Notice of Appeal: Now What?

Tips for Your First Time in a South Carolina Appellate Court

By Benjamin R. Gooding

In the practice of law, like life, you win some and you lose some. Sometimes you don't have the right facts. Other times the judge or jury didn't buy your side of the story. And sometimes the law just isn't in your favor. In these situations, it wasn't in the cards for you to win. There may be times, however, when the trial judge misapplied the law to the facts of your case or failed to apply the proper law in the first instance. The mechanism for correcting these errors is an appeal. An appeal can be a steep task for those who are unfamiliar with the appellate process. But with effort and planning, you can increase the odds that your first appeal will be a success.

Let's get started.

When contemplating an appeal, the first thing any lawyer should do is review the rules. This is particularly true for a lawyer handling his or her first appeal. The South Carolina Appellate Court Rules are filled with specific instructions addressing everything from deadlines and citation formats to what color paper to use for a brief's cover page.[1] If you have never handled an appeal before, read these rules from front to back at the start. You will likely refer back to the rules often throughout the appellate process.

For the appellant, the first step in any appeal is serving a notice of appeal. Rule 203 states that "a party intending to appeal must serve and file a notice of appeal," and this notice "shall be served on all respondents within thirty (30) days after receipt of the written notice of entry of the order or judgment."[2] This deadline is not flexible. Under South Carolina law, an appellant's failure to serve a notice of appeal within 30 days after receiving written notice of the entry of a final order or judgment divests the appellate court of subject matter jurisdiction and will result in the dismissal of the appeal.[3] Accordingly, if you miss this deadline, then your appeal will be over before it starts.

If a transcript of the underlying proceeding is necessary for the appeal, then the appellant must order a copy of this transcript almost immediately after the service of the notice of appeal. The deadline for ordering this transcript varies between 10 and 30 days after service of the notice of appeal, depending on which court was handling the underlying case.[4] The appellant's deadline for filing and serving his or her initial brief and designation of the matter to be included on appeal will be 30 days from receipt of the transcript or 30 days from the service of the notice on appeal if no transcript is ordered.[5]

Once you've filed and served the notice of appeal, it is time to start thinking about which issues to raise on appeal. When deciding which rulings to appeal, avoid the shotgun approach. Most successful appeals focus on a small handful of issues. As a general rule of thumb, most appellate lawyers advise that any more than three or four issues is too many. Including weak arguments will only dilute your credibility with the appellate court. For

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the respondent, simply sit back and wait for your opponent's initial brief to identify the issues on appeal.

Putting pen to paper

The most effective tool for advocating for your client on appeal is the written briefs submitted to the court. The briefs are the best opportunity to set forth your view of the facts and carefully lay out your arguments on appeal. Strive to make these documents the best possible representation of your client's view of the case.

Good brief writing takes a lot of time. The importance of a well-written brief cannot be overstated. Under the South Carolina Appellate Court Rules, there is no guarantee that your case will be afforded oral arguments.[6] Accordingly, the briefs may be your only opportunity to convince the court of the merits of your client's arguments on appeal. Moreover, even if the court grants oral argument in a given case, there is no guarantee you will have time to address every issue raised in your briefs during the short time allotted for oral argument. In such a scenario, the briefs are the court's only insight into why your client should prevail.

When writing a brief, remember that less is more. A brief should be direct and concise in laying out your client's view of the facts, the controlling law, and how that law should have been applied or, if you're the respondent, how it was correctly applied. The appellate court rules limit principal briefs to 50 pages and reply briefs to 25 pages.[7] Do not feel the need to reach these limits. Remember that the judges and their staff review hundreds of briefs and records, so don't waste their time with information or argument that is irrelevant to resolving your appeal. Avoid lengthy examples, voluminous case law without explanatory parentheticals, and extraneous information.

Always cite to documents or testimony for every factual proposition in your brief. The judges and their staff will double check facts and case law cited in the briefs, so thorough citation to the record will be appreciated and can bolster your credibility. This practice also ensures that your record on appeal contains all the testimony and documents that the court will need to decide the case.

Understand the standard of review in your case. The standard of review dictates how much deference the appellate court will give the trial court in reviewing its decisions.[8] This standard will often make or break your appeal. Appellants typically benefit from broader standards of review, such as the "de novo" standard, which permits the appellant court to make its own findings of fact from the evidence.[9] Respondents, on the other hand, typically benefit from a standard that gives more deference to the trial court's findings and conclusions, such as the "abuse of discretion" standard or "any evidence" standard.[10] In any event, you should research the applicable standard, include this information in your brief, and consider how this standard impacts your arguments.

What next?

After a solid draft of the initial brief is completed, you need to decide what to include in the record on appeal. This task should be straightforward. Whatever documents or transcripts have been cited in your brief should be likewise included in your designation of matter.[11] As a general rule, if you haven't cited to it, it should not be included. Appellate judges and their staff do not want giant records containing extraneous information that is not determinative of the issues on appeal. Carefully read the rules regarding how pages of testimony should be marked and designated.[12]

Once both parties have submitted their initial briefs, the appellant will compile and submit the record on appeal. When compiling the record, be sure to consult Rule 210 of the South Carolina Appellate Court Rules to determine the order in which the materials should be placed.[13] Following the submission of the record on appeal, the parties will prepare final briefs. The final briefs must be identical to the initial briefs, but should be revised to include citations to the pages of the record on appeal and to correct for typographical errors and misspellings.[14] The citations in the final brief should reference the page number in the record where the information can be found, not the page numbers from the original transcript.

If your case is selected for oral argument, you will receive a letter from the clerk of court asking for your availability in future months and oral argument will be scheduled accordingly. Alternatively, the court may notify you that the case will be decided on the briefs. The time between submission of final briefs and hearing back from the court is often months. So do not worry if you don't hear anything from the court for a while.

Preparing for oral argument

The first thing to do is re-read the briefs submitted to the court. Months likely will have passed since the final briefs were submitted, and you will likely not have thought about your appeal in the meantime. Re-reading the briefs will refresh your recollection of the case and provide an opportunity to view the case with a fresh set of eyes. Interestingly, at this stage, you are in a similar position to the judges and their staff who will be deciding your case.

Spend time to carefully analyze the other side's arguments on appeal. During the allotted time at oral argument, the court is likely to focus on the strongest points in favor of your opponent and what your opponent has indicated are the main weaknesses in your position. So be prepared to address these issues.

Practice makes perfect, or at least nearly perfect. Practice arguing and discussing your case aloud as often as possible. Have another attorney play the role of the court and ask questions about the appeal to get comfortable discussing the issues. Anticipate what questions the judges may ask at oral argument. Expect the judges to talk about the weaknesses of the appeal for your client and the strengths

of any argument in favor of your opponent. Do not be afraid of the tough questions. If you prepare well, then your answers to these tough questions will provide the court the guidance it needs to rule in your client's favor.

Finally, consider the long-term and practical ramifications of the outcome of any ruling in your client's favor. An appellate court will carefully consider how its determination of a particular case affects other cases down the road. Be cognizant of this consideration, and be prepared to discuss how any ruling in your favor will play out in future cases.

Travel details

Both the S.C. Court of Appeals and S.C. Supreme Court are located in Columbia. If you practice and live in South Carolina, then it is possible to make a day trip for oral argument. Be sure to build some extra time into the trip in case of traffic or other unforeseen traveling woes. Arriving the night before is all the better. On the day of the argument, arrive early to check out the setup of the courtroom. If at all possible, scout out the courtroom a few days in advance to ensure that you know where you are going on the day of oral argument.

At the court of appeals, there are a handful of two-hour meters directly in front of the Calhoun Building, where the court is located. If these spaces fill up, parking in the metered spots on Senate Street directly in front of the courthouse is a good alternative. The entrance to the court will be through the basement on the right hand side of the building (when approaching from the corner of Sumter and Senate). The courtrooms are on the fifth floor.

At the Supreme Court, parking can be trickier. There are a small number of visitor spots available in the parking lot behind the court, but these tend to fill up quickly. Finding a metered spot near the courthouse is the next best option. If not there, then a couple of parking garages are within two or three blocks of the courthouse. The entrance to the court is located on the side of the building facing Gervais Street. The courtroom will be directly in front after you enter the building.

Logistics of oral arguments

At the court of appeals, each case is heard by a panel of three judges. You will not know which judges are on the panel until the day of oral argument and, more specifically, until your particular argument. If your case is the first to be argued that day, you will be able to tell the panel of judges based upon the nameplates on the bench at the front of the courtroom. Typically, the same three judges hear all of the cases in a given day. So even if your case is not the first argument scheduled that day, more likely than not the same judges will hear your case too. However, it is possible that a member of the panel has a conflict in your case, meaning a different judge will sit for your argument.

At the Supreme Court, there is no need to guess. Barring any conflicts, the five sitting justices

will hear the argument on appeal. When arriving at the courthouse in the morning, after clearing security, go straight to the security officer's desk where there is a roster of the cases to be heard and notes regarding any substitutions of justices.

At both courts, the typical time allotted for oral argument is 10 minutes for the appellant, 10 minutes for the respondent and then an additional five minutes for reply from the appellant. However, these time allotments are subject to change depending on the specifics of your case. In addition, arguments often go well over the allotted 25 minutes. This is particularly true with an active panel who has many questions for the oral advocates.

All of the appellate courtrooms in South Carolina are set up with a digital timer and warning light system. Green indicates the time is running, yellow indicates the end of the allotted time is near and red indicates you are out of time. If the time expires while you are still in argument, acknowledge that the time has run, but offer to finish answering any questions the panel may have. If the panel is interested in hearing further discussion on a particular topic, it will continue to ask questions until it is satisfied.

Tips for effective oral advocacy

First and foremost, good oral advocacy simply consists of having an intellectual discussion about the legal issues raised in your case. Expect, and hope, for questions from the bench. The judges or justices may want you to clarify a fact from the record or further explain your position.

Have a strong opening and closing. These are likely the only parts of your rehearsed speech that are guaranteed to be presented to the panel. In the opening, get to the heart of your appeal quickly. In your closing, be sure to tell the court what you want to happen (i.e., reversal, remand for a new trial, or affirm the court below).

Listen carefully to the questions from the bench and answer those questions. One of the worst things an oral advocate can do is not answer the question asked. Remember that not every question is adversarial. Some questions can actually be softballs from one of the judges who may be advocating on your behalf to the rest of the panel. Often judges will try to use the discussion at oral argument to convince the other judges on the panel who may not share their view of the case. Remember back to the first point: This is a conversation.

In every appeal, have a central theme to fall back on. Judges often ask difficult questions or hypotheticals for which you may not have prepared an answer. While you ponder the appropriate response, the central theme is always a good point to fall back on and buy yourself time to consider a more direct answer. If the judge wants an answer to that specific question, they will likely ask it again.

Conclusion

The appellate process can be a bit overwhelming at first. However, at the end of the day, proper preparation can make this one of

the most rewarding experiences of a lawyer's career.

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Endnotes

[1] *See* Rule 208(a), Rule 209(a), Rule 210(a), & Rule 211(a), SCACR (establishing the deadlines for filing and serving the initial brief, designation of matter, record on appeal, and final brief, respectively); Rule 268, SCACR (identifying proper citation format for various sources); Rule 267(e), SCACR (identifying the color paper to be used for the cover of various filings with the court).

[2] Rule 203, SCACR.

[3] *See, e.g.*, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008).

[4] Rule 207(a)(1) ("In appeals from the court of common pleas, masters in equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. In appeals from the court of general sessions or the family court in juvenile actions, the transcript must be ordered within thirty (30) days of the date of service of the notice of appeal.").

[5] Rule 208(a), SCACR.

[6] Rule 215, SCACR ("[T]he appellate court may decide any other case without oral argument if it determines that oral argument would not aid the court in resolving the issues.").

[7] Rule 208(b)(5), SCACR.

[8] Black's Law Dictionary 1535 (9th ed. 2009) (defining "standard of review" as "the criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court").

[9] *See Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011) (noting that de novo review "permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings."). However, it should be noted that in most cases applying the de novo standard, the appellate court, while not bound to the trial court's findings of fact, will not "disregard the findings of the trial court or to ignore the fact that the trial court is in the better position to assess the credibility of the witnesses." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011).

[10] *See Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 333, 628 S.E.2d 894, 898 (Ct. App. 2006) (noting that under the abuse of discretion standard, a trial court will only be overturned if its "ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support"); *Simpson v. Moore*, 367 S.C. 587, 595, 627 S.E.2d 701, 705-06 (2006) (noting that under the any evidence standard, a trial court's findings "will be upheld if there is any evidence of probative value sufficient to support them.").

[11] Rule 211(b)(1), SCACR (requiring the citations in the initial briefs to be replaced with citations to where that material appears in the record on appeal).

[12] Rule 210(c), SCACR ("Where witness testimony is included in the Record on Appeal, the first page of each witness's direct, cross, redirect and recross examination must show the name of the witness, the phase of examination and the name of the counsel conducting the examination."). Typically, most court reporters will format their transcripts to automatically comply with this requirement. However, you should double check to ensure compliance. To the extent you will need to provide this additional information, Rule 210 provides a specific format. *See* Rule 210(c), SCACR ("If this information is not already reflected on the page, the top of the page shall be annotated with the required information in the following form: John H. Doe--Direct (Cross) (Redirect) (Recross) Examination by Mr. Smith.").

[13] Rule 210(c), SCACR ("Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents, and a certificate by appellant.").

[14] Rule 211(b), SCACR.