facts, the trial court must interpret a rule, a statute, a constitution, or common law to determine the appropriate rule of law. As you also know, the trial court's decision in that part of the process is entitled to no deference—it is reviewed de novo. Finally, the trial court must apply the rule it has determined to the facts it has found.

This last step—when the court applies the rule that it has discovered to the facts it has found—is the so-called mixed question of fact and law. That is the tricky part: What is the proper standard of review for that part of the process? It depends. If the application of the law to the facts in a given case is more like fact-finding, then the clearly erroneous standard applies. If, in contrast, the application is more like interpreting the law, the de novo standard applies. Unfortunately, courts and commentators may disagree about when the application of law to facts is more "fact-finding-like" and when it is more "law-interpreting-like."

Thus, if you are faced with an issue that turns on a mixed question of fact and law, do your research. Determine whether the courts in your jurisdiction have reached a conclusion. With luck, the courts will have already decided the appropriate standard of review for your issue. If not, as suggested previously, you should argue for the standard that benefits your client.

5. No articulated standard of review

Sometimes, the courts have not reached a conclusion about the appropriate standard of review. In that case, you will need to advocate that a particular standard of review should apply. In doing so, you should consider whether the particular issue is one that would better be resolved

17. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

by the fact finder—who is in the better position to make factual calls—or the appellate court—which is more suited to decide legal questions. Of course, if you won below you will hope that you can make a good faith argument that the trial court's decision should be upheld unless it is clearly erroneous—a standard under which you are more likely to prevail. Alternatively, if you lost below, you will similarly look for a good faith argument that the standard of review is de novo.

Effective appellate advocacy requires an understanding of standards of review. Often, they are obvious and undisputed; in other cases, they are unclear and open to argument. Other cases are more complicated. For example, what first appears to be one issue may need to be pulled apart into several sub-issues and different standards of review will be applied to different sub-issues depending on whether the sub-issue involves fact finding, interpreting the law, or choosing from among legally permissible conclusions.[18] Whether obvious or complicated, standards of review play a role in every appellate case, and you must think about them carefully when you are working on an appeal.

The discussion above provides a brief overview of the standards of review that you will most often see in practice. Table 5-C summarizes those standards and provides examples of when each standard would be used. If you write appellate briefs, familiarize yourself with the other standards of review that exist—for example, those standards that govern review of an agency's factual findings. Entire books could be and have been written on the subject of standards of review.[19] Most importantly, remember that standards of review are critical to appellate judges.

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18. For example, as the First Circuit Court of Appeals explained,

> The appellate standard of review for [Federal] Rule [of Evidence] 702 rulings is abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). "This standard is not monolithic: within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed de novo, and judgment calls are subjected to classic abuse-of-discretion review." *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010); *see also Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 251-52 (1st Cir. 1998) (noting these three dimensions of the abuse of discretion standard in reviewing exclusion of expert testimony).

Milward v. Acuity Specialty Prods. Grp., Inc., 639 F.3d 11, 13-14 (1st Cir. 2011).

19. *See, e.g.,* Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions* (2007); *see also* U.S. Ct. of App. for the 9th Cir., *Standards of Review*, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368 (accessed June 4, 2015) (defining and outlining standards of review in criminal and civil proceedings and in review of agency decisions).

Table 5-C • Standards of Review: Federal Courts*

STANDARD OF REVIEW	DE NOVO	ABUSE OF DISCRETION
Type of decision under review	Question of law and some mixed questions of fact and law	Discretionary action
Lower-court decision-maker	Trial judge	Trial judge
Degree of deference given to lower-court decision-maker	No deference	Substantial deference
Party typically benefitted by this standard	Appellant	Respondent
Definition	"[W]e review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). "When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).	"Under this standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances." *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1233 (10th Cir. 2001). "Under an abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. That is to say, we will not alter a trial court's decision unless . . . the court's decision was an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* at 1235-36 (citations and internal quotation marks omitted).
Examples	Motions for summary judgment; constitutional questions; statutory interpretation; mootness, ripeness, and standing; contract interpretation.	Amount of Rule 11 sanctions; attorney's fees; courtroom management and discovery issues (such as whether to grant a motion for continuance or whether to grant a motion to compel the production of documents); injunctions; temporary restraining orders.

* Professor Terri Pollman, University of Nevada, Las Vegas William S. Boyd School of Law, created the original version of this chart. Numerous other professors within the legal writing community have since updated and modified it.

	CLEARLY ERRONEOUS	SUBSTANTIAL EVIDENCE	ARBITRARY AND CAPRICIOUS
	Question of fact	Question of fact	Agency resolution of a question of fact
	Trial judge	Jury	Administrative law judge
	Significant deference	Extreme deference	Extreme deference
	Respondent	Respondent	Respondent
	A reviewing court "will not reverse a lower court's finding of fact simply because [it] would have decided the case differently. Rather, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citations and internal quotation marks omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). *See generally* Fed. R. Civ. P. 52(a)	When evidence is supported by substantial evidence, it means that there is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The "unsupported by substantial evidence" is more deferential than the "clearly erroneous" standard. *Stern v. Marshall*, 131 S. Ct. 2594, 2627 (2011), *reh'g denied,* 132 S. Ct. 56.	The absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992)
	Findings of fact made by a trial court.	A finding of fact from a jury, or a finding of fact made by an administrative agency under an Administrative Procedure Act adjudication or formal rulemaking.	A government agency's resolution of a question of fact decided by informal rulemaking under the Administrative Procedure Act.

Practice Points

- An appellate brief typically has these parts:
  - Cover
  - Table of contents
  - Table of authorities
  - Statement of jurisdiction
  - Statement of the issues (or questions) presented
  - Statement of the case
  - Summary of the argument
  - Argument
  - Conclusion and relief sought
- Before you begin drafting determine the following:
  - The rules that govern appellate procedure
  - Whether it makes sense to appeal
  - Which issues should be raised on appeal
  - Whether those issues have been preserved
  - The standard (or standards) of review that apply to each issue on appeal