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# What Price Success on Appeal?

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## COMMENTS.

### WHAT PRICE SUCCESS ON APPEAL?

This is a brief review of the trials and tribulations of a successful appellant. There is a saying quite frequently voiced by both classes of litigants, winners and losers, victors and defeated, that "If you win, you lose; and if you lose, you win." There is considerable justification for this statement, more so now than in past years. In these days of long and expensive transcripts and printed briefs, appeals have become a luxury, available as a successful remedy or relief principally to those of financial means and ample patience, and to those who become disgruntled with a burdensome decision of a trial court or the verdict of guilty by a jury in a criminal case. The losing attorney upon hearing the fatal decision is greeted by his justice-seeking and innocence-asserting client with this practical question: How much will an appeal cost? The defeated client having been informed of the probable cost of the appeal, then manages to raise the necessary money therefor and authorizes his counsel to proceed with an appeal "to the highest court of the land if necessary."

### THE QUESTION OF TIME

After being convinced of the injustice and error of the decision or verdict the indignant litigant propounds the following interrogatory to counsel for the prospective appellant: How long will it take to appeal the case and obtain a favorable decision? This question must be answered with care and caution. After informing his inquirer that court reporters are busy—extremely busy—in the daily and constant war-like litigation of persons engaged in peaceful occupations—and that it will take several weeks for the completion of a transcript of the evidence (written outside of the hours during which trials must be reported), the wondering and somewhat bewildered client is then informed there will be further delay occasioned by writing for a certified copy of all the proceedings had or pleadings and papers filed in the case. Upon completion of these transcripts and their approval by the trial judge, the venturesome but justice-seeking litigant is told that his counsel must have those documents indexed and bound and each page renumbered and marginal notes written thereon so that the court on appeal may know at a glance the purported contents of each page and thus save the wheat from the chaff.

Then it is that the lawyer must acquaint his almost perpetual client (for he will have this client for a long time pending the appeal) that it will take many days—and nights too—of the time of his advocate while not trying cases or not being engaged in more important work, to create a brief properly, and efficiently, sufficiently presenting to the court on appeal the story of his client's defense, alibis and excuses, and setting forth with accurate precision and skill (in the manner required by the highly technical rules of the court) the many grave charges of error and misjudgment on the part of the trial judge, backed and supported by decisions of the highest courts of the state, the nation and of foreign countries, together with quotations and statements of principles from various text books and eminent legal authorities.

#### VIRTUES OF A PRINTED BRIEF

The client then learns that a printed brief is easier to read than a type-written one, and that printed briefs receive greater consideration from the courts and do not blur; and besides he can have some copies for circulation among his business associates, relatives and friends so that "they who run may read" and thus learn how he was "robbed" or "persecuted" (as the case may be). Naturally, the client seeing himself about to be made the hero of a new best-seller, yields to the wise counselor's advice, and after many visits to the office of his busy legal adviser, he receives a number of printed copies of the latter's able efforts produced in a finished state after months of labor and research, and forthwith the appellant proceeds to increase the circulation of the paper-bound book which has reached its first and only edition.

#### SERIOUS PURPOSE OF BRIEF

But the undistributed excess number of this valuable and individually unpriced book are destined for a more serious and useful mission, free from personal interest or adornment of library tables. A dozen of their number are placed on file in the office of the clerk of the court of appeals, after notices of the appeal have been issued or served, and thereupon in company with his counsel who also files the transcript (a massive and impressive stenographic achievement), the humble appellant seeking only justice and complete vindication finds himself lifted to the heights of hero of a new story bearing a prison-like serial number and duly catalogued and indexed under his name in the permanent archives of the court and state. In due time

the case is fully briefed and argued orally by both sides (without the presence of the appellant or appellee) and then waits its turn for final decision by the august tribunal which likewise has before it for similar disposition, a varied assortment of appeals involving almost every statute or principle of law.

After making prompt disposition of most of the copies given and paid for by him, our anxious client reads his advocate's final appeal for mercy and justice, and is greatly impressed and eminently satisfied with the author of his own choice. He learns for the first time that if not an angel, he is at least a law-abiding citizen, incapable of harming anyone, particularly society, while he remembers the prosecutor's thundering charge to the jury that the defendant was a hardened criminal. Or, if it be a civil case, involving a breach of contract, for instance, the appellant reads of himself as being an honorable and upright business man and citizen, dealing fairly and squarely with every one whether his contract be expressed by pen or voice, and that the possibility of breaking a contract was to him unthinkable. The appellant goes on, his chest expands and a pleased look gleams from his eyes when he recalls the closing argument of the plaintiff's lawyer accusing him of being a slick trader, a crook, a man whose signature to a contract was meaningless and a waste of ink; a man who intended to perform his contract when it appeared beneficial to himself but who dodged it when a storm approached and a slight loss seemed imminent. How well did the appellant remember the mean look of the opposing attorney when making those nasty and caustic remarks to the court, nor could he forget the quick, cutting and puzzling questions propounded to him which caused him to blush, then turn colors, then squirm around in the witness chair, and hesitate frequently before answering the rapid and searching cross-fire of his enemy's counsel. He remembers he finally lost his head completely and blurted out meaningless and confusing answers. Those uncomfortable minutes had been as so many hours of torture.

The appellant laid down the book-brief, wearied of technical terms and phrases, for after all he was human; he did not like to see an unpleasant play a second time nor read a story twice. He wanted to forget and not be reminded of the battle in the past. He fell asleep, and after a long rest so it seemed, (but it was years later) he awoke to learn from the press reports that his case had been reversed by the court of last resort, a fitting climax to the noble work of his counselor-at-law.

## ADVICE OF COUNSEL REMEMBERED

The appellant remembered the advice of his attorney concerning appeals: Faces of witnesses before the court or jury are in time obliterated; their testimony becomes dimmed and hazy and is eventually blurred and re-shaped into printed or typewritten words; the peculiar conduct of witnesses on the stand becomes invisible and disappears; if a witness takes a second, a minute or two minutes or more to answer a puzzling question, the answer in printer's ink does not so indicate because a stop-watch is not part of the reporter's equipment. If a witness evidences hostile looks to the court and jury, those looks fade away forever and do not show up in the transcript. If a witness displays guilty characteristics while testifying and his actions belie his words, his words prevail in the typewritten record of his conduct as well as in the printed record and briefs, for no records on appeal contain photographs or motion pictures except patent cases. If a witness answers distasteful questions in an equally distasteful or boisterous manner, his distaste or manner never reach the transcript except as mere words identical with those of the most polished gentleman. If a witness does not impress the court or jury with his candor or truthfulness, the court on appeal nevertheless holds that *all* witnesses must be believed, if possible, and will not weigh the evidence. If a witness testifies while drunk and the reporter (because of his proximity) smells liquor on his breath, the reporter not being called as a witness cannot include his knowledge of the drunken condition of the witness in the transcript. If the defendant in a liquor case says he never took a drink in his life but staggers to the witness chair and gives incoherent answers and the court and jury know he has not fully recovered from the drink mentioned in the indictment, the jury's knowledge vaporizes into thin mist and is not apparent of record, and the stagger is merged and becomes entirely lost in the printed straight and steady lines of the record.

The appellant feels that the dead have been buried and buried well. To summarize, how magical is an appeal to the wronged and injured litigant. His real character may truly be submerged. The astute counsel said that while the presumptions on appeal as to the correctness of the trial court's decision (or the guess of the jury) are with the appellee, yet he felt a reversal could be had and *some* of the bad features of the case obliterated on appeal because the higher court does not *see* the parties and does not *hear* the evidence, but merely *reads* the record and

briefs. Naturally, it was not difficult for the appellant to see the advantages of an appeal.

#### WHAT THE COURT DECIDED

On calling at his attorney's office the latter's stenographer reads to him the opinion of the highest court of the state, from which the successful appellant ascertains with certainty that he won his case for the following reasons: because the trial judge should have sustained a demurrer to the seventh paragraph of the third amended complaint; or because the trial judge in charging the jury in a criminal case had stricken out a few essential words in one of the instructions tendered by the defendant's counsel.

Then the stenographer reads "Cause reversed with instructions to the trial court to grant defendant's motion for new trial." When informed that this meant that he, though successful in his appeal, would have to go through the ordeal of another trial, the appellant realized that the mask had been snatched from his face, that his true character would again be proclaimed, that the highest court of the state had reversed the case only upon reaching the first reversible error without proceeding further with the other errors assigned in the briefs, that the court on appeal never decided whether he was guilty or innocent, right or wrong—*the merits of the case had not been determined.*

The appellant then came to life. He saw his own ghost walk  
- - - and he collapsed.

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