

Lesson: How the Appellate Process Works

Objective: Understand what happens to a case when it leaves the trial courts. (*Colorado Model Content Standards: Civics, Standards 1.1, 2.1, and 2.3, grades 9-12*)

Activities: Teacher lecture (background information and lecture outline provided); class participation activity.

Outcomes: Students understand the appellate process and how a case is appealed.

Grade Level: Grades 9-12

Anticipated classroom time: 45-60 minutes

Comment from Colorado Court of Appeals Judge Arthur P. Roy:

In my view, the appellate process is designed to accomplish two primary goals. The first is to dilute power; that is, it is to be a check on the application of the law by lower courts or agencies. The second is to have uniformity in the development and application of the law.

With respect to the first, there is an old adage that states: “power corrupts and absolute power corrupts absolutely.” Imagine a world in which a judge could make any decision he or she wanted without fear of an appeal. The appellate process accords the parties to a dispute a means of correcting the mistaken application of the law and the finding of facts with no support in the evidence.

With respect to the second, it is important in a fair system that the correct law be applied uniformly. This is why, in our tradition, courts can make law. The decisions of appellate courts are binding on lower courts as to the interpretation and application of the law. On occasion, the courts have made, or modified, law to resolve a dispute for which there is no applicable law. The law of contracts and torts was initially formulated and applied by the courts. The courts are also the final interpreter of the state and federal constitutions and, in that role, they are a check the power of the legislative and executive branches of government.

Because of these important functions, appellate courts are composed of more than one judge or justice. That way it takes more than one jurist to review the work of another and to make decisions binding on lower courts. Our court of appeals sits in panels of three judges, and the supreme court is composed of seven justices who hear all cases before that court.

Appellate courts do not hear witnesses or determine the facts in a dispute. This is a function of the trial court. Appellate courts are bound by the findings of fact made by the trial judge or the jury after hearing the witnesses and reviewing other evidence if those findings have any support in the evidence. Appellate jurists read briefs, hear arguments from counsel, research the law, and issue opinions stating the correct application of the law to facts of the case.

Teacher background information:

Compiled with information from the American Bar Association and the Office of the State Court Administrator. For more information, please access the American Bar Association website at <http://www.abanet.org/publiced/courts/appeals.html>.

A popular misconception is that cases are always appealed. However, there usually must be a legal basis for an appeal, such as an alleged material error in the trial, not just the fact that the losing party didn't like the verdict.

In a civil case, either party may appeal to a higher court. In a criminal case in Colorado, the defendant has a right to an appeal, while the prosecution has a limited right to appeal to determine certain points of law. Prosecution appeals usually occur before the actual trial is concluded and go directly to the Supreme Court for determination. Appeals by the prosecution after a verdict in a criminal case are not normally allowed because of the prohibition in the U.S. Constitution against double jeopardy, or being tried twice for the same crime.

Criminal defendants convicted in state courts have a further safeguard. After using all of their rights of appeal on the state level, they may file a writ of habeas corpus in the federal courts in an attempt to show that their federal constitutional rights were violated. The right of a federal review imposes the check of the federal courts on abuses that may occur in the state courts.

The Colorado Court of Appeals must accept every case that is properly filed with the court. The Colorado Supreme Court does not have this requirement, however, and grants certiorari (the privilege of an appeal) to approximately 10 percent of the cases filed with the court. An appeal is *not* a retrial or a new trial of the case. The appeals courts do not consider new witnesses or new evidence. Appeals in either civil or criminal cases are usually based on arguments that there were errors in the trial's procedure or errors in the judge's interpretation of the law.

Appeal Procedure

The party appealing is called the appellant, or sometimes the petitioner. The other party is the appellee or the respondent. The appeal is instituted with the filing of a notice of appeal, then there is a time period within which the record must come up from the trial court. The receipt of that record by the Court of Appeals begins the time period within which the appellant must file an "Opening Brief," a written argument containing that side's view of the facts and the legal

arguments upon which they rely in seeking a reversal of the trial court. The appellee then has a specified time to file an "Answer Brief," detailing his/her side and addressing issues raised in the Opening Brief. The appellant then files a "Reply Brief," which is similar to a rebuttal. Because decisions of the appellate courts set precedents that affect the entire state, other interested parties can present their views about a case in amicus curiae (friend-of-the-court) briefs.

Appeals courts often make their decision only on the basis of the written briefs. In other cases, they hear oral arguments before deciding a case. The court may ask that the case be set for oral argument, or one of the parties may request oral argument. If a party requests an oral argument, it is mandatory in the Court of Appeals and within the discretion of the Supreme Court.

During oral arguments, lawyers are forbidden to read at length from the briefs, and they are limited to arguments raised in the briefs, unless permitted by the court. Each side's attorney is given a relatively brief opportunity to argue the case to the court and to answer questions posed by the judges. In the Colorado Supreme Court, for example, an hour is set for oral argument of most cases, which gives each side's lawyers 30 minutes to make their oral argument and answer questions. In the Colorado Court of Appeals, the attorneys are allotted 15 minutes to make their arguments.

The appellate court determines whether errors occurred in applying the law at the lower court level. It generally will reverse a trial court only for an error of law. Not every error of law, however, is cause for a reversal. Some are harmless errors that did not prejudice the rights of the parties to a fair trial. For example, in a criminal case, a higher court may conclude that the trial judge gave a legally improper instruction to the jury. However, if the mistake was minor and, in the opinion of the appellate court, had no bearing on the jury's finding, the appellate court may hold it a harmless error and let a guilty verdict stand. On the other hand, an error of law such as admitting improper evidence may be determined to be harmful and therefore reversible error.

All seven justices on the Supreme Court hear and take part in every case reviewed by the Supreme Court (unless there is a conflict of interest). Immediately after the completion of oral arguments or review of the case, the justices meet in a conference room to determine the views of the members of the court and take a tentative vote. A majority is necessary to make a ruling in each case the court hears. The chief justice presides, and, in general, the members of the court express their views in order of seniority, with the most junior justice opening the discussion.

The chief justice assigns the case to one of the justices who has voted in the majority. The justice assigned to the case will, in most instances, write the court's majority opinion. The opinion is a statement of the court's decision and the reasons upon which that decision is based. The opinion may go through several drafts before a majority of the court agrees with it. Other justices can write concurring or dissenting opinions in the case. A concurring opinion is one in which a justice agrees with the majority opinion but not for the same reasons. A dissenting

opinion is one in which a justice disagrees with the result reached by the majority of the other justices. However, the majority opinion is the official opinion of the court in the case.

Unlike the Supreme Court, Court of Appeals judges sit in panels of three to decide cases before the court. However, the composition of each panel of three judges rotates so that all Court of Appeals judges handle an equal amount of arguments. The judges discuss the case and take a vote to determine the views of the panel; at least two of the three judges on a panel must agree for an opinion to be issued. Usually, a case is assigned to a particular judge for the writing of the opinion before the actual oral argument or review of the case, but that assignment may change after the panel discusses the case. The other judges on the panel can write concurring or dissenting opinions if they so choose.

Occasionally, the Supreme Court will simply issue an unsigned opinion. These are called *per curiam* (by the court).

If the appeals court affirms the lower court's judgment, the case ends, unless the losing party appeals to a higher court. The lower court decision also stands if the appeals court simply dismisses the appeal (usually for reasons of jurisdiction).

If the judgment is reversed, the appellate court will usually send the case back to the lower court (remand it) and order the trial court to take further action. It may order that

- a new trial be held,
- the trial court's judgment be modified or corrected, or
- the trial court reconsider the facts, take additional evidence, or consider the case in light of a recent decision by the appellate court.

In a civil case, an appeal doesn't ordinarily prevent the enforcement of the trial court's judgment. The winning party in the trial court may order the judgment executed. However, the appealing party can file an appeal or supersedeas bond. The filing of this bond will prevent, or stay, further action on the judgment until the appeal is over by guaranteeing that the appealing party will pay or perform the judgment if it is not reversed on appeal.

Class participation activity: Put students in groups of three or four. Give each group one of the questions listed below and allow them 15 minutes to fill out the worksheet entitled "Analyzing the Appellate Process." Afterward, have the groups share their answers and/or group consensus, along with their reasoning, with the rest of the class.

- 1) Do you think it is right that the Colorado Supreme Court does not rule on every case that is filed with it?

- 2) How do you feel about the process of having only three of the 22 judges on the Court of Appeals hear each case?
- 3) Do you think that the lawyers in a case should be limited to only the issues raised in the briefs? What if something “comes up” after the original trial?
- 4) Do you think it is reasonable that some cases are decided without oral arguments, based only on the written briefs?
- 5) Do you think the rule against “double jeopardy” is reasonable?
- 6) Do you think it is right that someone can repeatedly appeal court decisions? In these types of cases who should pay the expenses for the courts and the opposing side?

Homework assignment: Have students do the worksheet entitled “Granting Certiorari.” This worksheet details what cases would and would not be taken up by the Colorado Supreme Court.

Lecture Outline:

Who Can Appeal

- Civil case
 - Either party may appeal to a higher court
- Criminal case
 - In Colorado, defendant has a right to an appeal; prosecution has limited right to appeal points of law during trial
 - Appeals by prosecution after a verdict are not normally allowed because of prohibition in U. S. Constitution against double jeopardy
 - After criminal defendant uses all rights of appeal on state level, may file a writ of habeas corpus in federal courts
 - Must show that their federal constitutional rights were violated

What Can Be Appealed

- Not all cases appealed
 - Must be legal basis
 - Appeal is *not* a retrial or a new trial
- Appeals courts do not consider new witnesses or new evidence
- Appeals based on arguments that there were errors in the trial's procedure or errors in the judge's interpretation of the law
- Colorado Court of Appeals
 - Must decide every case that is properly filed
- Colorado Supreme Court
 - Does not hear every case filed
 - Grants certiorari (the privilege of an oral argument) to approximately 10 percent of cases filed

Details

- Party appealing called the appellant or sometimes petitioner
- Other party is appellee or respondent
- Appeal is instituted with filing of notice of appeal
- Appellant must file an "Opening Brief"
- Appellee files an "Answer Brief"

- Appellant files a “Reply Brief”
- Other interested parties can present views in amicus curiae (friend-of-the-court) briefs
- Appellate court determines whether errors occurred in applying the law at the lower court level
- Generally appeals courts will reverse a trial court only for error of law
- Not every error of law is cause for reversal
- Some are harmless errors that did not prejudice the rights of the parties to a fair trial

Oral Arguments

- Appeals courts often make decision only on the basis of the written briefs
- Sometimes they hear oral arguments
 - Lawyers forbidden to read at length from the briefs
 - Limited to arguments raised in the briefs

Colorado Supreme Court

- All seven justices take part in every case (unless there is a conflict of interest)
- Each side given 30 minutes during oral arguments
- After the completion of oral arguments or review of briefs, justices meet to take a tentative vote
- Chief justice assigns the case to one of the justices who has voted in the majority
- Justice assigned to the case writes court’s majority opinion; other justices can write concurring or dissenting opinions
- Concurring opinion is one in which a justice agrees with the majority opinion but not for the same reasons
- Dissenting opinion is one in which a justice disagrees with the result reached by the majority of the other justices

Colorado Court of Appeals

- Three judges (out of 22) decide each case
- Composition of each panel of three judges rotates so that all judges handle equal amount
- Majority is necessary to make a ruling
- After the completion of oral arguments or after reviewing the briefs, panel judges meet to take a tentative vote
- Usually a case is assigned to a particular judge for the writing of the opinion before the oral argument or review of briefs, but assignment may change after the panel discusses the case
- Judge assigned to the case writes court’s majority opinion
- Other judges on the panel can write concurring or dissenting opinions

Judgments

- Occasionally Supreme Court will issue an unsigned opinion called per curiam
- If appeals court affirms lower court’s judgment
 - Case can end

- Losing party can appeal to a higher court
 - Lower court decision stands if appeals court dismisses the appeal
- If judgment is reversed
 - Appellate court will send case back to lower court
 - Order the trial court to take further action
 - May order that
 - New trial be held
 - Trial court's judgment be modified or corrected
 - Trial court reconsider the facts, take additional evidence, or consider the case in light of a recent decision by the appellate court

Civil case

- Appeal doesn't prevent the enforcement of the trial court's judgment
- Winning party in trial court may order the judgment executed
- Appealing party can file an appeal or supersedeas bond
- Filing of this bond will prevent further action on the judgment until the appeal is over

Analyzing the Appellate Process

(Class participation activity)

Question you were given to analyze: _____

Students in your group: _____

Reasons why the appellate process works this way: _____

Reasons why it might not be fair: _____

Reasons why it could be considered fair: _____

Consensus of the group (fair or unfair?): _____
